

STARTING A CLASS ACTION: EVIDENTIARY AND PRACTICAL MATTERS

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INTRODUCTION

In assessing whether a potential action would be a viable class proceeding, there are a number of factors to take into account before issuing a statement of claim. Among other matters, a firm must consider whether the substantive case has merit, the likelihood of success at certification, the evidentiary record required prior to certification, the potential value of the action, and the financial and personnel resources required to properly pursue the action. In addition, the nature and quality of the potential representative plaintiff's claim as well as their ability to adequately represent the proposed class must be addressed.

Class Counsel will probably be faced with a defendant who is willing and able to defend the action utilizing every possible procedural and substantive roadblock, and every possible route of appeal, in order to prevent an adverse judgment. Furthermore, unless the particular area of litigation has already been well developed, plaintiff's counsel will have to undertake the effort and expense of nurturing experts and conducting ground-breaking discovery, all of which will be expensive.

This paper addresses the evaluation of a potential class action through 1) consideration of the evidentiary requirements of the certification motion and 2) other practical considerations.

While this paper focuses on the class proceeding, acting on behalf of a group allows counsel to analyze a variety of individual fact situations before committing to a particular course of action. Counsel may choose to pick a "test case" from within the ranks of clients, thus presenting the best possible case early in the process and establishing a culture of plaintiff victory in the minds of the public, potential jurors, and the judiciary, not to mention the defendants themselves. On

the other hand, it may be that the case is best suited for the class action procedure. It is well worth it to devote significant time and energy to these considerations in advance of commencing the proceedings.

EVIDENTIARY REQUIREMENTS FOR THE CERTIFICATION HEARING

Class action practice has now evolved to the point where a significant evidentiary record may be useful at the certification hearing. The party seeking certification should ensure that it places proper and adequate information before the court to allow it to decide the certification motion. The form and the amount of information will vary, but usually some form of affidavit material along with the pleadings themselves will be sufficient. Courts also have the discretion to adjourn the certification hearing itself to permit the parties to amend their materials or pleadings or to permit further evidence.¹ The clear intent of the legislation is that the certification process be flexible.

Certification motions are normally supported by a solicitor's affidavit. In light of the fact that the *Class Proceedings Act, 1992* (CPA) is a purely procedural statute, in a number of cases, a solicitor's affidavit (without more) has been sufficient. In British Columbia, both the Act and judicial commentary suggest that an affidavit of the representative plaintiff is also required.² In Ontario, the practice increasingly is to file an affidavit from the representative plaintiff. It is not necessary that such an affidavit address the merits of the case, but as a practical matter, the solicitor's affidavit will address the procedural aspects of the certification motion while an accompanying affidavit from a representative plaintiff may touch on issues related to the factual basis giving rise to the cause of action.

¹ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(4).

² *Bittner v. Louisiana Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 (S.C.).

The existence of an identifiable class as well as the representation issues identified at section 5(e) should also be addressed. The affidavit material filed in support of certification must make reference to the adequacy of the proposed representative along with the fact that there is no conflict with the other members of the class on the common issues. Typically, the affidavit will contain a brief description of the facts underlying the representative's claim and will make it clear that the facts or law underpinning this claim are common to the other members of the class. In some cases, affidavits from experts have been filed in support or opposition to the certification motion. In such a case, experts' evidence, again, should be focussed on the certification test (e.g. whether or not there is an identifiable class or a common issue) as opposed to the merits of the claim.

The plaintiff must show some basis in fact for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action. This does not entail any assessment of the merits. The court is not in a position at the certification hearing to resolve conflicts in the evidence or to engage in detailed assessments of evidentiary weight, rather it must find some basis in fact for the certification requirement at issue.³

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. Pleadings challenges by parties opposed to certification have been a frequent occurrence in the practice area. Therefore, carefully drafted pleadings are essential.

³ *Cloud v. Attorney General (Canada)* (2004), 73 O.R. (3d) 401 at paras. 49 and 50 (C.A.).

Identifiable Class

Although the process is flexible, a defendant is within his or her rights to insist that an appropriate class definition, supported by an evidentiary basis be provided.⁴ In addition, both the plaintiff and the defendant are required to provide their best information on the number of members in the class.⁵ As a practical matter, defendants have resisted satisfying this obligation, apparently on the basis of an unwillingness to concede any notion that a 'class' may exist. The point seems to be that, in the absence of a certification order, no class exists. The statute is clear, however, that there is an obligation on the parties to provide such information on a 'best evidence' basis.

While the class as a whole must be identifiable, not all class members need be identified at the certification stage.⁶ 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:⁷

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.

The onus falls on the representative plaintiff to show that the class is defined sufficiently narrowly but without resort to any arbitrary exclusion.

In *Hollick* the Supreme Court made it clear that the requirement that the class not be defined in an overly broad manner is not an onerous one.

⁴ *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 at 308 (S.C.J.).

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

⁶ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s.6; *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.), online:Q.L. (ORP).

⁷ *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para 10 (Gen. Div.), online: QL (ORP); see also Cloud at para. 45.

The representative need not show that everyone in the class share the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly *without arbitrarily excluding some people who share the same interest in the resolution of the common issue*. (Emphasis added).⁸

The Supreme Court also noted that the process is a flexible one. The Chief Justice held that the remedy of an overly broad class definition is to "...either disallow certification or allow certification on condition that the definition of the class be amended . . ."⁹

On the other hand, although the process is flexible, plaintiffs' counsel should not expect the court to assume the role of counsel.¹⁰

The plaintiffs prevail upon me to amend the class definition, to redefine the class in any way necessary to render this action certifiable. In my view, the approach is not what McLachlin C.J. was advocating in *Hollick*. As I read her reasons, the court may either reject certification where the class is not properly defined or otherwise grant a conditional certification on the basis that the plaintiffs will have to provide an acceptable definition to the court. In some circumstances, it may be appropriate for the court to alter or amend a class definition to be consistent with other findings made on a certification motion. That is not the case here. What the plaintiffs suggest is akin to having the court perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept. That goes beyond a simple exercise of discretion and verges into the prohibited territory of descending "into the arena" with the parties to the motion.

In this case, it is clear that the plaintiffs are having difficulty in reaching any definition that meets with even their own approval let alone the approval of the court.¹¹

⁸ *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 (S.C.C.).

⁹ *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 21.

¹⁰ M.A. Eizenga, M.J. Peerless and C.M. Wright, *Class Actions Law and Practice*, (Toronto: Butterworths, 1999).

¹¹ *Caputo v. Imperial Tobacco Limited*, [2004] O.J. No. 299 (S.C.J.) at paras. 41 and 42.

The Act recognises that subclasses may be necessary in situations where common issues are not shared by all members of the class.¹²

There must be some rational relationship between the class and the common issues.¹³ It is not necessary that all class members fully share a cause of action; the shared interest need only extend to the resolution of the common issues.¹⁴

It is also useful to have the proposed definition of the proposed class included in the affidavit, along with the common issues which the plaintiff initially proposes to be the subject matter for the class proceeding. In this respect, class counsel should not approach the certification hearing as simply a threshold issue (that is, to gain certification) but rather as the point at which the framework for the entire proceeding will be established.

It should be noted, however, that the certification motion normally takes place at a very early stage of the proceedings, and that final class definitions and statements of common issues may only be possible following discovery. Modifications are to be expected.

Common Issues

The underlying question is whether allowing the action to proceed as a representative one will avoid duplication of fact-finding or legal analysis. An issue will be common only if its resolution is necessary to the resolution of each class member's claim and if it is a substantial ingredient of each of the class members' claims. An issue can constitute a substantial ingredient, however, even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided.¹⁵

¹² *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(2).

¹³ *Cloud v. Attorney General (Canada)* (2004), 73 O.R. (3d) 401 at para. 45 (C.A.).

¹⁴ *Cloud v. Attorney General (Canada)* (2004), 73 O.R. (3d) 401 at para. 46 (C.A.).

¹⁵ *Cloud v. Attorney General (Canada)* (2004), 73 O.R. (3d) 401 at paras. 51-53 (C.A.).

The plaintiff should identify the common issues that will be determined by the class proceedings. The factual background supporting these issues should be provided in the affidavit material contained in the motion record. Class Counsel may also consider including expert opinion or other evidence that will enable the court to readily define the particular issues to be determined.

Preferable Procedure

The preferability requirement involves determining whether the class action would be a fair, efficient and manageable method of advancing the claim and whether the class action would be preferable to other reasonably available means of resolving the claims of class members. This analysis must be conducted while keeping in mind the goals of the CPA.¹⁶

The three main goals of the CPA, as articulated by the Ontario Law Reform Commission and the Attorney General's Advisory Committee on Class Action Reform and consistently commented upon by the courts, are to promote judicial economy, to make the court system more accessible to the public and to modify the behaviour of potential defendants.

The certification inquiry must take into account the importance of the common issues in relation to the class as a whole. The preferability requirement can be met even where there are substantial individual issues. The critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.¹⁷

It is incumbent on plaintiff's counsel to critically analyze, at the outset, whether a class action is the preferable procedure. With respect to the preferable procedure, the affidavit should address any facts that may indicate an alternative to a class proceeding is not the preferable procedure. In particular, if there are alternative avenues of redress for class members such as private ADR

¹⁶ *Cloud v. Attorney General (Canada)* (2004), 73 O.R. (3d) 401 at para. 73(C.A.).

¹⁷ *Cloud v. Attorney General (Canada)* 73 O.R. (3d) 401 at paras. 74-76 (C.A.).

or compensation schemes, these should be addressed. The affidavit should also address, where circumstances warrant, the economics of the litigation.

Representative Plaintiff

The only formal tests for the representative plaintiff are that he or she be representative of "an identifiable class of two or more persons" and that he or she:¹⁸

- (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.

From a practical standpoint, it appears that this section may speak more to the ability of Class Counsel to move the action forward, than the quality of the representative plaintiff. However, the role of representative plaintiff can be demanding. The representative plaintiff should be someone who is committed to the case and to advancing not only his/her own interests, but also those of the class as a whole. He/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.

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.

¹⁸ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(e).

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.¹⁹ For example, with respect to personal injury actions in Ontario, relatives of the class members who wish to claim pursuant to the *Family Law Act*,²⁰ may form a subclass and appoint a representative plaintiff of that subclass.

In cases with multiple defendants, courts have held that it is necessary for there to be at least one representative plaintiff who has a claim against each defendant.²¹

Litigation Plan

One of the conditions for certification requires that the representative plaintiff present a detailed litigation 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."

The ostensible end result of a certified class is a litigated case with the result that a properly prepared litigation plan should be of assistance to the court in determining whether a number of the tests for certification can be met. For example, if the plan does not display that the resolution of the common issues will lead to litigation economies and that any individual issues that need to be dealt with can be handled in a manageable way, it is unlikely that the court will conclude that a class proceeding is the preferable procedure for the resolution of the common issues.

The appropriateness of the representative plaintiff will, in part, be determined by whether or not the representative's counsel has prepared a practical litigation plan which the court will be able to follow to bring the litigation to a conclusion. The litigation plan has become increasingly more

¹⁹ *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 5(2).

²⁰ *Family Law Act*, R.S.O. 1990, c. F.3.

²¹ *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Gen. Div.).

important in the certification process. The litigation plan should include details of the notice to be given to the class, the procedure surrounding the mutual exchange of documents and expert reports, a schedule for the proposed examination for discovery, the manner in which the common issues would be litigated, the manner in which any individual issues would be determined, the means of distributing damages where necessary, and the general timing relating to each of the above steps. Production of a suitable litigation plan can be critical to the certification process.

In *Carom v. Bre-X*, a complex class proceeding involving allegation of misrepresentation, breach of fiduciary duty, conspiracy, and breach of the Competition Act, and involving numerous defendants, Winkler J. found that the plaintiffs' plan of proceeding was insufficient. The plaintiffs were given thirty days to submit a revised litigation plan. In rendering his decision, Winkler J. made the following comments:

A practice has developed in class proceedings of accepting litigation plans in support of certification motions that are sparse and lacking in detail. While this may be appropriate in more straightforward cases, in complex litigation such as the instant case, a detailed plan which meets the requirements of the Act is of critical importance.

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.²²

The comments made by Winkler J. highlight the need for class counsel to ensure a practical and detailed plan for proceeding is presented to the court in the certification materials. None the

²² *Carom v. Bre-X* (1999), 44 O.R. (3d) 174 at 203 (Sup. Ct.).

less, there is a significant amount of flexibility here and we are aware of no example of an otherwise certifiable class being denied because of an inadequate plan.

SOME PRACTICAL CONSIDERATIONS IN ASSESSING A POTENTIALLY VIABLE CLASS ACTION

Class actions are not for the faint of heart, and in the normal course, not for a firm that lacks a substantial capital base to carry the file. We have become increasingly conservative in our approach to case selection, due to the risk associated with pursuing one of these cases.

Resources

In many ways, the strategy and tactics that Class Counsel must pursue are no different from those used in any large-scale plaintiff litigation. We have found that the sheer volume of material to be mastered, particularly when one considers the risk of such litigation, has required us to work in teams. These teams include not only a core of individuals (lawyers, law clerks and assistants) familiar with class action procedure, but may involve specialists in areas of substantive law that are brought in to deal with the central subject matter of the litigation.

We have also found it necessary to invest heavily in computer technology in order to be able to manage these files from an administrative standpoint. By their very nature, class actions are usually complex pieces of litigation and can be very expensive to pursue or to defend. Class action firms or teams can use technology to manage this form of litigation in a variety of ways, depending upon the particular challenges that arise.

Mobility

Due to their size and scope, class actions can require extensive travel, and can require teams of counsel who are geographically diverse. Network access, including access to document summaries or images, may need to be provided remotely through a secure high speed connection.

Secure bulletin boards permitting posting of relevant information and review by team members can be useful tools in some cases.

Communicating with the Class Members

One of the burdens on Class Counsel is communicating with the class of plaintiffs represented in the action.

Due to the public nature of class actions (including a sometimes remarkable media interest and formal notice), you can expect to be inundated with telephone calls, letters and requests for information.

It is important to have the personnel and technology to collect and store class member information and to provide class members with regular updates as the litigation progresses. This process is especially important if a settlement is reached that requires class members to submit claims.

Communications within the class action practice group, and between the group and the class itself, is critical. Toll-free call centres staffed with knowledgeable law clerks, regular mailings, updates to the web site, secure and non-secure e-mail, and other tools can be used as the need arises.

Voicemail systems need to be carefully analyzed to be sure that they are capable of handling the influx of calls sometimes experienced in a high-profile class actions.

The Retainer Agreement

In Ontario, the formal requirements of the Retainer Agreement are straightforward. It must state the terms under which fees and disbursements shall be paid, including whether their payment is contingent upon success and the method by which payment is to be made whether by lump sum, salary or otherwise. Courts have concluded that the language of this section is sufficiently broad to give significant discretion to the judge approving the retainer agreement.

It would seem prudent for Class Counsel to seek approval of the retainer agreement early in the litigation process. It should not be forgotten that the agreement not only sets the terms according to which the representative plaintiff (and through it, the class) is prepared to pay Class Counsel, it also sets the terms according to which Class Counsel is prepared to be retained.

CONCLUSION

Recognizing a viable class action and deciding whether to pursue the action involves, among other things, a careful examination of the merits of the action, the likelihood of success at the certification stage, the (pre-discovery) evidence required at the certification hearing, the potential value of the action, and your firm's resources both human and capital.

A great deal of analysis, research and consideration is required prior to commencing a class proceeding, for once a class proceeding is commenced it cannot be abandoned without court approval.²³

²³ *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29(1).