

# Introduction to Class Proceedings

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The introduction of the *Class Proceedings Act, 1992*<sup>1</sup> in Ontario has provided another vehicle for personal injury litigation. Ontario, along with Quebec and British Columbia, is one of three provinces in Canada with Class action legislation.

The Ontario Law Reform Commission began a comprehensive study on class actions in 1976.<sup>2</sup> In 1982 the Commission, published the *Report on Class Actions*.<sup>3</sup> This report recommended legislative reform to facilitate class proceedings in Ontario. The report listed the three major goals and benefits of class actions as: Judicial Economy, Increased access to the courts, and Behaviour Modification.<sup>4</sup>

## 1. Judicial Economy

In mass wrongs situations, class actions result in efficiencies to the plaintiffs, the defendant and the judicial system. The total amount of litigation is reduced by diminishing the multiplicity of hearings. This significantly reduces the expense of litigation and results in time savings for all parties.

2. Access to the Courts

Litigation, particularly personal injury litigation, can be prohibitively expensive for plaintiffs. In addition to the economics of litigation, social and psychological barriers can prevent a plaintiff from pursuing a meritorious claim. Often times, the individual claim amounts in class actions are too small to litigate on an individual basis, but at the same time are a significant amount to each individual claimant.

3. Behaviour Modification

The introduction of the Act in Ontario could aid in the prevention of wrongdoing by potential defendants. The real possibility of a class proceeding could provide these potential defendants with the incentive to modify inappropriate behaviour.

In 1990, the Attorney General's Advisory Committee on Class Action Reform published a report and draft Bill.<sup>5</sup> The report strongly relied upon the Ontario Law Reform Commission's 1982 report<sup>6</sup> and incorporated the three benefits and goals of class proceedings as mentioned above: judicial economy, access to the courts and behaviour modification.

The *Class Proceedings Act, 1992*<sup>7</sup> was based on the Committee's draft Bill and was proclaimed in force on January 1, 1993.

## CERTIFICATION

The Act has a procedure whereby the court screens potential class actions pursuant to a five part test.<sup>8</sup> This stage is known as "certification".

In order for an action to advance as a class proceeding, it must be certified by the court. Certification is procedural in nature<sup>9</sup> and does not address the merits of the case.<sup>10</sup> Section 5(1) of the Act<sup>11</sup> provides the certification test:

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 interests of the 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.

The first class proceeding to be certified in Ontario was a product liability action whereby damages for personal injuries were claimed. In *Bendall v. McGhan*<sup>12</sup> the plaintiffs were recipients of silicone gel breast implants manufactured by the Defendant. They brought an action as a class proceeding seeking damages for negligence, breach of contract, breach of warranty and negligent misrepresentation. In certifying the action Montgomery J. held: “[c]ertification is the only way a large number of women can access a legal system that would otherwise be denied to them. The court maintains a supervisory role under the Act to ensure a fair and expeditious determination.”

#### Pleadings Disclose a Cause of Action

Although many aspects of class proceedings are novel, the underlying claims carried forward by way of class proceedings will stand or fall on the basis of traditional litigation principles found in legislation, the Rules of Court and at common law.

In *Peppiatt v. Nicol*, Chilcot J. stated that the court could obtain some guidance in determining whether there was a cause of action by considering the test found in Rule 21 of the Ontario Rules of Civil Procedure (determination of an issue on a point of law):

It has not been shown to the court beyond doubt that the Plaintiffs could not succeed in the present action.

The allegations of fact here are not ridiculous or incapable of proof and are capable of establishing, if proven, that there was negligent misrepresentation made by (Nicol) to the class, also that there was a breach of the fiduciary duty owed by Nicol to the class.<sup>13</sup>

#### Identifiable Class

While the class as a whole must be identifiable, not all class members need be identified at the certification stage.<sup>14</sup> Care should be taken when defining the class so as not to set the parameters too broadly or too narrowly. Winkler J. has noted that:

The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.<sup>15</sup>

The Act recognises that subclasses may be necessary in situations where common issues are not shared by all members of the class.<sup>16</sup>

### Common Issues

Common issues are defined in the Act as:<sup>17</sup>

- (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;

As a matter of procedure, common issues are generally presented to the court in question format.

Although resolution of the common issues need not be dispositive of liability (individual issues may yet need to be determined) it must advance the proceedings, in order to meet the objectives of efficiency and access to the justice system.<sup>18</sup>

In *Anderson v. Wilson*, the class consisted of individuals who alleged to have been infected with Hepatitis B as a result of undergoing electroencephalogram ("EEG") tests at five different clinics operated by the Defendants.<sup>19</sup> On the common issues test, Campbell J. stated:

It is not necessary, in order to proceed with a class action, to demonstrate that the common issues will in themselves determine liability. The common issues need only be issues of fact or law that move the litigation forward[.]

It would defeat the purpose of the class proceedings legislation, having regard to the strong and potentially determinative common features of the claims of those infected with Hepatitis B in this mass outbreak associated with the defendants' clinics, to deny class certification to those actually infected.<sup>20</sup>

The court further stated that,

The mere fact that it might be necessary to determine a number of individual issues does not necessarily destroy the advantage of a class action.

...

[T]he common issues are so central that a class action, for reasons of judicial economy and increased access to the courts, is superior to other available methods for the fair and efficient resolution of the controversy. Although individual tests and limited discovery might be necessary the advantage of trying the common issues together, in order to achieve judicial economy and greater access to justice, outweigh any potential problems caused by the individual issues.<sup>21</sup>

So long as common issues exist, the presence of individual issues should not be a bar to certification.

#### Preferable Procedure

Certification has most often been denied based on a failure to satisfy this part of the test. The court must be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues.<sup>22</sup> Factors to consider when determining whether a class proceeding is the preferable procedure are: the economics of the litigation (both

quantum and expense), the presence of numerous individual issues, the potential for third party claims and alternatives to a class proceeding.

In *Nantais v. Telectronics*,<sup>23</sup> a class of plaintiffs brought an action against the manufacturers of defective pacemaker leads. Although the leads implanted in the majority of the class members had not yet failed, medical experts predicted that the leads would eventually fail. The plaintiffs claimed damages as a result of the alleged negligence in the design, manufacture and distribution of the leads. With respect to preferable procedure, Zuber J. held the following:

In my respectful view this is the kind of case for which the *Class Proceedings Act 1992* was designed. The stupendous financial burden of a case such as this would consume all or almost all of the proceeds of the judgment of any single plaintiff. The defendants (if responsible) would likely therefore be insulated from any of these claims because of financial consequences alone. It is only by spreading out the cost that the members of the class have any chance of success. Not only is the class proceeding preferable, it is the only procedure whereby the members of the class will have any real access to the courts.<sup>24</sup>

This action was certified as a class proceeding and ultimately a settlement was reached and approved by the court.

#### Adequacy of the Representative Plaintiff

The role of representative plaintiff may be demanding. The representative plaintiff must be someone who is committed to the case and to advancing not only her own interests, but also those of the class as a whole. She must be available to satisfy the time commitment required in complex litigation cases and must be prepared to provide evidence and be subjected to cross-examination and accordingly must understand the issues sufficiently in order to instruct counsel. In addition, the representative may be subject to adverse costs awards. The adequacy of the representative plaintiff will be evaluated in order to ensure that she will fairly and adequately represent the interest of the class.<sup>25</sup>

In most cases, the experiences and characteristics of each class members' case varies somewhat from person to person. The representative plaintiff need not be someone who shares every characteristic of every class member. The representative plaintiff need not even be typical of the class so long as she would fairly and adequately represent the interests of the class and does not, on the common issues, have an interest in conflict with the class.<sup>26</sup>

More than one representative plaintiff may be named in a class proceeding. This is required where there is a subclass whose members have common issues that are not shared by the class as a whole.<sup>27</sup> With respect to personal injury actions in Ontario, relatives of the class members who wish to claim pursuant to the *Family Law Act*,<sup>28</sup> may form a subclass and appoint a representative plaintiff of that subclass.

In cases with multiple defendants, courts haven sometimes held that it is necessary to have representative plaintiffs who have claims against each named defendant.<sup>29</sup>

The Act also requires that a representative plaintiff produce a plan for proceeding that sets out a workable method of advancing the proceeding and providing the class members with notice.<sup>30</sup> In practise, this requirement begins with a rough outline and evolves into a plan with the input of class counsel, the judge and defence counsel.

Satisfaction of each of the five tests results in mandatory certification pursuant to the language of s. 5(1) of the Act. Furthermore, the Act further provides grounds that shall not be a bar to certification:

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.

## INDIVIDUAL ISSUES & DAMAGES

In the event that certification is granted, a Notice will be provided to the class to provide class members with information about the lawsuit to advise them of their right to opt out of the class proceeding.<sup>31</sup> Class members who opt out will neither be bound by the results of the class action nor will they receive any of its benefits. In light of the fact that

individual class members are not responsible for costs awards in a class proceeding, it would appear that the only reason to opt out would be a class member's desire to pursue an individual lawsuit.

Following certification and notice, the class proceeding resemble a traditional piece of individual litigation as it moves through discovery and trial of the common issues. The Rules of Court apply to class proceedings, however, the case management judge has broad discretionary power of supervision to ensure that the lawsuit proceeds in a fair and expeditious manner.<sup>32</sup> Ordinarily, the case management judge will hear all pre-trial motions including the certification motion but will not hear the trial of the common issues.<sup>33</sup>

The scheme of the *Act* envisions that following determination of the common issues, individual issues may remain to be determined. Again, the Court has a broad discretion to direct that such issues be determined by way of further hearing, a reference under the rules of court or with the consent of the parties, by any other manner.<sup>34</sup>

In personal injury class proceedings, damages may vary from person to person. Section 6 of the Act specifically provides that the need for individual damages assessments shall not be a bar to certification. As stated by Campbell J. in *Anderson v. Wilson*, "The need for some separate assessment of damages is inherent in many class actions and the statute provides machinery to provide separate assessments to the extent they are necessary".<sup>35</sup>

These damages could be proven on an individual basis at trial after determination of the common issues. Section 25(1) of the Act provides:

(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.

Settlement agreements can also be structured to allow class members to make a claim for damages to a settlement fund. Claims would be accepted if certain criteria are met as set

out in the settlement agreement. Where there are a large number of claimants, an independent third party is often appointed to process claims.

Several breast implant settlements have involved individual assessment of damages of some sort as part of the claims procedure. In *Jones v. Baxter Healthcare*,<sup>36</sup> claims were assessed according to three main criteria: level of disability, disease category and age of onset of symptoms.

In *Godi v. Toronto Transit Commission*,<sup>37</sup> an action was brought on behalf of passengers and their family members who were on subway trains that collided. The Defendants admitted liability for the cause of the accident and certification was granted and a settlement agreement was approved by the court. Pursuant to the settlement, class members could claim damages for physical injuries, psychological injuries, property damages and expenses caused by the accident. Claims for damages proceeded through a mediation process, failing which the parties would proceed to arbitration employing the Small Claims Court rules of evidence.

#### SETTLEMENT AGREEMENT APPROVAL

Court approval is required of any settlement of a class proceeding. In considering whether to approve a class settlement, a court must balance the need to scrutinize the proposed

settlement closely to ensure that it does not sell short the potential rights of the class against the recognition that:

“. . . all settlements are the product of compromise and the process of give and take in settlements rarely gives all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.”<sup>38</sup>

The basic test for court approval is that, “the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.”<sup>39</sup>

The burden of proving that the settlement ought to be approved by the court rests on the parties proposing the settlement.

The role of the court is not to rewrite or modify the terms of the settlement but only to approve or reject it.<sup>40</sup> However, as a practical matter, a court may indicate areas of concern and offer the parties the opportunity to answer and address the concerns through amendments to the settlement.<sup>41</sup>

The following criteria articulated by Newberg on Class Actions<sup>42</sup> has been considered useful by Canadian courts in the approval hearing context:

- i. Likelihood of recovery, or likelihood of success;
- ii. Amount and nature of discovery evidence;
- iii. Settlement terms and conditions;
- iv. Recommendation and experience of counsel;
- v. Future expense and likely duration of litigation;
- vi. Recommendation of neutral parties if any;
- vii. Number of objections and nature of objections;
- viii. The presence of good faith and the absence of collusion.

In the United States, there is a strong initial presumption of fairness when a proposed class settlement which was negotiated at arms length by counsel for the class is presented for court approval.<sup>43</sup> Accordingly, as Newberg states:

As a practical matter, the overwhelming majority of proposed settlements are approved when the court is satisfied that arms length bargaining took

place during settlement negotiations and experienced class counsel has recommended approval of the settlement.<sup>44</sup>

In Ontario, the court has also held that a recommendation by experienced class counsel is a factor in favour of the settlement. It is, however, only one criterion which must be considered:

The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line.<sup>45</sup>

## FEES

In class proceedings, financial barriers to litigation are reduced for class members. Class counsel, however, assume a substantial economic risk. In Ontario, the *Class Proceedings*

*Act, 1992* is unique in that class counsel are permitted to enter into a contingency fee agreement with a representative plaintiff,<sup>46</sup>

33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

Such agreements may also permit the lawyer to make a motion to the court to have his or her fees increased by a multiplier.<sup>47</sup> As an alternative to multipliers, courts have also approved retainer agreements based on percentages and block fees.<sup>48</sup> The fees of class counsel are subject to approval by the Court.

## CONCLUSION

The class proceedings device is a procedural vehicle only. The *Act* creates no new cause of action and potential class lawsuits should be evaluated by practitioners first on the basis of the merit of the substantive claim. However, the *Act* clearly has opened the door to a new

kind of litigation which is reflective of the realities of the modern market place in which identical or similar product of services are used by hundreds of consumers.