

Managing Class Actions

C. Scott Ritchie

Michael J. Peerless

Michael A. Eizenga

Siskind, Cromarty, Ivey & Dowler

December 5, 2000

The Canadian Institute

TABLE OF CONTENTS

A. INTRODUCTION	4
B. CERTIFICATION	6
1. Materials for Use at the Hearing of the Motion	8
2. The Certification Tests	9
3. Common Issues	9
a. The Predomination Test	9
b. Preferable Procedure	11
4. Certification and the Objectives of the Legislation	12
C. SUBSTANTIVE LAW: PRODUCTS LIABILITY	13
1. Manufacturing Defect	15
2. Negligent Design	16
3. Failure to Warn	17
4. The Learned Intermediary Rule	18
5. Products Liability Combined with Other Causes of Action	19
6. Choosing the Right Defendants	20
7. Limitation Periods	21
D. JURISDICTIONAL ISSUES AND THE NATIONAL CLASS	22
E. CLASS ACTION FEES	27
1. The Retainer Agreement	28
2. The Base Fee and Multiplier	29
3. Fixed Sum Per Case	35
4. Percentage Based Fee Agreements	35
F. CONCLUSION	36

INTRODUCTION

The Ontario class proceedings regime is generally consistent with its American counterpart, although the *Class Proceedings Act, 1992* provides a more comprehensive statutory code than does U.S. Federal Rule 23 (The *Act* and accompanying regulations comprise almost 60 detailed paragraphs). Where the *Act* departs from the American approach, it is thought to be more liberal or amenable to certification (for example, there is no “predomination” test in the Ontario *Act*.)

The introduction of the *Class Proceedings Act, 1992*ⁱ in Ontario was the result of more than a decade of study. In 1982, following six years of work, the Ontario Law Reform Commission published the *Report on Class Actions*.ⁱⁱ 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 modification of behaviour of actual or potential defendants.ⁱⁱⁱ

In 1990, the Attorney General’s Advisory Committee on Class Action Reform published a report and draft Bill.^{iv} The report strongly relied upon the Ontario Law Reform Commission’s 1982 report^v and incorporated the three benefits and goals of class proceedings as mentioned above.

The *Class Proceedings Act, 1992*^{vi} was based on the Committee’s draft Bill and was proclaimed in force on January 1, 1993.

Notwithstanding the stated goals of the legislation, it is incumbent on plaintiff’s counsel to critically analyze, at the outset, all of the elements of the certification section of the *Act*, especially to decide whether or not a class action is the “preferable procedure” for the resolution of any common issues.

Plaintiffs will usually 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 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, and may be necessary in advance of certification.

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 at the outset. Counsel must take the time to carefully consider all possible procedural options prior to taking on the often substantial burden of a class action.

CERTIFICATION

In order for an action to advance as a class proceeding, it must be certified by the court. Certification is procedural in nature^{vii} and does not address the merits of the case.^{viii} Section 5(1) of the *Act*^x 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*^x 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.”

Materials for Use at the Hearing of the Motion

Given the purely procedural nature of the certification motion, and the fact that the individual plaintiff’s particular circumstances may not be enormously relevant to the certification tests,^{xi} most such motions have been supported by affidavit evidence sworn by someone other than the proposed representative plaintiff (for example, a lawyer). The only specific statutory

requirement of the contents of the motion material is that both sides must give their best information on the number of members in the class.^{xii}

This approach has recently come under attack, and Courts have begun to expect more specific evidence respecting the ultimate merits of the case, at least in order to sort out whether or not the ultimate litigation is likely to truly contain the commonalities required for class treatment.^{xiii} In particular, in appropriate cases, Courts have encouraged fulsome affidavit evidence from the proposed representative plaintiff.

Plaintiff's counsel need to keep these new requirements firmly in mind, in that this approach may require very significant investment in sorting out the litigation position at a very early stage in the proceeding (ie. before any documentary or oral discovery).

It is also useful to have the precise definition of the proposed class included in the motion material, along with the common issues which the plaintiff proposes 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.

Again, the practice has evolved in this area in recent years. Originally, certification motions were often conducted on a bifurcated basis, with Courts making the decision to certify (or not), and then only if necessary hearing argument respecting the specifics of the common issues, class definition, and plan for the proceeding.^{xiv} More recently, Courts have tended to insist that plaintiff's take their best shot at all elements of the certification tests, and that the specifics of the common issues, class definitions, and plan of proceeding will go a long way to directing the Court on making the certification decision.^{xv}

It should be noted, however, that the certification motion takes place at a very early stage of the proceedings, and that final class and common issue definition may have to take place following discovery. Modifications are to be expected and ought to be welcomed by counsel and by the Court.

The Certification Tests

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

The other three tests are the primary areas for debate and discussion in most of the certification decisions.

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.^{xvii}

Identifiable Class

While the class as a whole must be identifiable, not all class members need be identified at the certification stage.^{xviii} 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.^{xix}

Membership in the defined class should not be dependent on the merits of the case.^{xx}

Winkler J. has also noted that the threshold for establishing the existence and size of the class may depend on whether the cause of action is objective or subjective.^{xxi}

An objective cause of action is determinable without reference to personal characteristics of the plaintiff. For example, in a mass disaster or product liability case,

[t]he harm alleged is not dependent on the plaintiff having certain characteristics but rather arises from the existence of a state of affairs outside the norm, the facts of which are sufficient to establish on the 'plain and obvious' test that a cause of action exists. Hence, the evidence of the class, to adopt the words of Sharpe J. in *Taub*, may be 'inherent in the claim itself'.^{xxii}

A subjective claim, however, will require more extensive evidence to establish the existence and size of the proposed class. "A subjective claim is characterized by allegations of the plaintiff's injury from a reaction to a situation that is neither inherently harmful nor apparently wrongful."^{xxiii}

The *Act* recognises that subclasses may be necessary in situations where common issues are not shared by all members of the class.^{xxiv}

Common Issues

Common issues are defined in the *Act* as:^{xxv}

- (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.^{xxvi}

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.^{xxvii} 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.^{xxviii}

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.^{xxix}

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

The financial burden associated with pursuing complex litigation can often dwarf the amount of damages pursued by any individual plaintiff. Not only are class proceedings preferable in such circumstances, they are the only procedure by which the large majority of plaintiffs will have access to the courts.^{xxx}

In *Rumley v. British Columbia*,^{xxxi} an action was commenced on behalf of former students of a residential school for the deaf and blind who alleged that they were sexually abused while they attended the school. The lower court refused to certify the action as a class proceeding. Kirkpatrick J. found that the standard of care owed by the defendant was subject to change during the 42 year period in question. The court acknowledged that the problem of establishing a standard of care might be resolved by determining a standard applicable to the entire period with a minimum threshold that must be met regardless of the shifting standard of care. It was determined, however, that such an approach would not advance the litigation as the question of the suitability of the threshold to each particular case may require examination.

Kirkpatrick J. listed a number of considerations that led to the conclusion that the action lacked sufficient commonality among the proposed class members in relation to the standard of care imposed on the defendant.^{xxxii}

- (i) the time period spanned by the claims;
- (ii) the dramatic and relatively recent evolution of societal understanding of sexual, physical and emotional abuse and the means by which to counter and prevent it. Thus, for instance, preventative measures which might have been reasonable and sufficient in 1955 might have been unreasonable and insufficient in 1985;
- (iii) the status of perpetrators (i.e.: is the government subject to the same standard of care in relation to abuse perpetrated by a government employee as it is in relation to abuse perpetrated by a ward?);
- (iv) the number of perpetrators;
- (v) the state of the defendants' knowledge as to the occurrence of abuse at the school at a given point in time; and
- (vi) the vulnerability of particular plaintiffs.

The British Columbia Court of Appeal overturned the lower court and held that the claims of class members who were sexually abused raised common issues.

It was held that the lower court failed to adequately recognize the limited grounds on which the class claims were to be advanced. If the plaintiffs succeeded on a common issue, each class member would be required to prove on a balance of probabilities that he or she was sexually abused at the school. The Court of Appeal found that issues related to sexual abuse were standard of care issues. Mackenzie J.A. was of the view that the duty of the school to

reasonably protect its students from sexual abuse was “clear and immutable” throughout the 42 year period that the school was in operation.^{xxxiii}

Furthermore, it was held that determination of the status and number of individual perpetrators was not essential to the issues of liability as the plaintiffs were not relying on vicarious liability. “In essence the claims will be based on systemic negligence, the failure to have in place management and operations procedures that would reasonably have prevented the abuse.”^{xxxiv} The Court of Appeal found that the plaintiffs were entitled to restrict the grounds of negligence they wished to advance in order to make the action more amenable to a class proceeding.

The Court of Appeal was of the view that limiting the ground of liability to systemic negligence did not eliminate all difference among class members, however, the differences were not insurmountable. If the breach of the standard of care during the period relevant to a particular student was established and the class member succeeded in proving that he or she suffered sexual abuse, proof of causation between the breach and the harm should not present many individual issues. The causation issue was whether the harm would reasonably have been prevented if the school had maintained reasonable measures to prevent sexual abuse.

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

Section 5 of the *Ontario Act* makes no reference whatsoever to individual issues and the plain language of the Statute contains no reference to a predomination test.^{xxxvi} Indeed, the 1982 Ontario Law Reform Commission Report included a draft Bill which contained a reference to the predomination test.^{xxxvii} This was dropped from the language of the statute as enacted, and it must be assumed that this was done deliberately by the legislature.

The point of this is that the presence of individual issues (even many individual issues) does not mean that a proceeding is inappropriate for class litigation. Section 25 of the *Act* envisions that the mechanism for dealing with individual issues be established by the court and the plain language of the Section seems to envision that much litigation may follow the determination of the common issues.

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

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner.

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

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

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.^{xxxviii}

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^{xxxix} (unlike the Rule 23 test that a class action must be “superior” to other available methods for the fair and efficient adjudication of the controversy).

Factors to consider when determining whether a class proceeding is the preferable procedure are: the economics of the litigation (individual and cumulative quantum of damages, and resources required to be expended to pursue the litigation to its conclusion), the presence of numerous individual issues, the potential for third party claims and alternatives to a class proceeding.

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

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 the modification of the behaviour of wrongdoers.^{xl}

In *Nantais v. Telectronics*,^{xli} 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.^{xlii}

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

Courts have consistently displayed flexibility and have favoured “practical and workable” solutions.^{xliii}

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 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.^{xliv}

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.^{xlv}

A representative plaintiff is not expected to have detailed knowledge of the civil litigation process or the issues involved in the action. A demonstrated ability to retain and instruct competent counsel will provide for adequate representation of the class.^{xlvi}

In cases with multiple defendants, courts have sometimes held that it is necessary to have representative plaintiffs who have claims against each named defendant.^{xlvii}

The *Act* also requires that a representative plaintiff produce a plan for the proceeding that sets out a workable method of advancing the case and providing the class members with notice.^{xlviii} In his reasons in *Carom v. Bre-X*,^{xlix} Winkler J. outline the court’s view of the plan of proceeding:

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.

The production of a well developed plan for proceeding at the certification hearing will assist the court in assessing the manageability of the action as a class proceeding and also provides class counsel with an opportunity to establish that a class proceeding is the preferable procedure for the resolution of the common issues.

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* outlines certain specific 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.ⁱ

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.

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.ⁱⁱ

The existence of individual issues which remain to be resolved following the determination of the common issue is not a bar to certification. The *Act* provides for broad latitude in the

management of individual issues in order to satisfy all three objectives of the *Act* namely access to justice, judicial economy and behaviour modification.^{lii}

In any class proceeding, damages may vary from class member to class member. 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”.^{liii}

As Sharpe J.(as he then was) stated in the case of *Delgrosso v. Paul*:

I accept the argument that if the plaintiff is successful on the common issues, it will be necessary to have individual assessments of damages. However, it is well established that 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: *Anderson v. Wilson*, supra.^{liv}

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.^{lv}

Several breast implant settlements have involved individual assessment of damages of some sort as part of the claims procedure. In *Jones v. Baxter Healthcare*,^{lvi} 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*,^{lvii} 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

Settlement of any class proceeding requires court approval. 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.^{lviii}

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.”^{lix}

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.^{lx} 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.^{lxi}

The following criteria articulated by Newberg on Class Actions^{lxii} 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 *Parsons v. The Canadian Red Cross Society*, Winkler J., added two other factors which might properly be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.^{lxiii} In that case, the court approved an agreement which was the largest settlement in a personal injury in Canadian history. The settlement was Pan-Canadian in scope, affected thousands of people and is to be administered over 80 years.

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.^{lxiv}

Certification and the Objectives of the Legislation

Although the certification tests are stated to be entirely procedural, certification decisions also seem to be significantly driven by the legislative objectives. For example, Mr. Justice Montgomery in *Bendall*, in certifying the class action against a breast implant manufacturer, emphasized the second objective of the *Act* (access to the Courts):

Possibly the strongest argument in favour of certification is access to the Courts. It is argued that huge numbers of women will not be able to access the system because of the cost of litigation other than by class action. Class actions include Court regulated contingent fees, regular actions in Ontario are not litigated on contingent fees. The cost of experts alone is prohibitive. Absent class actions who can individually afford this type of lawsuit?

. . .

To deny certification at this juncture would, in my opinion, do a grave injustice to the nameless recipients who, according to the literature, have had implants removed, suffered complications or are otherwise generally worried about their long term health. Certification is the only way a large number of women can access a legal system that would otherwise be denied to them.^{lxv}

In dismissing the Defendant manufacturers' motion for leave to appeal the certification, Mr. Justice White stated that the breast implant case was "an ideal case"^{lxvi} for class certification.

JURISDICTIONAL ISSUES

The issue of jurisdiction is a growth area with respect to class actions. Many recent potential class actions in Canada have faced jurisdictional challenges, some of which appear to be on their way to the Supreme Court of Canada.^{lxvii}

We live in a mass consumer society, where large multinational corporations market their products in huge volumes across national boundaries lowered by various free trading agreements. As a result, products, accompanied by any design or manufacturing defects, tend to be distributed on a wide basis. Similarly, policies and procedures developed at multinational corporations are rarely amended by international or provincial boundaries, unless some specific statutory requirement exists.

In the context of a class action, this could mean the possibility of a national class. In *Nantais v. Telectronics Proprietary (Canada) Ltd.*,^{lxviii} Mr. Justice Brockenshire certified an action involving alleged faulty leads on pacemakers on a national basis notwithstanding that the *Class Proceedings Act* is provincial legislation. A motion for leave to appeal to the Divisional Court from this order, brought before Mr. Justice Zuber, was dismissed.^{lxix} The question of whether there can be a national class is important because only three jurisdictions in Canada (Quebec, Ontario and British Columbia) have class proceedings legislation. It seems inappropriate, in an era of mass distribution of products, that consumers in one province may have a class remedy while other jurisdictions may only offer individual causes of action. In many cases, this may result in a denial of access to the Court system simply because an individual claim may not be economic to pursue. It is this realization that has caused us to reach for a national class solution. It should be noted that the British Columbia Act has a provision that allows non-British Columbians to opt into a British Columbia class action. In Ontario, the legislation merely provides for class members to opt out.

In the *Nantais* case Mr. Justice Brockenshire referred to three cases in justifying his decision to order a national class. The first was *Phillips Petroleum*^{lxx} where Justice Rehnquist of the U.S. Supreme Court held that in a class proceeding, reasonable notice plus an opportunity to opt out provides “at a minimum” sufficient due process for the judgment of one state to be given full faith and credit by the Courts of other states so that class members in the first state would be prevented from taking action in other states.

The second case referred to was the Supreme Court of Canada decision in *Morguard*,^{lxxi} where Mr. Justice La Forest, speaking for the entire Court, spoke of the modern need to deal nationally with problems and said that:

The Courts of one province should give “full faith and credit” to the judgment given by a Court in another province or territory, so long as that Court has properly, or appropriately, exercised jurisdiction in that action.^{lxxii}

The third case discussed was *Hunt*^{lxxiii} where Mr. Justice La Forest revisited the theme of nationality:

The basic thrust of *Morguard* was that in our federation a greater degree of recognition and enforcement of judgments given in other provinces was called for. *Morguard* was careful to indicate, however, that a court must have reasonable grounds for assuming jurisdiction. One must emphasize that the ideas of “comity” are not an end in themselves, but are grounded in notions of order

and fairness to participation in litigation with connections to the multiple jurisdictions.^{lxxiv}

Mr. Justice Brockenshire concluded that it would be eminently sensible to have questions of liability of the defendants determined once and for all, for all Canadians.

There is nothing in the Act to prevent it. Any questions of the treatment of non-members of the class either through opting out or through some future successful jurisdictional argument would be dealt with separately. I do not see the possibility of a future adverse finding on jurisdiction as a present bar to certification of all affected Canadian residents.^{lxxv}

Mr. Justice Zuber, on the leave to appeal application, addressed the defendant's concern about how far the Ontario legislation reached and said:

It is clear that the Ontario legislature and the Ontario courts are not simply imposing jurisdiction on non-residents. Those outside the jurisdiction who are included in the class are free to opt out in the same manner as those inside Ontario may do.

Whether the result reached in Ontario in a class proceeding will bind members of the class in other provinces who remained passive and simply did not opt out remains to be seen. The law of *res judicata* may have to adapt itself to the class proceeding concept. In my respectful view, the order of Brockenshire J. setting out a national class finds powerful support in the judgment of La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.^{lxxvi}

The argument of multiplicity of laws was considered "largely speculative" by Mr. Justice Zuber:

I am not aware of any difference in the law respecting product liability or negligence in the common law provinces and I have not been shown that there is any real difference between the common law on this matter and the law in the province of Quebec.

... If it is shown that the law of another province is so substantially different as to make the trial with respect to class members from that province very difficult, the class can be redefined. Additionally, if a class is certified in another province, that group can be deleted from the Ontario class.^{lxxvii}

The need for a national class concept is not simply a need of plaintiffs in non-class action jurisdictions to seek access to the Courts but it is also a need for the defendant who wants to buy peace across Canada. Simply put, how does a defendant who wishes to settle, buy peace in those jurisdictions without class proceedings?

FEES

In class proceedings, financial barriers to litigation are reduced for class members. Class counsel, however, often assume a substantial economic risk. The *Class Proceedings Act, 1992* is unique in that it permits class counsel to enter into a contingency fee agreement with a representative plaintiff, which is otherwise prohibited in Ontario:

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.^{lxxviii}

Such agreements may also permit the lawyer to make a motion to the court to have his or her fees increased by a multiplier.^{lxxix} As an alternative to multipliers, courts have also approved retainer agreements based on both percentages and block fees.^{lxxx} The fees of class counsel are ultimately 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 merits 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.

The litigation needs of the population in this era of mass marketing of consumer products and global trade have clearly changed. All of this has taken place in the context of an increasingly restrained public purse. This means that the litigation bar needs to be open to change as well. It is imperative that we seek to utilize creative cost efficient mechanisms to allow individuals to have access to the justice system and to promote efficient solutions to the problems of consumers, suppliers, and producers alike.

ⁱ *Class Proceedings Act, 1992, S.O. 1992, c. 6.*

ⁱⁱ Ontario, Ministry of the Attorney General, Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982).

The Supreme Court of Canada also recognized the need to reform the traditional class action rules. The Supreme Court of Canada in *Naken v. General Motors* (1983), 144 D.L.R. (3d) 385 (S.C.C.) applied a restrictive approach to the former Rule 75 narrowly and suggested that legislative reform was needed to advance cases. In this case, an was sought on behalf of 4,000 purchasers of allegedly defective Firenza automobiles. The Supreme Court held that the Rule 75 could not support the procedural requirements of a large class of claimants and dismissed the action.

ⁱⁱⁱ Ontario, Ministry of the Attorney General, Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982), vol. I at 117.

^{iv} Ontario, Ministry of the Attorney General, Policy Development Division, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Queen's Printer, February 1990).

^v Ontario, Ministry of the Attorney General, Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982).

^{vi} *Class Proceedings Act, 1992, S.O. 1992, c. 6.*

^{vii} *Bendall v. McGhan* (1993), 14 O.R. (3d) 734.

^{viii} *Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(5).*

^{ix} *Class Proceedings Act, 1992, S.O. 1992, c. 6.*

^x (1993), 14 O.R. (3d) 734.

^{xi} *Bendall v. McGhan* (1993), 14 O.R. (3d) 734.

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

^{xiii} *Kumar v. Prudential.... Taub v. Manufacturers Life ...*

^{xiv} *Bendall v. McGhan* (1993), 14 O.R. (3d) 734.

^{xv} *Kumar v. Prudential.... Bre-X....*

^{xvi} *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(a) and (b).

^{xvii} *Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133 at 140-141 (Gen. Div.).

^{xviii} *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s.6; *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (General Division), online:Q.L. (ORP).

^{xix} *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para 10 (Gen. Div.), online: QL (ORP).

^{xx} *Bywater v. Toronto Transit Commission* [1998] O.J. No. 4913 at para. 11 (Ont. Ct. (Gen. Div.)).

^{xxi} *Lau v. Bayview Landmark Inc.* [1999] O.J. No. 4060 at para 27 (S.C.J.).

^{xxii} *Lau v. Bayview Landmark Inc.* [1999] O.J. No. 4060 at para 28 (S.C.J.). In the *Taub v. Manufacturers Life* (1998), 40 O.R. (3d) 379 (Ont. Ct. (Gen. Div.)) case, the plaintiff alleged that she had health problems related to exposure to mould in her apartment.

^{xxiii} *Lau v. Bayview Landmark Inc.* [1999] O.J. No. 4060 at para 29. (S.C.J.).

^{xxiv} *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(2).

^{xxv} *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 1.

^{xxvi} Ontario, Ministry of the Attorney General, Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982).

Campbell v. Flexwatt Corp., [1997] B.C.J. No. 2477 at para. 53 (B.C.C.A.).

Endean v. Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158 at para. 35; rev'd in part on other grounds (1997), 157 D.L.R. (4th) 465 (B.C.C.A.).

Tampa Hall Limited v. C.I.B.C. (1998), 37 O.R. (3d) 150 at 159 (Gen. Div.).

Webb v. K-Mart Canada Ltd., [1999] O.J. No. 2268 at para. 21 (S.C.J.).

^{xxvii} (1997), 32 O.R. (3d) 400 (Gen. Div.); amended in part (1998), 37 O.R. (3d) 235 (Div. Ct.).

^{xxviii} 37 O.R. (3d) 235 at 243 (Div. Ct.).

^{xxix} 37 O.R. (3rd) 235 at 246-247 (Div. Ct.).

^{xxx} *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 434 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 87 (C.A.), leave to appeal to S.C.C. dismissed October 22, 1998.

^{xxxi} *L.R. v. British Columbia* [1998] B.C.J. No. 2588 (S.C.); rev'd [1999] B.C.J. No. 2634 (B.C.C.A.).

xxxii *L.R. v. British Columbia* [1998] B.C.J. No. 2588 at para 65 (S.C.).

xxxiii [1999] B.C.J. No. 2634 at page 5 (B.C.C.A.).

xxxiv [1999] B.C.J. No. 2634 at page 5 (B.C.C.A.).

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

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

xxxvii Report of the Ontario Law Reform Commission, 1992, Vol. 3.

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

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

xl *Carom v. Bre-X Ltd.* (1999), 44 O.R. (3d) 173 at 239 (S.C.J.).

xli (1995), 25 O.R. (3d) 331 (Gen. Div.) leave to appeal denied (1995), 25 O.R. (3d) 247 (Gen. Div.).

xlii (1995), 25 O.R. (3d) 247 (Gen. Div.).

xliii *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 638 at 640 (S.C.J.).

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

xlv *Anderson v. Wilson* (1998), 37 O.R. (3d) 235 at 251 (Ont. Div. Ct.).

xlvi *Maxwell v. MLG Ventures Ltd.*, [1995] O.J. No. 1136 at para. 10 (Gen. Div.).

Haney Iron Works v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565 at para. 30 (B.C.S.C.).

xlvii *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Gen. Div.); *Harrington v. Dow Corning* (11 April 1996), Vancouver C9543339 (B.C.S.C.).

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

xlix (1999), 44 O.R. (3d) 174 at 203 (S.C.J.).

¹ *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 8.

li *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 24.

lii *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s.6

Peppiatt v. Nicol (1993), 16 O.R. (3d) 133 at 145 (Gen. Div.)

Scott v. Ontario Business College (1977) Limited and Greer, Endorsement of Shaughnessy, J. dated September 20, 1999 (Court File No. 100514/99).

liii (1998), 37 O.R. (3d) 235 at 248 (Div. Ct.).

liv *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 at 611 (Gen. Div.)).

-
- lv For example, *Bendall, McRae v. Mutual of Omaha*
- lvi *Jones v. American Heyer-Schulte Corp.* (30 March 1998), Toronto 18169/94 (Ont. Ct. (Gen. Div.)) [unreported].
- lvii (20 September 1996), Toronto 95-CU-89529 (Ont. Ct. (Gen. Div.)) [unreported].
- lviii *Dabbs v. Sun Life Assurance Company of Canada* (24 February 1998), Toronto 96-CT-022862 (Ont. Ct. (Gen. Div.)).
- lix *Dabbs v Sun Life Assurance Company of Canada* (24 February 1998), Toronto 96-CT-022862 (Ont. Ct. (Gen. Div.)).
- lx *Dabbs v Sun Life Assurance Company of Canada* (24 February, 1998), Toronto 96-CT-022862 at p. 4, (Ont. Ct. (Gen. Div.)) at p.4. Federal Judicial Centre, *Manual for Complex Litigation*, 3d ed, (St. Paul: West Publishing, 1995) at 30-42.
- lxi *Dabbs v Sun Life Assurance Company of Canada* (24 February 1998),/ Toronto 96-CT-022862 at p. 4, (Ont. Ct. (Gen. Div.)).
- lxii H. Newberg , A. Conte, *Newberg on Class Actions*, 3rd ed (Colorado: Shepard's/ McGraw-Hill, Inc., looseleaf).
- lxiii (22 September 1999), Toronto 98-V-146405 (S.C.J.) [unreported] at para. 70.
- lxiv *Dabbs v Sun Life Assurance Company of Canada* (3 July 1998), Toronto 96-CT-022862 at pp. 13,14, (Ont. Ct. (Gen. Div.)).
- lxv *Bendall and Wise v. McGhan et al* (1993), 14 O.R. (3d) 734 (Gen.Div.).
- lxvi *Bendall and Wise v. McGhan et al* (1993) [unreported], leave to appeal denied (Div. Ct.).
- lxvii Polybutylene b.c., polybutylene ontario, onhwp, wilson v. servier, etc.
- lxviii (1995), 40 C.P.C. (3d) 245 (Ont.Gen.Div.).
- lxix (1995), 40 C.P.C. (3d) 263 (Ont.Gen.Div.).
- lxx *Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965 (1985); the Supreme Court of Canada has not yet dealt with this issue.
- lxxi *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; this case involved enforcement in B.C. of a foreclosure action in Alberta against a B.C. resident, served in B.C. per Alberta rules.
- lxxii At 1079
- lxxiii *Hunt v. T & N plc*, [1993] 4 S.C.R. 289; this case involved an interpretation by the B.C. court of the constitutionality of a Quebec statute.
- lxxiv At 325
- lxxv (1995), 40 C.P.C. (3d) 245 at 262

-
- lxxvi (1995), 40 C.P.C. (3d) 263 at 267
- lxxvii (1995), 40 C.P.C. (3d) 263 at 267-8
- lxxviii *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 33.
- lxxix *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 33(4).
- lxxx *Anderson v. Wilson* (11 September 1996), Whitby 73198/96 (Ont. Ct. (Gen. Div.)) [unreported]; *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.).