



EXPECT THE BEST

Blaney  
McMurtry  
BARRISTERS & SOLICITORS LLP

# **CONFRONTING THE "CRISIS" OF A CLASS PROCEEDING: "DANGER" OR "OPPORTUNITY"?**

**Robert J. Potts**

Blaney McMurtry LLP  
416.593.3952  
rpotts@blaney.com

## **CONFRONTING THE “CRISIS” OF A CLASS PROCEEDING “DANGER” OR “OPPORTUNITY”?**

**By Robert J. Potts, BA, LLB**

The first thing Monday morning just before your initial cup of coffee has had a chance to take effect, what lands on your desk but several Statements of Claim dutifully passed on to you by a number of propane furnace manufacturers whom your company has insured from time to time over the past number of years. As you shake yourself from your weekend lethargy and pursue a few of these pleadings, you quickly surmise that they uniformly involve claims by several of your insureds' customers forcefully asserting that they have suffered damages for what is characterized as the faulty design and manufacture of the heating systems in mid and high efficiency appliances manufactured and distributed by your insureds. Before the day is done, it is apparent that what began as a trickle is now building into a flood of claims by similarly aggrieved plaintiffs including a massive subrogated one by Ontario New Home Warranty Plan. Thoughts of a relaxing second cup of coffee are lost in the flurry of file openings and hurried calls.

How do you react to such a crisis? The natural inclination may be to let loose the dogs of war upon this audacious multitude — to unleash your nastiest pit bull legal beagles and have them throw Demands for Particulars, Rule 21 motions, motions for summary judgment, and, above all, to dismiss any notion of acceding to a class proceeding certification motion which the plaintiffs appear to be proposing, vowing instead to fight it out to the last would be class plaintiffs' lawyer's dollar.

Or — one might pause and reflect for a moment and draw upon your familiarity with the Mandarin dialect and the concept within it of “crisis” which is portrayed by two characters — one denoting “danger” and the other “opportunity”.

Does an “opportunity” lie within these substantial, complex claims launched by a vast number of Canadian residents? Does the Ontario *Class Proceedings Act* afford you, the insurer, faced as you are with the “danger” attending what will undoubtedly be costly and time consuming litigation, a means to achieve an expeditious, cost effective, and comprehensive solution. Before exploring these questions further within the context of the fact situation described above, let us briefly touch on the *Class Proceeding Act*.

### **THE CLASS PROCEEDINGS ACT (“CPA/THE ACT”)**

The CPA is fast approaching its eight anniversary having been proclaimed in force in Ontario on January 1, 1993. It is one of the most far reaching and comprehensive pieces of multiple party dispute legislation in the world. Two other provinces, British Columbia and Quebec, have similar legislation.

At the root of the CPA are three goals identified by the Ontario Law Reform Commission whose *Report on Class Actions* published in 1982 preceded the drafting of the legislation.

Those goals, which have been adopted by our courts in subsequent decisions, are “judicial economy, increased access to justice, and behavioural modification”.

This legislation is purely “procedural” and is not intended to modify the substantive law of this province in any fashion. Rather, as the authors of a follow up Report (the *Report*

*of the Attorney General's Advisory Committee on Class Actions*) preceding the enactment of the CPA emphasized, the intent of the legislation is to "treat plaintiffs and defendants in a fair and equitable manner and ... not impose any unnecessary burdens on the courts".

The CPA therefore provides a procedural mechanism whereby a representative plaintiff on behalf of similarly situated plaintiffs can, where the claim raises common issues, bring a single action against one or more defendants and seek a remedy that will bind all members of the class. In this manner claims which, because of their relatively small dollar value might not have been advanced prior to the enactment of this legislation can now be prosecuted.

A "screening" process has been built into the legislation which is intended to ensure that only those claims that can be fairly tried in this unique representative manner are "certified" as worthy of proceeding in this fashion. Section 5(1) of the CPA lays down the ground rules for this screening process. Within a recent article, Justice Winkler, who has been appointed as one of the class proceedings judges within this jurisdiction and has rendered a number of ground breaking decisions in respect of the legislation, has neatly summarized the impact of Section 5(1) in the following way:

"Briefly stated, there must be a cause of action that is shared by an identifiable class, that raises common issues for which a class proceeding is the preferable procedure for resolution and in which the class may be fairly and adequately represented by a plaintiff or plaintiffs who have produced a workable plan for advancing the litigation."

If on the motion for that purpose the court determines that the action ought to be certified, it will then normally make an order requiring that notice of certification of the

class proceeding be given by the representative plaintiff to the class members so that they are made aware of the newly certified action and, in particular, their right to opt out of the proceeding if they do not wish to be bound by any judgment that may arise within it. The court will direct how notice is to be given and who is to bear the costs of such notice.

The court may dispense with notice if, having regard to certain factors such as the cost of giving notice, the number of class members, and the place of residence of class members, it considers it appropriate to do so.

Once the action has been certified and notice, if required, has been given, class members have until a specified date to opt out of the proceeding. Pursuant to Section 27 of the Act, all class members who do not opt out within the specified time will be bound by any judgment on the common issues specified within the certification order, regardless of whether they actually received notice of the certification and/or notice of the judgment.

This particular provision gives “closure” to defendants in the sense that they need not worry about absent plaintiffs coming forward years after the litigation has been resolved. If a class member does not opt out of the class proceeding, he or she will be bound by any judgment on the common issues and will be forever barred from commencing or continuing an individual action against the defendant seeking the same relief.

The CPA mandates that common issues for a class must be determined together and that individual issues requiring participation of individual class members must be determined individually according to certain procedures set out within the Act. The

legislation contemplates a trial on the common issues and then, if necessary, individual “mini-trials” to resolve the individual issues.

The Act also confers upon the judge appointed to administer a class proceeding the usual case management powers supplemented by a broad discretion to “make any order he/she considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as he/she considers appropriate”. That includes the right, on the judge’s own initiative, or at the request of a party, to stay proceedings.

Discovery rights are also provided for within the Act and essentially allow a defendant, after discovery of the representative plaintiff, to seek further discovery of other class members if such defendant can persuade the court that additional discovery is warranted. In making that determination, the court must consider, among other things, whether further discovery is necessary and whether such further discovery will result in oppression or undue annoyance, burden or expense for the class member sought to be discovered.

The CPA makes it clear that the Rules of Court apply to class proceedings and, as such, many of the procedural mechanisms available in individual actions are also available in class actions (e.g. Motion for Summary Judgment, Motion to Dismiss, etc.).

Once the trial proceeds and the court renders judgment on the common issues, the judgment must:

- (a) set out the common issues;

- (b) name or describe the class or subclass members;
- (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
- (d) specify the relief granted.

Again the court is likely to order that notice of the judgment be given to class members so that all class members are made aware of the result and of their entitlement to claim their portion of the relief granted.

The Act also sets out appeal rights available to the parties both in terms of the certification decision and in terms of the judgment.

Costs are governed by the *Rules of Civil Procedure* and the *Courts of Justice Act* but in a class action the court may also consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. Although a representative party can be held liable for costs other class members can not.

It is worthwhile noting that pursuant to Section 28 of the CPA, any applicable limitation periods are “suspended” once the class proceeding has been commenced and only reinstated in respect of the class once the action has been decertified or finally determined, or in respect of individual claimants, once they opt out.

The Act requires that any settlement of a class proceeding be approved by the court. In the majority of cases that have come before the courts since the inception of the CPA, the settlement agreements reached by the parties have been approved. The court must be satisfied that the settlement is “fair, reasonable and in the best interests of those

affected by it.” (*Dabbs v. Sun Life Assurance* (1988), 40 O.R. (3d) 429 (Gen. Div.) aff’d 41 O.R. (3d) 97 (C.A.))

As Justice Winkler noted in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (*Ontario New Home Warranty Program v. Chevron Chemical Co.*, 46 O.R. (3d) 130):

“The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.”

In assessing whether a settlement should be approved, the court will consider a number of factors including the likelihood of recovery or success, the amount and nature of discovery, evidence and investigation, the settlement terms and conditions, the recommendations and experience of counsel, the future expenses and likely duration of the litigation, the recommendation of any neutral persons, the nature and force behind any objections, the presence of arm’s length bargaining and the absence of collusion.

One final point of note regarding the CPA is that it mandates the use of contingency fees by plaintiffs’ counsel. Such a fee arrangement must necessarily be in writing and is subject to court approval. This unique exception to the norm has had the intended effect of encouraging plaintiff’s counsel, especially those with an entrepreneurial bent and who are less risk adverse than many of their brethren to take on the type of challenging (and potentially lucrative) claims which are at the root of class actions.



## **APPLYING THE CPA TO THE *ONTARIO NEW HOME WARRANTY CLAIM***

So much for the nuts and bolts of the legislation. How does this information assist you in dealing with these hundreds of claims that are now piled up on your desk and that so rudely interrupted your Monday morning reverie? Well, as it turns out, in the factual scenario that is described at the outset of this paper, some of the parties confronted with this real “crisis” were able to deflect the impending “danger” presented by the multiple claims with which they were faced, and seize upon the “opportunity” afforded them by the CPA to bring complete closure to what was shaping up to be potentially financially debilitating litigation.

In the Ontario New Home Warranty claim involving these alleged defective furnace systems, some of the defendants, rather than adopting a “knee jerk” confrontational position, shrewdly opted to access a facilitator who assisted them and the plaintiffs in mediating a creative settlement which had the following components:

- for settlement purposes, the action would be certified as a class proceeding;
- compensation for repairing the defective systems would be fixed at \$800.00 per unit in respect to those units manufactured by the settling defendants;
- a claim approval process using the services of a private claims administrator specializing in such matters would be established to expedite applications for payment based upon simple proof of repair;

- notice of the certification of the class proceeding would be disseminated and any class member who wished opt out could do so within 60 days. Those who did not opt out had five months from the date of the notice of certification and settlement approval to submit their proof of repair to the claims administrator for processing;
- the most critical portion of the settlement from a closure perspective (at least from the point of view of the settling defendants) was that the liability of the settling defendants would be fixed at 65% no matter what other finding might be made at a subsequent trial and the non-settling defendants would be “barred” from claiming over against them for contribution and indemnity. Similarly, the settling defendants would be “barred” from claiming over against the non-settling defendants. The plaintiffs would be bound by the finding of liability against the settling defendants and would have to bear any loss that might result if following a subsequent trial, it was determined that the settling defendants’ liability was greater. In other words, the non-settling defendants’ “several” liability would be “capped” at 35% of the total damages proven at trial;
- the action would be “stayed” against the settling defendants pending the final determination of the case; and
- the non-settling defendants would have oral and documentary discovery of the defendants with leave as if they were “non-parties”.

When this proposal was submitted to Justice Winkler for his approval, he sanctioned it with some minor fine tuning which afforded the non-settling defendants, with leave of the court, to acquire broader oral and documentary discovery of the settling defendants and obliged them to respond to a Request to Admit and produce a representative to testify at trial, if so ordered.

When approving the settlement, Justice Winkler noted:

*“The Class Proceedings Act is meant to provide a mechanism for the redress of mass wrongs which are linked by an element of commonality. This is such a case. The court must remain flexible and exercise its inherent jurisdiction to meet the needs of the parties and to achieve the purpose of the statute.”*

Justice Winkler rejected the non-settling defendants’ vigorous assertions that the settlement would abrogate the substantive rights afforded them by the *Negligence Act*.

As he pointed out:

*“... When the prohibitive provisions contained in the agreement are considered in total, it is apparent that they affect no claim of the non-settling defendants that could be successfully asserted against the settling defendants under the *Negligence Act* or otherwise ...*

*Here, the settling defendants have abandoned any claim for contribution and indemnity as against the non-settling defendants. In addition, the plaintiffs have chosen to seek damages only in the amount for which the non-settling defendants are “severally” liable.”*

What the *Ontario New Home Warranty* case illustrates is that by using a little creative initiative and letting the CPA work for you, a host of complex and potentially protracted and financially exhausting suits can be brought to an end — at least for those defendants who recognize such an “opportunity” when it presents itself in the guise of a “crisis”.

Before leaving this case, a few comments regarding the operation of the CPA and its application to *Ontario New Home Warranty* type actions is warranted.

- There may be a temptation among some when confronted with a class proceeding to structure a “sweetheart” deal with a less than scrupulously class plaintiffs’ counsel with a compliant representative plaintiff in tow, whose interests may lie more in acquiring a substantial contingency fee than in protecting the interests of his/her class clients. There have been some recent examples of such settlements presented in the U.S. However, in this jurisdiction, the extensive and vigorous scrutiny afforded by the CPA presided over by judges who specialize in the administration of this legislation should be sufficient to deter such plans;
- The *Ontario New Home Warranty* case points up the fact that the CPA and ADR have many synergies. The Act affords the class proceedings judge a broad discretion to encourage mediation initiatives prior to settlement and to access such mechanisms as “med-arb” and arbitration or utilize the services of private dispute mechanisms post-settlement
- Where products liability and mass torts are involved, the claims invariably cross provincial, and for that matter, national borders. In many cases, the plaintiffs seek to certify a “national class”. Provided that there is a “real and substantial connection” between the subject matter of the claim and Ontario, then our courts will have jurisdiction to apply Ontario’s “procedural” law by utilizing the CPA. This has been done in such cases as *Nantais* (defective pacemaker leads), and

*Carom v. Bre X* (stock fraud). As Justice Cumming noted in his decision which was released last month wherein he certified phen-phen litigation in this province (*Wilson v. Servier Canada Inc. and Bioforma S.A.*):

“Mass torts and defective products do not respect provincial boundaries. Complex and costly litigation is not viable for individual claimants. The procedural latitude of the CPA recognizes the authority of all provinces and the rights of their individual residents. If a non-resident of Ontario wishes to commence an action in another province, that person can opt out of the Ontario action. If a class action is commenced and certified in either British Columbia or Quebec, that certified class proceeding will take precedence for the residents of that province.”

Accordingly, in appropriate situations the CPA affords insurers the means to bring closure on a “national” scale to complex multi-party litigation.

- In mass tort claims involving toxic substances (asbestos, moulds) or products liability claims (breast implants, pacemakers, defective drugs) the plaintiffs’ damages may stem from exposure to the harmful substance over an extended period and the consequences of such exposure may manifest themselves over many years. In our earlier example of the *Home Warranty* case, a number of insurers may have been on cover over the time when the defective heating systems were manufactured by each of the individual manufacturers. With occurrence triggered CGL policies responding to such claims, determining which policy(ies) should respond is a challenging task. It is not within the scope of this paper to delve into, let alone resolve which of the “exposure”, “manifestation”, “triple trigger” or “injury in fact” theories necessarily apply other than to point out that if the CPA is to be effectively utilized to achieve closure, the active

participation and eventual cooperation of all of the exposed insurers will be required.

Hopefully these comments will assist you when next faced with a “crisis” of the proportions presented by a *Home Warranty* type case with the result that by having seized the “opportunity” afforded by the CPA to take steps to bring a quick and relatively inexpensive closure to the problem, your second cup of coffee that Monday morning will be as relaxing and refreshing as was the first.