

The Mechanics of Class Action Certification

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THE MECHANICS OF CLASS ACTION CERTIFICATION

Michael A. Eizenga

Friday, May 13, 1994

INTRODUCTION

Class Litigation to this early date in the life of the *Class Proceedings Act, 1992*, S.O. 1992, has centred upon the appropriateness of the class proceedings vehicle for various specific types of lawsuits. In other words, the debates and discussions among judges and lawyers to date have dealt largely with the question of certification.

A member of a class of persons may commence a proceeding on behalf of the members of that class, however, in order for the proceeding to continue as a class proceeding, that person is required to obtain an Order, certifying the proceeding as a class proceeding and appointing the person as representative plaintiff for the class.¹

TIMING

The motion for certification to be brought within 90 days of (the later of) the date on which the last Statement of Defence (or Notice of Intent to Defend or Notice of Appearance) is delivered and the date on which the time prescribed by the Rules of Court for delivery of the

¹ *Class Proceedings Act, 1992*, S.O. 1992 c. 6, Section 2(2)

To date, class proceedings have generally been resisted by Defendants (I'm aware of one case in which the defendant consented to the certification). Nonetheless, it is an interesting feature of the *Act* that a defendant to two or more proceedings may at any stage move for an Order certifying the proceedings and appointing a representative plaintiff. (*Class Proceedings Act, 1992*, S.O. 1992 c. 6, Section 3)

last Statement of Defence (or Notice of Intent to Defend or Notice of Appearance) expires. Subsequent to the 90 day period, the certification may only be brought with leave of the court.²

CERTIFICATION ITSELF

Certification is an entirely procedural step. The *Act* creates no new substantive cause of action³ and the certification hearing is not to address the merits of the proceeding.⁴

Sections 5 and 6 of the *Act* contain the key provisions respecting certification.

Section 5(1) the court shall certify a class proceeding on a motion under section 2,3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interest of the

² *Class Proceedings Act, 1992*, S.O. 1992, c.6, Subsection 2(3)

³ *Bendall and Wise v. McGhan and Dow Corning*, (1993) 14 O.R. (3d) 734, with supplementary reasons [as yet unreported] released on October 22, 1993, at p. 739

⁴ *Class Proceedings Act, 1992*, S.O. 1992, c.6, Section 5(5)

class,

- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Section 6 The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

MATERIALS FOR USE AT THE HEARING OF THE MOTION

Given the procedural nature of the certification motion, it seems appropriate to rely upon an affidavit sworn by someone other than the proposed representative plaintiff (e.g. a lawyer). This has been the approach generally used to date.

The only specific statutory requirement of the affidavit is that both sides must give their best information on the number of members in the class.⁵

⁵

Class Proceedings Act, 1992, S.O. 1992, c.6, Section 5(3)

It is also useful to have the precise definition of the proposed class included in the Affidavit along with the common issues which the plaintiff proposes be the subject matter for the class proceeding.

Class counsel should not approach the certification hearing as simply a threshold issue (i.e. to gain certification) but rather as the point at which the framework for the entire proceeding will be established.

THE CERTIFICATION TESTS

Certification is mandatory if the five tests of Section 5(1) of the *Act* are satisfied. The first two tests, namely that the pleadings disclose a cause of action and that there is an identifiable class of two or more persons that would be represented by the proposed representative plaintiff are relatively straightforward.⁶

The language of Section 5(b) makes it clear that it is not necessary that the class members be identified but only that it is possible to identify the class.

The history of class litigation in the United States indicates that, although it is necessary for an individual class member to provide evidence of his or her inclusion in the class in order to be able to claim under a settlement or judgment, this is not necessary at the certification stage.

⁶ *Class Proceedings Act, 1992*, S.O. 1992, c.6, Sections 5(a) and (b)

COMMON ISSUES

The Predomination Test

Rule 23 of the U.S. Federal Rules of Civil Procedure governs the conduct of a class action. Rule 23, which contains the "prerequisites" to an American class action contains language which is very similar to Section 5 of the Ontario Act.⁷ In addition to satisfying these prerequisites, a class action will be maintainable only if certain other conditions are satisfied and in certain cases this will require that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members".

The 1982 Ontario Law Reform Commission Report included a draft bill which specifically required the court to consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members".⁸ This language, however, was removed from the current legislation.

Section 5 of the Ontario Act makes no reference whatsoever to individual issues and the plain language of the Statute certainly contains no reference to a predomination test.⁹

The point of this is that the presence of individual issues (even many individual issues) should not mean that a proceeding is inappropriate for class litigation. Section 25 of the *Act* envisions that the mechanism for dealing with individual issues be established by the court and

⁷ *U.S. Federal Rules of Civil Procedure, Rule 23, Class Actions*

⁸ *Report of the Ontario Law Reform Commission, 1992, Vol. 3 at p. 862*

⁹ *Bendall and Wise v. McGhan and Dow Corning*, supra, at p. 741, however, see *Abdool v. Anaheim Management Ltd. (1993)*, 15 O.R. (3d) 39 (Gen. Div.), at p. 51

the plain language of the Section seems to envision that much litigation may follow the determination of the common issues.

Section 25(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

(2) The Court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.¹⁰

PREFERABLE PROCEDURE

For a class action to be maintainable in the United States, *Rule 23* requires that class

¹⁰

Note that Section 24 deals with assessment and apportionment of damages.

litigation be "superior" to other available methods for the fair and efficient adjudication of the controversy [emphasis added].¹¹

Accordingly, American courts have held: "[t]he telling enquiry is what would such a determination [i.e. on the common issues] do to advance the cause of the class members as a group?
. . . .

. . . although common questions need not be dispositive of the entire class action, . . . the resolution should at least provide a definite signal of the beginning of the end."¹²

The Ontario Law Reform Commission draft Bill likewise included a provision which referred to the "fair and efficient resolution of the controversy".¹³

In contrast, Section 5(d) of the Ontario *Act* simply states that the class proceeding must be "the preferable procedure **for the resolution of the common issues**".

This language is obviously much less burdensome to the party seeking to obtain class certification and is consistent with the draft Bill prepared in 1990 and included in the Report of the Attorney General's Advisory Committee on Class Action Reform.¹⁴

¹¹ *U.S. Federal Rules of Procedure, Rule 23, Class Actions*

¹² *Murtans v. Abbott Laboratories*, 99 F.R.D. 38 (DNH) 1983 at p. 41

¹³ Report of the Ontario Law Reform Commission, 1992, Vol. 3 at p. 862

¹⁴ Report of the Attorney General's Advisory Committee on Class Action Reform, February, 1990, at p. 30

Note, however, that in its discussion concerning "preferable procedure" the Advisory Committee stated that it chose the word "preferable" because it was felt that this would best draw the court into a consideration of whether or not the class proceeding was a fair, efficient and manageable method of advancing the claim. One would assume that in the face of the plain language of the Statute as well as the Advisory Committee's draft Bill, that advancing the claim should be interpreted to refer to the resolution of the common issues.

ADEQUACY OF REPRESENTATION

The American courts have considered not only whether the representative plaintiff has prepared an appropriate plan for the litigation but also whether the class counsel will be able to effectively handle the litigation. Factors such as the size and capitalization of the proposed class counsel firm have often been addressed.

In addition, a "workable plan" for the litigation must be prepared by the representative plaintiff before the court may determine that the class will be fairly and adequately represented.

THE CERTIFICATION ORDER

Section 8 of the *Act* sets out the required contents of the Certification Order.

8.(1) An order certifying a proceeding as a class proceeding shall,

- (a) describe the class;
- (b) state the names of the representative parties;
- (c) state the nature of the claims or defences asserted on behalf of the class;
- (d) state the relief sought by or from the class;
- (e) set out the common issues for the class; and
- (f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass.

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding.

See Appendix 1 for a sample Certification Order.

NOTICE OF CERTIFICATION

In addition to the Certification Order required by Section 8, Section 17 of the *Act* requires a separate Order which is to follow certification concerning the Notice which is to be given to the class.

Section 17(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

- (a) the cost of giving notice;
- (b) the nature of the relief sought;
- (c) the size of the individual claims of the class members;
- (d) the number of class members;
- (e) the places of residence of class members; and
- (f) any other relevant matter.

Section 17(6) Notice under this section shall, unless the court orders otherwise,

- (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
- (b) state the manner by which and time within which class members may opt out of the proceeding;

- (c) describe the possible financial consequences of the proceeding to class members;
- (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
- (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
- (f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
- (g) describe the right of any class member to participate in the proceeding;
- (h) give an address to which class members may direct inquiries about the proceeding; and
- (i) give any other information the court considers appropriate.

See Appendices 2 and 3 for examples of a draft Section 17 Order and Notice.

ONTARIO COURT (GENERAL DIVISION)

THE HONOURABLE)	FRIDAY , THE 22ND DAY OF
)	
MR. JUSTICE MONTGOMERY)	OCTOBER , A.D. 1993
)	
)	

B E T W E E N:

DEBORAH A. BENDALL
and CONNIE WISE

Plaintiffs

- and -

MCGHAN MEDICAL CORPORATION
and DOW CORNING CANADA INC.,
and DOW CORNING CORPORATION

Defendants

Proceeding under the *Class Proceedings Act, 1992*

O R D E R

THIS MOTION, made by the Plaintiffs for an Order that the within proceeding be certified as a class proceeding, was heard in Toronto on June 18, 1993, on the question of certification with written Reasons released August 26, 1993, and further submissions dealing with the requirements of the formal order pursuant to Section 8 of the Class Proceedings Act being made on September 24, 1993 at Toronto with Supplementary Reasons being delivered on October 22, 1993.

ON READING THE materials filed, and on hearing the submissions of counsel for all parties,

THIS COURT ORDERS that the within proceeding be certified as a class proceeding pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6, S.2(2).

THIS COURT FURTHER ORDERS that the class is identified as:

All persons, resident in the Province of Ontario as of February 18, 1993 or who received their implants in the Province of Ontario, who have had silicone gel breast implants placed in their bodies, whose implants were manufactured, developed, designed, fabricated, sold, distributed or otherwise placed into the stream of commerce by the named Defendants.

THIS COURT FURTHER ORDERS that Deborah A. Bendall be appointed as the representative Plaintiff as against the Defendant, McGhan Medical Corporation.

THIS COURT FURTHER ORDERS that Connie Wise be appointed as the representative Plaintiff as against the Defendants, Dow Corning Canada Inc. and Dow Corning Corporation.

IN THIS CLASS PROCEEDING the Plaintiffs claim damages against the respective Defendant for negligence, breach of contract, misrepresentation, breach of the provisions of the Sale of Goods Act, and failure to warn. These allegations arise out of the implantation of silicone gel breast implants manufactured, developed, designed, fabricated, sold, distributed or otherwise placed into the stream of commerce by the named Defendants.

IN THIS CLASS PROCEEDING the Plaintiffs are seeking general and special damages from the Defendants for injuries allegedly suffered as a result of having silicone gel breast implants implanted in their bodies.

THIS COURT ORDERS THAT the action will proceed on the basis of the following common issues:

- (A) What information did the Defendants have regarding adverse effects of silicone gel breast implants and when was that knowledge available to them?
- (B) Are silicone gel breast implants likely to cause specific medical conditions?
- (C) Were adequate notices of either of the foregoing given by the Defendants?

THIS COURT FURTHER ORDERS THAT members of the class may opt out of the class proceeding by filing with the Court (at the address listed below) and serving the solicitors for the parties (at the addresses listed below), written notice of their desire to opt out of the proceeding.

Registrar
Ontario Court of Justice (General Division)
80 Dundas Street
London, Ontario
N6A 1E7

Re: Action No. 14219/93

Siskind, Cromarty, Ivey & Dowler
Barristers and Solicitors
680 Waterloo Street
London, Ontario
N6A 3V8

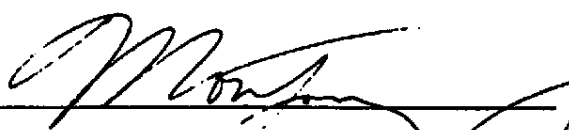
Jones, Rogers
Barristers and Solicitors
1600 - 155 University Avenue
Toronto, Ontario
M5H 3B6

Dutton, Brock, MacIntyre & Collier
Barristers and Solicitors
Suite 1700
438 University Avenue
Toronto, Ontario
M5G 2L9


THIS COURT FURTHER ORDERS THAT members of the class must opt out of the class proceeding within 6 months of the date of the last newspaper advertisement placed pursuant to the Notice required by section 17 of the Act.

THIS COURT ORDERS THAT the costs of this motion be fixed in the

amount of \$5,000.00 and be paid to the Plaintiffs in any event of the cause.



Justice Ontario Court (General Division)

ENTERED AT LONDON
In Book No. 9411
As Doct. 111
on OCT 28 1993
by 

ONTARIO COURT (GENERAL DIVISION)

Proceedings commenced at London

O R D E R

SISKIND, CROMARTY, IVEY & DOWLER
Barristers and Solicitors
680 Waterloo Street
London, Ontario
N6B 2P5

C. Scott Ritchie
(519) 672-2121

Solicitors for the Plaintiffs

MJP/sdj
55540

ONTARIO COURT (GENERAL DIVISION)

THE HONOURABLE MR. JUSTICE)	THE	DAY OF
)		
MONTGOMERY)		, 1994
)		
)		

B E T W E E N :

DEBORAH A. BENDALL and CONNIE WISE

Plaintiffs

- and -

MCGHAN MEDICAL CORPORATION
and DOW CORNING CANADA INC.
and DOW CORNING CORPORATION

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the Plaintiffs for an Order approving the Notice pursuant to Section 17 of the *Class Proceedings Act*, was heard this day at Osgoode Hall, 130 Queen Street W., Toronto.

ON READING the Affidavit of Michael J. Peerless, and on hearing the

submissions of counsel for all parties,

THIS COURT ORDERS that Notice of certification of a class proceeding be provided by the representative Plaintiffs to the class members by means of the advertising Notice annexed hereto and marked as Exhibit "A" to the within Order.

THIS COURT ORDERS that the within advertising Notice be published in the *Globe & Mail* on May 7th, 1994 and May 16th, 1994, pursuant to s.17(4)(b) of the Class Proceedings Act, 1992.

THIS COURT FURTHER ORDERS that the within advertising Notice be published in the *Toronto Star* on May 11th, 1994, and May 15th, 1994, pursuant to s.17(4)(b) of the Class Proceedings Act, 1992.

THIS COURT FURTHER ORDERS that the cost of the within advertising Notice be borne by

Justice, Ontario Court
(General Division)

ONTARIO COURT (GENERAL DIVISION)

Proceedings commenced at London

O R D E R

SISKIND, CROMARTY, IVEY & DOWLER
Barristers and Solicitors
680 Waterloo Street
London, Ontario
N6B 2P5

C. Scott Ritchie
(519) 672-2121

Solicitors for the Plaintiffs

CSR/sdj
55540

FINANCIAL CONSEQUENCES:

The class action shall deal with certain common issues. No Class member other than the representative Plaintiffs will be liable for costs with respect to the determination of these common issues. However, once the Court has determined the common issues, it may be necessary that individual members of the Class participate in individual proceedings to determine issues which are not common to the Class in order to establish their claim. If this is necessary, each member of the Class may have to bear the costs of such individual proceedings and, if unsuccessful, could be liable to pay a portion of the Defendants' costs incurred with respect to such individual proceedings.

Class members may be entitled to receive financial compensation from the Defendants if the class action is successful.

The representative Plaintiffs have entered into an agreement with their solicitors whereby fees and disbursements related to the trial of the common issues will be payable only in the event of success in the class action. Any fees charged by the solicitors for the representative Plaintiffs must be approved by the Court.

TENTATIVE "GLOBAL" SETTLEMENT:

You should know that a tentative settlement of a global class action dealing with breast implants has been reached in the United States. This proposed settlement, if finalized, may include all members of the Ontario Class who received their implants prior to June 1, 1993, whether or not later removed.

If you wish to participate in the "global" settlement, you must register and file claims forms by certain dates. To receive an information package setting out these dates and containing the details of the proposed global settlement, Registration Forms and Exclusion Forms, call 1-800-887-6828 (toll free). Your request will not be a matter of public record and your identity will be protected against disclosure except to the extent necessary to administer the settlement.

If you do not register to participate in the global settlement you may still bring an action in Ontario, either by participating in the Ontario class action, or, if you opt out of the Ontario class action, by bringing your own individual action in Ontario. However, you will not be able to bring an action in the United States

unless you opt out of the "global" settlement by filing an Exclusion Form by June 17, 1994.

You may wish to discuss the terms of the global settlement with your own lawyer or with the solicitors for the representative Plaintiffs at the address below.

For further information please contact *Siskind, Cromarty, Ivey & Dowler* at 1-800-461-6166 or in writing at the address below.

To opt out of the proceeding, please write to:

Registrar
Ontario Court of Justice (General Division)
80 Dundas Street
London, Ontario N6A 1E7
Re: Action Nos. 14219/93, 15980/93

Siskind, Cromarty, Ivey & Dowler
680 Waterloo Street
London, Ontario
N6A 3V8
Attention: C. Scott Ritchie, Q.C.

Solicitors for the representative Plaintiffs.

Dutton, Brock, MacIntyre & Collier
Barristers and Solicitors
Suite 1700 - 438 University Avenue
Toronto, Ontario
M5G 2L9
Attention: W. Graham Dutton, Q.C.

Solicitors for the Defendants, Dow Corning Canada Inc. and Dow Corning Corporation.

Jones, Rogers
Barristers & Solicitors
Suite 1600 - 155 University Avenue
Toronto, Ontario
M5H 3B6
Attention: Ian F.H. Rogers, Q.C.

Solicitors for McGhan Medical Corporation, CUI Corporation, and Inamed Corporation.

	Cause of Action?	Identifiable Class?	Representative Plaintiff?	Common Issues?	Preferable Procedure for Resolution of Common Issues?
Adelaide Capital (securities holders)	NO	YES	NO	?	NO - because of unique circumstances
Goldman, Sloan (law firm)	YES	YES	NO	NO	NO - because no common issues and because of U.S. law
Deloitte & Touche (accountants)	YES	YES	NO	NO	NO - because no common issue and because of individual procedural concerns
McGhan and Dow Corning	YES	YES	YES	YES	YES