

CASE SELECTION IN CLASS ACTIONS: WHY WON'T COURTS EMBRACE CONSUMER CLAIMS?

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Our firm recently argued a motion to certify an action where the central concern expressed by the Court was to ensure that some significant benefit would accrue to the proposed class should the class action be successful. It was made clear that we needed to demonstrate that some benefit of more than a trivial or theoretical nature for class members lay at the end of the litigation. It seemed that the Court needed to be satisfied that there was a significant benefit to justify the complexity and expense that would be added (in the Court's view) as a result of certification.¹

This might be a somewhat surprising concern to find in this body of law. Class actions practice is aimed in large part at access to justice and behaviour modification. It has given root to such concepts as *cy pres* distributions of damages where it would be impractical to distribute those damages to individual class members because individual entitlements are too small. The size of class members' claims is really a merits question, and is not contemplated as part of the test for certification under the *Class Proceedings Act, 1992*.

It seems to us, however, that both the size of the potential individual claims and the perceived social importance of the claims asserted are factors that the courts implicitly recognize in making procedural decisions on class actions. The size and nature of individual class members' claims is a factor that can and does influence judges' decisions on procedural matters on class actions, particularly where there are strong competing arguments being made before the court. As in the example above, this can arise in motions for certification, as well as on other questions such as costs. We believe that the courts have shown an affinity for "real"

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¹ We do not agree that the *Class Proceedings Act, 1992* necessarily adds complexity or expense if viewed and used as intended, but that is a subject for another day.

cases, as contrasted with cases where perhaps the wrong does not draw the court's ire, or where the individual benefit of the action may be minimal.

Word from the Top

To begin to understand our assertion, we look first to the Supreme Court of Canada's decisions in *Hollick*² and *Rumley*³. We do not suggest that the phenomenon that we are describing here began with the Supreme Court's 2001 decisions in *Hollick* and *Rumley*. Indeed, it had arguably manifested itself prior to that in, for instance, *Chadha v. Bayer*⁴, *Bendall v. McGhan Medical Corp et al.*⁵ and others, each of which arguably reflected some aspect of this theory. We point first to *Hollick* and *Rumley* because they represent our highest court's implicit recognition of our thesis.

When the Supreme Court decided these two cases as it did, it placed a significant emphasis on the magnitude of the injury alleged in making its decision about the strictly procedural issue of certification. In doing so, it effectively stated that certain cases were more worthy of the procedural benefits provided by class proceedings legislation than others, and that that determination turned, at least in part, on the magnitude of the injury alleged.

In order to understand this proposition, some review of the facts in each case and the basis upon which each was decided is necessary. In *Hollick*, the plaintiff was a resident of north Toronto who lived near the Keele Valley Landfill, which was owned and operated by the City of Toronto. He complained that he and others who lived nearby were subjected to noise and physical pollution from the landfill. The landfill was operated under a Certificate of Approval issued by the Ontario Ministry of the Environment. There was in place a "Small Claims Fund" to cover individual claims of up to \$5000 arising out of "offsite impact". The case was pleaded in

2 *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158

3 *Rumley v. British Columbia*, [2001] 3 S.C.R. 184

4 (2001) 54 O.R. (3d) 520 (Div. Ct.)

5 (1993), 14 O.R. (3d) 734 (Gen. Div.)

nuisance and under s. 99 of the *Environmental Protection Act*, and sought injunctive relief, compensatory damages of \$500,000,000 and \$100,000,000 in punitive damages.

Chief Justice McLachlan wrote the Court's decision. In it, she wrote about the benefits of class actions, and directed that an overly restrictive approach should not be taken to the legislation, but rather that the legislation should be interpreted in a manner that gives full effect to its purpose.⁶

However, in declining to certify the case under the *CPA*, she appears to have relied repeatedly on a fact that appeared to be implicit, if not express on the material before the Court: any damage suffered by individual class members was only nominal. In considering whether there were common issues, the Court referred to the absence of a history of public outcry, the absence of claims against the Small Claims Fund, and the absence of applications to amend the terms upon which the site operated. She seemed to be implicitly adverting to the fact that no one had ever done anything beyond complaining about the alleged pollution. In determining that a class action was not the preferable procedure, she leaned heavily on the fact that there had been no claims to the no-fault Small Claims Fund, which was available for claims up to \$5000. Despite this evidence, the plaintiffs argued that the claims were so small that it would not be worthwhile for them to pursue relief individually.⁷

In *Rumley*, the plaintiff was a former student of a residential school operated by the province of British Columbia between the 1950's and 1992. The Jericho Hill School enrolled deaf students and, between 1979 and 1992, blind students. The case arose from allegations of widespread sexual, physical and emotional abuse of students by staff and peers over the course of many years. This abuse had been documented by the provincial Ombudsman in a report prepared by special counsel to the Attorney General, who recommended that the

⁶ *Hollick, supra* at para 15

⁷ *Hollick, supra* at para 33

province accept responsibility for the abuse that had occurred, and establish a compensation scheme for former students, offering compensation in a range from \$3,000 to \$60,000. The province had acknowledged its responsibility to the former students, and established a compensation scheme in line with that recommended by special counsel. That program had, when the original motion was brought, heard 49 claims.

McLachlan C.J. also wrote the *Rumley* decision, which was released as a companion decision to *Hollick*. The Court certified *Rumley*, applying criteria from the British Columbia legislation only subtly different from those contained in the *CPA*. In that decision, the magnitude of the potential harm figures significantly. After acknowledging that the issues of injury and causation were significant individual issues that would be left for litigation after the conclusion of the common issues, it found that the alternative procedure set up pursuant to the report of special counsel which provided for compensation of up to \$60,000 was not adequate in the face of the type of harm alleged, and the extraordinary difficulty these members would have in litigating the claim individually in light of their personal characteristics (the fact that they were blind and/or deaf).⁸

Upon comparison of these decisions, one is drawn to the conclusion that the size of the individual claims of class members was an important factor. One can say that in each case, it was alleged that class members had suffered some harm resulting from the conduct of the defendant which would or could have impacted differently on each individual. In each case, it seemed clear that at least some portion of the class had suffered a wrong at the hands of the defendant. There was evidence of hundreds of complaints about the Keele landfill before the Court in *Hollick*, and in *Rumley* the Court had the report of the special counsel to the B.C. Attorney General. In each case, the defendant was alleged to have owed duties to the class members that were breached, resulting in harm to the class members. In each case, the fact

⁸ *Rumley*, *supra* at paras 36-39

and causation of any harm was, at least potentially, an individual issue that each class member would have to prove.

One of the major distinctions between these two cases was the nature and quantum of the harm done to potential class members. In *Hollick*, the plaintiff submitted that individual claims were too small for individual litigation, but no one had made a claim on an available no-fault small claims fund. In *Rumley*, the province voluntarily offered compensation of up to \$60,000 per class member, but the Court found that insufficient.

The Court's treatment of these two cases is in some respects counter-intuitive. Some would say that there is nothing more individual than sexual abuse or assault, the subject matter of *Rumley*, where class treatment was approved. It might also be said that the pollution emanating from the Keele landfill must have, by its nature, impacted on at least a significant portion of its neighbours in a similar way. On an intuitive basis, class treatment makes sense. The Court's advertence to the nature and quantum of individual class members' claims was at least an implicit recognition of the importance of that factor.

The Theory in Practice

Since deciding *Hollick* and *Rumley*, the Ontario Courts have decided a string of cases which are consistent with the view we advance. For instance, in *Chadha v. Bayer Inc. et al.*⁹ the Court of Appeal rejected the certification of a class action launched on behalf of a class of persons who had purchased new homes during a period when, it was alleged, the defendants had engaged in a conspiracy to fix the price of iron oxide, a chemical used to colour building products such as concrete blocks. It was estimated that the typical class member's damages

⁹ (2003), 63 O.R. (3d) 22 (C.A.), application for leave to appeal to the Supreme Court of Canada dismissed, [2003] S.C.C.A. No. 106. The original motion for certification was allowed, but then reversed by the Divisional Court. See (1999), 45 O.R. (3d) 29 (S.C.J.), rev'd (2001) 54 O.R. (3d) 520.

would have been in the range of \$70-\$112 for a \$150,000 home if the conspiracy were proven, and all of the damages were passed down to the consumer class.¹⁰

In *Price v. Panasonic*, the plaintiff alleged that the defendant had illegally maintained its prices contrary to competition law and common law. It was estimated that some 20 million consumers had overpaid approximately 15-20% for products such as camcorders, televisions, VCR's, stereos, CD players, and cameras.¹¹ The court found that common issues were raised and an identifiable class pleaded. However, it found that a class action was not the preferable procedure for proving the class members' minimal damages.

In *Macleod v. Viacom Entertainment Canada Inc.*,¹² the plaintiff alleged that late fees and unreturned movie fees charged by Blockbuster Video in respect of video rentals constituted breaches of contract and unlawful penalties. He sought to certify his claim as a class proceeding, to recover the amounts unlawfully paid by Blockbuster's customers. He failed, after Justice Cullity found that his pleadings disclosed no cause of action or common issues.

In *Markson v. MBNA Canada Bank*,¹³ the court refused to certify a claim wherein it was alleged that the defendant had charged a criminal rate of interest on cash advances taken from a credit card account, and where the damages sought was the interest paid in excess of the criminal rate.

In *Cassano v. Toronto Dominion Bank*,¹⁴ Justice Cullity refused to certify a claim that the defendant had charged the plaintiff and others unauthorized and undisclosed fees for performing foreign exchange transactions with his credit card. The plaintiff's alleged loss on the transaction which formed the basis for the claim was \$21.18.

¹⁰ *Chadha v. Bayer Inc. et al.*, *supra* at paras 9

¹¹ *Price v. Panasonic Canada Inc.* [2002] O.J. No. 2362 (S.C.J.)

¹² [2003] O.J. No. 331 (S.C.J.)

¹³ (2004), 71 O.R. (3d) 741 (S.C.J.)

¹⁴ [2005] O.J. No. 845 (S.C.J.)

Each of these cases had a number of things in common. First, each of them focused on the conduct or practice of the defendant which was the alleged source of the harm. There was, in other words, an apparent common focus of the class members' claims. Second, the individual losses claimed were very modest, although the aggregate damages of the class may have been, in some cases, very substantial. Third, the claim was of a consumer nature, and the impact on individuals viewed in isolation was relatively minor. Fourth, none of them were certified. We say that it would not have been shocking to see any one of those cases certified, that it lay within the courts' power to do so, but that, in part for the reasons we have described, those various courts chose not to.

On the other hand, there are cases in which individual claims were more significant where the courts appear to have been more favourably inclined. In *M.C.C. v. Canada*¹⁵ ("*Cloud*"), the Ontario Court of Appeal certified a case arising from an allegedly abusive and assimilative atmosphere at a residential school. The individual claims were for personal harm which would need to be proven on an individual basis. There also existed substantial individual issues arising from the application of limitations defences.

In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*,¹⁶ Justice Winkler not only ordered the case certified, but directed certain restrictions on the defendant's contact with the class. In that case, the class members' claims were for amounts the plaintiff grocery store operator claimed was owing to it and the other franchisees as a result of the agreement they had entered with the defendant. Justice Winkler noted that the rebates in question formed a "significant part" of the margins for each franchisee.¹⁷

Finally, in *Caputo v. Imperial Tobacco Ltd.*, after refusing the plaintiffs' motion for certification, Justice Winkler considered the defendants' request for costs, in the amount of

15 [2005] O.J. No. 733, motion for leave to appeal dismissed, [2005] S.C.C.A. No. 50

16 (2003), 62 O.R. (3d) 535, aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.)

17 *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, *supra* at para 10

approximately \$1.2 million against the representative plaintiffs and their solicitors personally. The case sought to recover damages from the tobacco manufacturers for personal injuries arising from the consumption of tobacco products. In deciding that no costs should be awarded on the motion, Winkler J. noted the public interest in such litigation and the well-acknowledged health risks arising from smoking.

In each of these cases, the plaintiffs obtained a procedural advantage from the Court, either through certification of a class action, or by not being required to pay costs despite failing on a motion for certification. In each case, we would say, the court's decision was at least partially the result of the fact that the class members on behalf of whom the action was brought had, at least potentially, real and substantial claims, and not merely nominal ones.

The Right Reasons?

When the Ontario Law Reform Commission delivered its oft-cited *Report on Class Actions*¹⁸ in 1982, it articulated the three goals that the Supreme Court of Canada later said should underlie the application of class actions legislation in this country: judicial economy, access to justice and behaviour modification¹⁹.

In its introduction, the Commission made clear what it was thinking about when it approached the class actions question:

The mass production and sale of an inherently defective product has the potential to touch all consumers of that product. Misleading advertising by a large corporation can have province-wide or even national implications. Large scale pollution of rivers or the atmosphere can affect countless persons over a long period of time. Sophisticated securities frauds, discrimination in hiring, illegal strikes, and many other types of unlawful conduct have direct and indirect ramifications for all of society.²⁰

It seems from this description that the Commission saw a single act or course of conduct that impacted on a group of people as the model for the situation where class actions

¹⁸ *Report on Class Actions*, Ontario Law Reform Commission, 1982.

¹⁹ *Report on Class Actions*, *supra*, at 117-146 cited in *Hollick*, *supra*, at para ●

²⁰ *Report on Class Actions*, *supra*, at 3

would be appropriate and useful, despite the obvious presence of differing individual impacts in each of the examples the Commission cited.

We would argue that the courts engage in what is perhaps a subconscious screening exercise, which sees claims that are viewed as less socially worthy or, dare we say lawyer-driven, stopped at an early stage. Many of these claims appear to be the very claims that the legislation was intended to address. Viewed in isolation, these cases may not seem particularly important. In the aggregate, however, these litigations can be an important instrument of social change, effecting the goals which underlie the legislation.

Other than explaining the importance of a given proceeding to the court, our only suggestions are to beware of this trend and to handle these cases with care. While a seriously injured, sympathetic group may have a greater chance of success, consumer claims are also important, and equally worthy of class treatment.