

Certification of Misrepresentation Cases

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INTRODUCTION

One important area of class action activity has involved litigation arising out of allegations of misrepresentation. From a practical perspective, the availability of class procedures is important because of the commercial reality that many transactions involve standard form sales tools, information letters and other documents designed to generate a response in the consumer. From a legal perspective, such cases will often require a consideration of the relationships between common and individual issues which has been the focus of much judicial comment in certification decisions.

In general, cases which have been problematic for certification tended to involve large numbers of complex issues and large numbers of class members where the potential judicial efficiency is lost, and little access to justice is gained, is the case (even with class treatment) would involve a long series of individual trials dealing with many complex issues and many parties applying many different legal regimes.

These problems have regularly been addressed in misrepresentation cases seeking class certification.

Reference to the Class Proceedings Act ("CPA" or the "Act") includes both the Ontario *Class Proceedings Act, 1992* S.O. 1992, c. 6 and the British Columbia *Class Proceedings Act* R.S.B.C. 1996, c. 50.

BACKGROUND

common issues

One of the requirements for certification is that the claims of the class members must raise common issues.¹ "Common issues"² is defined as:

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

A common issue is an issue of fact or law common to all claims. An issue need not be dispositive of liability in order to constitute a common issue. A common issue is one which will

¹ *Class Proceedings Act, 1992* S.O. 1992, c. 6, s. 5(c); *Class Proceedings Act* R.S.B.C. 1996, c. 50, s. 4(c).

² *Class Proceedings Act, 1992* S.O. 1992, c. 6, s.1; *Class Proceedings Act* R.S.B.C. 1996, c. 50, s.1.

not only move the litigation forward in a logical manner but is an issue in respect of which a finding will contribute to the case in a legally material or meaningful way.³

Preferable Procedure

Another element of the test for certification is whether a class proceeding would be the preferable procedure for the resolution of the common issues.⁴

The critical features of the preferable procedure analysis were captured by the court in *Carom v. Bre-X*.⁵

A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and modification of the behaviours of wrongdoers.

Often, a trial of the common issues, followed by a number of trials to deal with individual circumstances, is preferable to the prospect of hundreds or thousands of individual actions dealing with common issues and common evidence.⁶

Individual issues

The existence of individual issues which remain to be resolved following the determination of the common issue is not a bar to certification. The CPA contemplates that individual issues respecting both liability and damages may need to be addressed following the determination of the common issues. The ability of a class member to access an expedited form of summary disposition of individual issues supports the legislative goals of judicial economy and access to justice.

The Act provides that certain matters will not be a bar to certification:⁷

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.

3 *Carom v. Bre-X* (1999), 44 O.R. (3d) 173 (S.C.J.); *Anderson v. Wilson* (1998), 37 O.R. (3d) 236 at 243.

4 *Class Proceedings Act*, 1992 S.O. 1992, c. 6, s. 5(1)(d); *Class Proceedings Act* R.S.B.C. 1996, c. 50, s. 4(1)(d).

5 (1999) 44 O.R. (3d) 173 at 239 (S.C.J.).

6 *Cooper v. British Columbia (Registrar of Mortgage Brokers)* [1999] B.C.J. No. 1390 at para 36 (S.C.).

7 *Class Proceedings Act*, 1992 S.O. 1992, c. 6, s. 6; *Class Proceedings Act* R.S.B.C. 1996, c. 50, s. 7.

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.

The stages of a class proceeding are set out as follows:⁸

S. 11 (1) Subject to section 12, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

Although, the court has discretion to determine the conduct of the proceedings pursuant to s. 12.⁹

S. 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.

The need to resolve certain aspects of the case on an individual basis is not a bar to a class proceeding and does not preclude finding of common issues. Individual hearings can be held to determine whether there are further facts in addition to those raised by way of common issues that would excuse the defendant from liability.¹⁰

MISREPRESENTATION

8 *Class Proceedings Act, 1992* S.O. 1992, c. 6, s.11; *Class Proceedings Act* R.S.B.C. 1996, c. 50, s. 11.

9 *Class Proceedings Act, 1992* S.O. 1992, c. 6, s.12; *Class Proceedings Act* R.S.B.C. 1996, c. 50, s.12.

10 (1999), 45 O.R. (3d) 605 at 611(Gen. Div.).

Cases which have been problematic for certification have tended to involve large numbers of complex issues and large numbers of class members where the potential judicial efficiency is lost when a case involves a long series of individual trials dealing with many complex issues and many parties and applying many legal regimes.¹¹ These problems are common in cases involving causes of action in misrepresentation.

In any action for misrepresentation, the plaintiff must prove the following elements:

- (a) that the alleged representation was made;
- (b) that the representation was negligently made;
- (c) and that he or she reasonably relied upon the misrepresentation
- (d) that the reliance was to his or her detriment.

Negligent Misrepresentation

Proof of negligent misrepresentation involves an analysis of both legal and factual issues. The plaintiff must establish that the defendant owed a duty to be reasonably careful about the accuracy of the representations in question - a legal issue. The plaintiff must also establish that in all of the relevant circumstances, the defendant fell below the applicable standard of care - a factual issue.

The elements of negligent misrepresentation were outlined by the Supreme Court of Canada in *Queen v. Cognos*¹² as follows:

1. there must be a duty of care arising from a special relationship between a representor and a representee;
2. there must be a representation made that was untrue, inaccurate or misleading;
3. the representor must have made the statement negligently;
4. the representee must have reasonably relied upon the statement;
5. the representee must have suffered damage as a result of the reliance.

¹¹ For example *Biffner v. Louisiana Pacific* [1997] B.C.J. No. 2281 (S.C.).

See also *Carom v. Bre-X minerals Ltd.* (1999) 44 O.R. (3d) 173
¹² [1993] 1 S.C.R. 87 at 110.

In a class proceedings context, the issue of negligent misrepresentation involves a mixed question of fact and law involving the defendant's behaviour and state of mind rather than the conduct and state of mind of the individual class members. Reliance does not have to be a common issue and can be determined at a later stage. For example, the common issue can be worded: "Was the statement X a misrepresentation IF we assume that it was relied upon."

It is possible to certify as common issues certain elements of misrepresentation common to all members of the class, thereby moving the litigation forward. Other elements such as reliance and damages may be left to be determined on an individual basis.

In *Schweyer v. Laidlaw*¹³ an action was commenced on behalf of former employees of the defendants who claimed that the terms of an early retirement package were misrepresented to them by the defendant. A common issue was certified as to whether there was any misrepresentation in a letter to employees. The element of reliance was left to be determined on an individual basis. The issue to be determined being, "did the employee rely and was that reliance reasonable in all of the circumstances."

In *Controltech Engineering Inc. v. Ontario Hydro*,¹⁴ an action concerning bidding proposals for work projects, Sharpe J. (as he then was) stated that it may be possible to move the litigation forward by determining certain elements of the misrepresentation claim common to all members of the class and leaving the element of individual reliance to be determined on an individual basis. The determination of whether there are elements of misrepresentation which amount of common issues requires an analysis of the facts in each particular case. In that case, certification was denied.

In *Abdool v. Anaheim Management Ltd.*,¹⁵ an action was commenced on behalf of purchasers of condominium units as part of an unsuccessful investment project. Although certification was denied in that case, the Divisional Court considered the question of whether an action involving a claim of misrepresentation could be certified as a class proceeding. The Court found that the need to prove individual reliance did not preclude certification.

In, *Rosedale Motors Inc. v. Petro-Canada Inc.*,¹⁶ an action was commenced on behalf of persons who had entered into a franchise agreement with the defendants. The plaintiffs alleged misrepresentation, breach of contract, unconscionability and breach of fiduciary duty. Sharpe J. (as he then was) while denying certification of the action, recognized that misrepresentation claims can be certified despite the need of individual class members to prove reliance. In that case, however, it was determined that each class member's claim would have to be examined individually.

In *Peppiatt v. Royal Bank*,¹⁷ the claims of all class members rested on misrepresentations contained in an information package developed to promote the sale of equity shares in a golf club. After certification, a motion was brought by the defendants seeking decertification. It became apparent that members of the class received different versions of the relevant representation and that many members of the class did not receive any version of the representation.

13 [unreported](4 February 2000) Toronto 18270/94 (S.C.J.).

14 [1998] O.J. No. 5350 (Gen. Div.).

15 (1998), 21 O.R. (3d) 453 (Gen. Div.).

16 (1998), 42 O.R. (3d) 776 (Gen. Div.) appeal pending.

17 (1996), 27 O.R. (3d) 462 (Gen. Div.).

Chilcott J. stated that in order to determine whether a particular plaintiff relied upon a representation, the qualifications of the plaintiff, the other particular circumstances, and other facts upon which the plaintiff may have relied are relevant inquiries.

In that case, Chilcott J. ordered the class to be divided into subclasses rather than requiring each individual member to be discovered.

Despite the general consensus that issues of reliance may be determined at a later stage on an individual basis, in at least one case, individual issues of reliance appear to have been considered at the common issues stage. In *Rumley v. British Columbia*,¹⁸ a case involving the abuse of students at a school in British Columbia, one of the proposed common issues was "Did the defendant make negligent, reckless and/or fraudulent misrepresentations regarding the School". The plaintiffs appealed an order dismissing an application to certify. One of the reasons given for denial of certification was that issues of reliance and causation linking the representations to the harm alleged will vary from claimant to claimant.

While the elements of reliance and damages can be dealt with at the determination of individual issues stage, the elements of duty of care, whether a misrepresentation was made and whether the misrepresentation was negligent are dealt with at a trial of the common issues. In order to certify a misrepresentation action, the courts consider whether these three elements are "common issues". If it is determined that these elements are common issues, the court must then be satisfied that a class proceeding is the preferable procedure for the determination of those common issues.

The courts will often commence their analysis of proposed common issues with the element of whether a representation was made.

With respect to the certification of misrepresentation cases, the courts have had regard to the individual facts of the case. Certification will be indicated in circumstances involving a single representation made to a group of people where the litigation can be moved forward by a determination whether the representation was misleading.

In *Maxwell v. MLG*¹⁹ the plaintiffs brought an action for damages for alleged misrepresentations in a securities Offering Circular contrary to the Securities Act. The same offer containing the same information was made to all class members. The defendants argued that if any member of the class had actual knowledge of the matters alleged not to have been disclosed in the Offering Circular then the defendants would not be liable and in addition, this could affect the limitation periods. It was held that the claim clearly raised issues common to all persons who tendered their shares pursuant to the Offering Circular. Gound J. stated that any difficulties which might arise with respect to actual knowledge of a proposed plaintiff could be adequately dealt with by requiring members of the class to file an appropriate affidavit with counsel for the plaintiffs, swearing as to whether he or she had any actual knowledge of the undisclosed facts and the date that he or she acquired such actual knowledge.

18 [1999] B.C.J. No. 2634 (C.A).

19 [1995] O.J. No. 1138 (Gen. Div.).

In *Campbell v. Flexwatt*,²⁰ a product liability case, the court certified the issues of whether the Canadian Standards Association made negligent misrepresentations as to the fitness of the product in approving the subject radiant heating panels.

In some cases, negligent misrepresentation cases involved a single representation which was found to raise common issues but it was decided that a class proceeding was not the preferable procedure.

In *Abdool*,²¹ the Divisional Court considered the issue of whether a class proceeding involving a claim of misrepresentation could be certified. The misrepresentation in that case rested on a single letter from an accounting firm commenting on financial forecasts for a condominium project. It was held that there were common issues involving the question of whether the single letter was a misrepresentation and as to whether it was negligently made. The action was not certified as it was held that a class proceeding was not the preferable procedure to determine the common issues.

Negligent misrepresentation cases have not been certified where the factual context surrounding the representation was complex such that the representations could not be reduced to a single misrepresentation. The determination of whether there are elements of misrepresentation amounting to a common issue to all members of the class is made in light of the context and facts of each particular action

Certification was denied in *Huras v. Com Dev Ltd.*²² In that breach of employment contract case, it was held that it was not case where there had been a single representation. There had been a number of representations made to different individuals in different contexts.

In *Mouhteros v. DeVry J.*,²³ a former student of the defendant brought an action for damages for negligent and fraudulent misrepresentation claiming, among other things, that the defendant misrepresented the quality of its programs and facilities. Winkler J., held that in some cases misrepresentation may constitute a common issue as in where it was a single letter. In *Mouhteros* however, the various misrepresentations were published by the defendant in 67 different television commercials and 30 different newspaper advertisements or were made verbally by 122 admissions officers over a 6 year period. "The nature of the representations made in DeVry's advertising and promotions, the question of whether the representations were false and misleading, and whether they were made negligently or fraudulently will vary according to the content of the advertisement or the statements made by the admissions officer, the time at which it was published or communicated, the program of study undertaken by each individual student, and the conditions then extant at each of the DeVry campuses."²⁴

In *Rosedale Motors Inc. v. Petro-Canada Inc.*,²⁵ the claims of all class members did not turn on a single common representation but rather upon what was said by the defendant's representatives to individual class members in separate meetings. Given the nature of the franchise agreements and the discussions that led to their creation, all of the evidence of misrepresentation pertaining to each class member would have to be considered in light of the

20 [1996] B.C.J. No. 1487 (S.C.).

21 [1995], 21 O.R. (3d) 453 (Gen.Div.).

22 [1999] O.J. No. 2680 (S.C.J.).

23 [1998], 41 O.R. (3d) 63 (Gen. Div.).

24 [1998], 41 O.R. (3d) 63 at 71 (Gen. Div.).

25 [1988], 42 O.R. (3d) 776 (Gen. Div.).

dealings that the class member had with the defendant's representative. In that case the representations were made both in writing and orally. There was an issue as to whether all proposed class members received a form letter containing the representations. Representations were made in the defendant's policy manual and in a brochure. There is also an issue as to whether all class members received the brochure. Oral representations were allegedly made at a convention as well as during individual meetings between the proposed class members and the defendant. Also, some class members retained legal counsel who assisted in the negotiation of the agreements.

In denying certification, Sharpe J. (as he then was) noted that the case involved some 40 commercial agreements between relatively sophisticated parties. It would have been necessary to consider in detail precisely what each franchisee was told, what significance those statements had in the context of the negotiation as a whole and what, if any, significance those statements had in relation to the legal nature of the relationship that was created.²⁵

In *Rumley v. British Columbia*,²⁷ The plaintiffs appealed an order dismissing an application to certify. On appeal, misrepresentation as a common issue was not certified. In that case the alleged representations occurred over a 42 year span and the representations were given by many different employees and agents.

In *Carom v. Bre-X*,²⁸ there were applications to certify actions against three types of defendants. The first was against Bre-X and its insiders for conspiracy, fraudulent misrepresentation and breach of the Competition Act. The second claims were against engineering companies for negligent misrepresentation and negligence. The third claims were against brokerage firms for negligent and fraudulent misrepresentation and breach of the Competition Act. Winkler J. certified some claims against Bre-X and its insiders but refused to certify class proceedings in respect of the claims against the engineering companies and the brokerage firms.

In that case the plaintiffs argued that the series of statements contained in the press releases and other documentation emanating from Bre-X, notwithstanding their number and diversity of content, contain a common misrepresentation - "gold was present in mineable quantities in the Busang". In that case over 160 statements were made by the defendants over a 4 year period to an unknown number of potential class members. The statements were distributed through various forms of media. The potential class members were investors with varying degrees of sophistication and knowledge. Their investment strategies were also different. In finding that the claims in negligent misrepresentation did not raise common issues, Winkler J. stated, "[a] reduction of the numerous representations to a common representation requires analysis and characterization of each individual representation, the plaintiff's perception of the representation and the circumstances in which it was made. This is of necessity, an individual inquiry"²⁹

In *Controltech*,³⁰ the factual context was complex. The alleged misrepresentations were made at various points in a relatively complex 3 stage bidding process involving sophisticated

25 (1998), 42 O.R. (3d) 776 at 788 (Gen. Div.).

27 (1999) B.C.J. No. 2634 (C.A.).

28 (1999), 44 O.R.(3d) 173 (Gen. Div.), appeal dismissed (1999), 44 O.R. (3d) 173 (Div. Ct.).

29 (1999), 44 O.R.(3d) 173 at 197 (Gen. Div.)

30 [1998] O.J. No. 5350 (Gen. Div.).

parties. Each bidder presented a different proposal and as the bids were selected at each stage, each bidder discussed its project and its progress on an individual basis with the defendant. While there was a common factual core, the facts were found to be too complex. Sharpe J. stated "...I fail to see how the proposed common issues would resolve anything that would 'move the litigation forward' in as much as it would still be necessary to examine what was said to each in individual bidder with respect to each individual claim."³¹

While the court found that there was a common course of conduct, there was not a single specific representation that was common to all members of the proposed class. While Sharpe J. was of the view that cases in which claims based on misrepresentation have been certified have all rested on a single misrepresentation, he noted that a single misrepresentation is not a requirement for certification.

The court was of the view that cases involving "corporate strategy" can be appropriate for certification. Sharpe J. stated, "[i]t is possible to imagine claims resting on various misrepresentations being certified. For example, it may be that a common issue would be found where a defendant developed and deployed a standard deceptive sales pitch for a consumer product, repeated time and time again in nearly identical circumstances to various consumers by various sales people"³²

The vanishing premium insurance cases are examples of negligent misrepresentation cases that were certified despite the absence of a single representation. In these cases, it was argued that the standard sales practices were developed as part of a corporate strategy and amounted to a common misrepresentation for certification purposes.³³

Schweyer v. Laidlaw, is a case where common issues were found despite the fact that there was no single representation. In his reasons, Cumming J. referred to the definition of common issues in the CPA which stated that common issues means common *but not necessarily identical* issues of fact or law.³⁴ Cumming J. exercised the Court's flexibility in the management of a class proceeding. The Act provides that the court may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination.³⁵ The Act also specifically provides that the Court may grant leave to discover class members. Cumming J. found that the case involved a focused set of common issues, the resolution of which would advance the litigation and noted that any resulting individual issues would be brief and manageable. Cumming J. also noted that the modest class size (30 people in this case) distinguished it from other cases where there were individual issues and large numbers of class members and large numbers of complex issues making certification problematic.³⁶

The *Schweyer* decision is an indication that the Courts are willing to certify common issues in a negligent misrepresentation case where the representations do not amount to a single representation but where there is a focused set of common issues rather than a large number of complex issues and where the class size is modest.

31 [1998] O.J. No. 5350 at para 16 (Gen. Div.).

32 [1998] O.J. No. 5350 at para 13 (Gen. Div.).

33 See *Dabbs v. Sunlife Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Ct. (Gen. Div.)); *McGrow v. Manufacturers Life Insurance Co.* [1998] O.J. No. 4692 (Gen. Div.).

34 *Class Proceedings Act*, 1992 S.O. 1992, c. 6, s. 1; *Class Proceedings Act* R.S.B.C. 1996, c. 50, s.1.

35 *Class Proceedings Act*, 1992 S.O. 1992, c. 6, s. 12; *Class Proceedings Act* R.S.B.C. 1996, c. 50, s.12.

36 Cumming J. referred to *Bittner v. Louisiana Pacific Corp.*, [1997] B.C.J. No. 2281 at para 66.

It could be argued that negligent misrepresentation cases where the representations do not amount to a single representation could be certified where there is a focused set of common issues and a larger class size provided there is a manageable plan for the resolution of the individual issues. The subject of the management of individual issues will be addressed in a later section of this paper.

In *Bre-X*, Winkler J. commenced his analysis of the claims of negligent misrepresentation against the engineers by examining the element of duty of care. Winkler J. reviewed the line of authorities and summarized the requirement of duty of care as follows:³⁷

To summarize the development of the law through *Anns*, *Kamloops* and *Hercules*, a duty of care which overrides any policy limitations will exist in a negligent misrepresentation or negligence case where the following four elements are present:

- (a) the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation;
- (b) that the reliance by the plaintiff in the circumstances was reasonable;
- (c) the defendant knew the identity of the plaintiff (or a class of plaintiffs);
- (d) the defendant's statements were used for the specific purpose or transaction for which they were made.

A prima facie duty of care will exist where elements (a) and (b) are present. Elements (c) and (d) reflect policy concerns. The policy reasons for limiting the liability of defendant are that in negligent misrepresentation actions, the defendant might be exposed to indeterminate liability, specifically, liability for an unknown amount, for an unknown period of time and to an unknown class. In some cases these policy concerns may override the duty found under (a) and (b).

In the claims against the engineering companies, Winkler J. was of the view that policy considerations are an essential element in the finding of a duty of care and that the determination of a duty of care is an individual issue. Winkler J. held that while the plaintiff may be able to establish a prima facie duty of care on behalf of the class, the individual issue in respect of whether there are policy considerations should override the prima facie duty. Winkler J. stated that in this case a finding could be made at a common issue trial that the defendants had knowledge that the information was being disseminated by *Bre-X* to the potential class members but that the final element (d) could only be made on a individual basis.

With respect, it could be argued that the last element of duty of care - "(d) the defendant's statements were used for the specific purpose or transaction for which they were made" requires an analysis similar to the element of reliance. As mentioned previously, it has been established that the elements of reliance and damages can be left to be determined at an individual issues trial. It is recognized that in doing so, the common issue ceases to be whether

there was a duty of care. As Winkler J. stated in *Bre-X* “[t]he common issue cannot be dependent upon findings which will have to be made at individual trials...”³⁸ However, we are suggesting that in some cases the resolution of the first three elements of the duty of care as common issues could still advance the litigation in a material way.

Fraudulent Misrepresentation

The elements of fraudulent misrepresentation as applied by the Supreme Court of Canada in *Pama v. G&S. Properties Ltd*³⁹ are as follows:

6. fraud is a false representation of fact;
7. made with a knowledge of its falsehood, or recklessly, without belief in its truth;
8. with the intention that it should be acted upon by the complaining party;
9. and actually inducing him or her to act upon it.

In *Bre-X*, while negligent misrepresentation was not found to raise common issues in the claims against *Bre-X*, fraudulent misrepresentation did. “The plaintiffs’ allegation is that the *Bre-X* operation was fraudulent. Therefore, it is contended, every representation, whenever made, is tainted by the fraud. The allegation that the fraud permeates every statement raises common issues regardless of whether individual issues may arise from the actual communications made to the class members.”⁴⁰

Although each action will be examined on a case by case basis. The reasoning in *Bre-X* indicates that common issues regarding fraudulent misrepresentation may be certified in certain cases.

RESOLUTION OF INDIVIDUAL ISSUES:

Consistently, the courts have displayed flexibility and have favoured practical and workable solutions.

One such case is *Webb v. K-Mart Canada Ltd.*⁴¹ This wrongful dismissal action was certified on a Canada wide basis (excluding British Columbia and Quebec). A manageable approach was approved for managing the individual issues. Three to four thousand potential reference hearings were ordered to be heard at or near the place of residence of the claimants. Lawyers in private practice would conduct the hearings and prepare a report which would include a recommendation. The referees will report back to the court and the court would give

38 (1999), 44 O.R.(3d) 173 at 197 (Gen. Div.).

39 [1970] 15 D.L.R. (3d) 336 at 344.

40 (1999), 44 O.R.(3d) 173 at 197-198 (Gen. Div.).

41 (1999), 45 O.R. (3d) 389, 425, 638 (Gen. Div.).

final approval. The referees would also include a recommendation about the payment of costs in their reports. The fees and disbursements of the referee would be paid according to an individual order of the court as to who should bear the cost of the fees.

Meditation has been ordered as a first step in the resolution of individual issues in some cases. Meditation procedures were used in *Godi v. Toronto*⁴², *Gagne v. Silcorp*⁴³ and *Atkinson v. Ault*.⁴⁴ Each case provided for arbitration should mediation fail to settle the dispute, however, none of the claims proceeding past mediation to arbitration. In those cases, the dispute resolution process was created on consent.

Individual issues may be managed largely through discovery. In *Schweyer v. Laidlaw*⁴⁵ the class was comprised of a maximum of thirty people. It was held that any trial of individual issues as to liability and damages would be brief and manageable. Cumming J. was of the view that these individual issues might well be managed through discovery.

In *Maxwell*,⁴⁶ common issues arose regarding misrepresentations in an Offering Circular. This was a case involving the same offer containing the same information being made to all members of the class. Counsel for the defendants submitted that some members of the class may have had actual knowledge of the matters alleged not to have been disclosed in the Offering Circular, thereby raising individual issues. The court held that any individual issues dealing with actual knowledge could be dealt with by requiring proposed class members to file an affidavit swearing as to whether he or she had any actual knowledge of the undisclosed facts and the date that information became known to them.⁴⁷

In *Dabbs v. Sunlife Assurance Co. of Canada*⁴⁸ and *McKrow v. Manufacturers Life Insurance Co.*,⁴⁹ the plaintiffs alleged that agents of the defendant insurance companies misrepresented to purchasers of policies that within a specified number of years, dividends would pay the premiums. Settlements were approved at the same time as certification in each case. Each settlement included "no-proof" benefits as well as a dispute resolution mechanism whereby a policyholder could present evidence of the nature of the actual misrepresentation made at the time of sale of the policy. Evidence was submitted by the policyholder in affidavit form and/or by submitting written documentation. The agents of the defendant insurance companies could also submit contradictory or supportive evidence in an similar form. Claims were reviewed through a multi-level arbitration system.

In cases where individual issues are unavoidable, it is prudent to develop a detailed and well thought out Plan of Proceeding. One element of the test for certification is that:

- (e) there is a representative plaintiff who,
 - (i) would fairly and adequately represent the interests of the class,

42 [unreported] (20 September 1996) Toronto 95-CU-89529 (Ont. Ct. (Gen. Div.)).

43 [unreported] (17 April 1997) Toronto 97-CU-120941 (Ont. Ct. (Gen. Div.)).

44 [unreported] (2 September 1997) Milton C17932/97 (Ont. Ct. (Gen. Div.)).

45 [unreported] (22 February 2000) at p. 8, Toronto 18270/94 (Ont. S.C.J.).

46 [1995] O.J. No. 1135 (Gen. Div.).

47 [1995] O.J. No. 1135 at para 7 (Gen. Div.).

48 *Dabbs v. Sunlife Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

49 *McKrow v. Manufacturers Life Insurance Co.* [1998] O.J. No. 4692 (Q.L.) (Ont. Ct. (Gen. Div.)).

- (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, an interest that is in conflict with the interests of other class members.

In his reasons in *Bre-X*, Winkler J. outlined the court's view of the Plan of Proceeding:⁵⁰

The production of a workable litigation plan serves a twofold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and, it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial.

A workable plan must be comprehensive and provide sufficient detail which corresponds to the complexity of the litigation proposed for certification.

CONCLUSION: