

The Association of Canadian General Counsel

Basic Concepts of Class Litigation in Canada

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Part I - Introduction

Less than 25 years old, class litigation is a relatively new phenomenon in Canada. This is in contrast with the American experience, which traces its roots to 1938, with the promulgation of the original Rule 23 of the Federal Rules of Civil Procedure.

Currently, 3 provincial jurisdictions in Canada have enacted comprehensive legislation regarding class actions. In Quebec, class actions are governed by the *Act respecting the Class Action*¹, enacted in 1978. Ontario established its *Class Proceedings Act*² in 1992 and British Columbia followed suit with similar legislation in 1995. While the province of Alberta does not have a comprehensive class proceedings law, a recent Supreme Court of Canada decision in the case of *Western Canadian Shopping Centres Inc. v. Dutton*³ permitted a class action to proceed under Rule 42 of Alberta's *Rules of Court*, the rules governing representative proceedings.

For the sake of brevity, and since the legislation in the common law provinces is so similar, the will here will be on Ontario's legislation and the case law and issues which have flowed from it. In competition matters, but also in other areas of conduct and commerce that affect large numbers of claimants and most often, large defendants, class litigation has become a significant risk factor in Canada that is likely to undergo very considerable expansion over time.

General outline of proceedings

The Ontario *Class Proceedings Act, 1992* was adopted in response to developments in the common law culminating in the 1978 Ontario Court of Appeal decision in *Naken v. General Motors of Canada*⁴ as well as a growing demand for reform in the area of representative litigation. The latter included a 1982 report from the Ontario Law Reform Commission, which recommended class actions as a means of enhancing judicial efficiency, improving access to the courts and generating a sharper sense of obligation to the public by those whose actions affect large numbers of people.⁵ These aims guided law makers and continue to influence judicial interpretations of the legislation.

A typical class action in Ontario takes place in 5 stages.

¹ R.S.Q., c. R-2.1

² S.O. 1992, c.6

³ [2000] S.C.J. No. 63, 2001 SCC 46

⁴ (1978), 6 B.L.R. 94, 21 O.R. (2d) 780, 7 C.P.C. 209, 92 D.L.R. (3d) 100 (C.A.)

⁵ 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).

First proceedings are commenced by way of either Writ in British Columbia, or by Statement of Claim or Notice of Application in Ontario. The second phase is the certification phase. This is the most important phase of the class proceeding, as most claims either settle or dissipate following its conclusion. Once the action has been certified, common issues are litigated, generally in the manner of a traditional lawsuit. Following this, both the BC and Ontario regimes envision that individual issues may need to be addressed. Both Acts therefore give the court discretion to either (a) determine individual issues through further hearings, (b) appoint someone to conduct a reference under the Rules of the Court, or (c) direct that the individual issues be determined in any other manner. In the fifth and final phase of proceedings aggregate and individual damage assessments are made, including means of distributing amounts awarded to individual class members. To date in Ontario, this has been achieved through court-ordered mediation, appointment of a third-party administrator, and by simple way of mathematical division among class members.

Certification

Certification is the lynchpin in the class action process, which is, in essence, a bifurcated one.

In **stage one**, the court addresses the threshold questions relating to whether the proceeding is appropriate for class treatment. The BC and Ontario legislation have the same requirements. Section 5(1) of the *Ontario Class Proceedings Act* requires:

1. That the pleadings or notice of application disclose a cause of action;
2. That there be an identifiable class of two or more persons;
3. That the claims (or defences) of the class members raise common issues;
4. That a class proceeding be the preferable procedure for the resolution of these common issues; and
5. That there be a representative plaintiff (or defendant) who would fairly and adequately represent the class, produce a workable plan for advancing the proceeding and does not, on the common issues, have interests which might conflict with those of the class.

The central notion of a class proceeding is that persons with common concerns ought to be able to resolve them in one central proceeding rather than through an inefficient multitude of repetitive proceedings. In the initial development of the law in Canada, the threshold for determining whether a sufficient number of common issues exist has been lower than that in the US, where generally a “preponderance” of common issues has been required. In contrast, Canadian courts have held that it is not necessary that common issues raise questions which, if answered, would determine the issue of liability. Rather, what is required is that resolution of the common issues will be effective to “advance the litigation”: *Carom v. Bre-x Minerals Ltd.*⁶

While the Ontario and BC legislation indicates that a court “may” grant certification in the event that all five tests are satisfied, U.S. Federal Sub-Rule 23(a) makes it clear that certification is to be granted “only if” the various tests are satisfied. Neither the BC nor the Ontario statutes

⁶ (1999), 46 B.L.R. (2d) 247, 35 C.P.C. (4th) 43, 44 O.R. (3d) 173 (S.C.J.)

explicitly state that each of the tests must be satisfied to warrant certification. But in practice, the courts to date have required that all the certification criteria be met, as explicitly required by the US legislation. Thus, while on its face the US rule appears to be the more strictly worded requirement, in essence both tests appear similar, regarding the requisite conditions.

In **stage two** of the certification process, the precise class description, common issues and plans for proceeding are defined. The two-stage process is designed to permit a losing party, which has opposed certification in the first stage and lost, to participate in the drafting of the procedural framework for the case in the second stage.

Part II - Recent Developments: Class Proceedings in Competition Matters

In 1976 Parliament granted a civil remedy to persons injured by anti-competitive behaviour when it amended the *Competition Act* to include a civil cause of action. Section 36 of the *Act* permits those injured by Competition offences, or by the failure of a party to comply with a Competition Tribunal or Court order, to sue for and recover from the defendant an amount equal to the provable loss or damage. The quantum of damages, in contrast to the treble damage incentive to litigation in the US, is limited to single damages. Prior to the passage of the provincial class proceedings legislation, the only way for a person to bring suit to recover his or her losses due to anti-competitive behaviour was in the form of an individual action. However, the advent of class proceedings legislation has made a degree of private enforcement of the *Competition Act* a reality.

Chadha v. Bayer

The first “antitrust” class action certified in Canada was *Chadha v. Bayer*⁷. The plaintiffs alleged that they and other owners of buildings sustained damages as a consequence of a conspiracy by Bayer Inc., Bayer Corporation and Harcros Pigments to fix the price of iron oxide used in concrete bricks, contrary to s. 45(1)(c) of the *Competition Act*. It is significant to note that the Competition Bureau investigated these allegations, but took no proceedings, criminal or otherwise, against the parties. Assuming that the plaintiffs could substantiate this claim, the evidence indicated that the ultimate purchaser of concrete bricks would have incurred an increased cost of between \$70 to \$112 on a \$150,000 home.

The defendants argued that the claim failed to disclose a cause of action on the ground that the plaintiffs must be able to satisfy the court that there is a reasonable prospect they can establish that damages resulted to them and their fellow class members. In this regard, they relied on the “indirect purchaser” defence of the American cases of *Hanover Shoe Inc. v. United Shoe Machinery Corp.*⁸, and *Illinois Brick Co. v. Illinois*⁹. To understand the background of *Chadha*, a brief look at these cases is helpful.

⁷ (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (Ont. S.C.J.); additional reasons at (September 29, 1999), Doc. 98-CV-142211 (Ont. S.C.J.); leave to appeal allowed (1999), 45 O.R. (3d) 478 (Ont. S.C.J.)

⁸ (1968), 392 U.S. 481 (S.C.)

⁹ (1977), 431 U.S. 720 (S.C.)

In *Hanover*, the US Supreme Court dealt with a defence raised in a treble damages suit under the *Sherman Antitrust Act (1890)* for alleged monopolization in the shoe machinery industry. The plaintiff was a shoe manufacturer that had direct dealings with the defendant, a supplier of shoe manufacturing machinery. The defendant sought to plead that the plaintiff had sustained no damages as it would have passed on to its customers any allegedly excessive costs. The Court held that this “pass on” defence was not available to the defendants. The difficulties in demonstrating the effect of added costs on subsequent parties would be difficult, if not insurmountable, and allowing the defence would undermine the incentive to immediate buyers to bring treble-damage actions.

In *Illinois Brick*, the Court applied this logic to the consumer side of the equation. There, the ultimate purchaser of concrete blocks attempted to bring a treble damages action against the manufacturers of the blocks, alleging a price-fixing conspiracy. If a defendant was not allowed to plead the “pass on” defence, the Supreme Court concluded that consistency would preclude an ultimate or indirect purchaser from bringing an action to remove antitrust damages. The Court held that allowing an ultimate purchaser to assert such a claim would create a serious risk of multiple liability for defendants and that the need to trace the economic factors flowing from an increased cost in one element of production would “greatly complicate and reduce the effectiveness of already protracted treble damages proceedings.” The court declined to overrule or distinguish *Hanover Shoe*, stating that it rested on the proposition that “the antitrust laws will be effectively enforced by concentrating the full recovery of the over-charge in the direct purchasers rather than by allowing every plaintiff potentially affected by the over-charge to sue only for the amount it could show was absorbed by it.”

In *Chadha*, Justice Sharpe of the Superior Court certified the class proceeding and rejected the application of the *Hanover Shoes* and *Illinois Brick* indirect purchaser principles to Ontario class proceedings law. However, on appeal¹⁰, the decision was overturned. The majority's main concern was that the case was being brought on behalf of end-users of products containing the product. As such, the calculation of the damage filtering down through the various links in the chain of distribution to the plaintiffs would be too difficult and individual to calculate.

More importantly in the context of competition law, the Court narrowed the scope of what can be certified in terms of common issues. While Sharpe J. had stated that the specific wording of the sections of the *Class Proceedings Act* governing certification “requires *only* that a class action be the preferable procedure for the resolution of the common issues,” the majority of the Superior Court of Justice (Divisional Court) disagreed. The two judge majority held that a range of factors must be considered when considering whether a class proceeding was the appropriate venue. These include:

- the nature of the proposed common issue(s);
- the individual issues which would remain after determination of the common issue(s);
- the complexity and manageability of the proposed action as a whole;

¹⁰ *Chadha v. Bayer*, [2001] O.J. No. 1844 (S.C.J. – Div. Ct.)

- alternative procedures for dealing with the claims asserted;
- the extent to which certification furthers the objectives underlying the Act; and
- the rights of the plaintiff(s) and defendant(s).

Under these criteria, the majority held that the existence of a conspiracy to fix prices was not in itself sufficient to justify certification. While an illegal conspiracy, if established, could help fix liability, the majority sided with the *Illinois Brick* decision and held that this was not sufficient to overcome the problem of quantifying damages in a “pass on” situation.

Barring a successful appeal (one has already been launched), the decision in *Bayer* seems to close the door on class claims by indirect purchasers. However, it is worth noting that the class proposed in this case was composed exclusively of indirect purchasers and so the decision may not bar future class which include a mixture of direct and indirect purchasers or where individual damages suffered by indirect purchasers are easily quantifiable.

Carom v. Bre-X Minerals Ltd.

The authors of the Ontario Law Reform Commission *Report on Class Actions* and the legislators who created the *Class Proceedings Act* which followed, did not intend that the test for determining the presence of common issues would be too stringent. The basis for this proposition lies in the policy of expanding access to justice, especially for mass claims by large numbers of victims, each of whose individual losses would be insubstantial. This principle was most recently addressed by the Ontario Court of Appeal in the case of *Carom v. Bre-X Minerals Ltd.*. Previous cases, most notably the *Rosedale Motors*¹¹ decision, had denied certification where there were a series of overlapping but not identical representations.

In *Bre-X*, the Court of Appeal addressed a negligent misrepresentation claim involving 160 separate representations by the company and insiders relating to gold deposits in Bre-X’s Busang claim in Indonesia. The motions judge, Winkler J., certified a class action with respect to three claims advanced by the plaintiffs – fraudulent misrepresentation, conspiracy and breach of the *Competition Act*. On the question of common issues, Winkler J. certified 15 common issues for determination in the class proceeding.¹²

¹¹ [1998] O.J. No. 5461 (Gen. Div.)

¹² (a) Did Busang contain gold in commercial quantities or in quantities sufficient to make the mining of it commercially viable ("gold in mineable quantities")?

(b) Was Bre-X operating a legitimate business?

(c) Were the core samples from Bre-X “salted” with gold from other deposits and, if so, how, when, where and by whom?

(d) Did Bre-X follow generally accepted mining exploration practices and techniques and, if not, how did it deviate? Was any deviation reasonable under the circumstances?

(e) Did Bre-X, Bresea Resources Limited and the various individuals who held senior positions in these companies conspire to inflate the price of Bre-X and Bresea shares on the Markets? If they did, what are the particulars of the conspiracy?

Winkler J. held that these common issues related to the torts of conspiracy and fraudulent misrepresentation and to breach of the *Competition Act*. He also held that a class proceeding would be the preferable procedure for the resolution of these common issues. However, he also held that the 15 “common” issues he identified did not relate to the claim of negligent misrepresentation. Additionally, Justice Winkler held, and the Divisional Court confirmed, that even if some of the common issues were applicable to negligent misrepresentation, nevertheless, the preferable procedure was that they be determined in separate actions brought by individuals. The claim in negligent misrepresentation therefore failed both s. 5(1)(c) (“common issues”) and s. 5(1)(d) (“preferable procedure”).

Citing the legislature’s objective of not setting the bar for certification too high, the Court of Appeal overturned the lower courts’ rulings on negligent misrepresentation and certified the claim to proceed, stating in part:

[T]he fact that determination of some of the common issues relevant to the claim in negligent misrepresentation (or indeed the other three claims) will not resolve the entire litigation is not determinative. Certification can be the preferable procedure in situations far short of final resolution of the lawsuit.

The court further concluded that any complications arising from the determination of individual issues were offset by the facts that (a) the presence and the evidence of the plaintiffs are not required for the first stage of the lawsuit; and (b) the status of the other three claims which had

(f) Did Bresea and the named individual defendants, or any of them, know or ought to have known the answers to the questions (a), (b), (c), (d) and (e) or any of them and, if so, who knew or ought to have known what, when and why and what should have they done, if anything?

(g) Did Bre-X and/or the named individual defendants represent that:

(i) There is gold in mineable quantities in the Busang?

(ii) Any company associated with SNC-Lavalin Inc. audited Bre-X's work or otherwise verified the accuracy of Bre-X's resource database?

(iii) Bre-X was operating a legitimate business?

(h) Were the representations identified by issue (g) made knowing that they were false or recklessly, caring not whether they were false or without exercising reasonable care and attention?

(i) Are the named individual defendants, or any of them, personally liable for any damages resulting from or caused by the representations identified by issue (g)?

(j) What is the meaning of the words "as a result of" in section 36 of the *Competition Act*?

(k) Does the *Negligence Act* or the concept of contributory negligence apply in assessing loss or damage under section 36?

(l) Must the plaintiffs prove an anti-competitive component to the *Competition Act* cause of action? If so, have they? Does Part VI apply to behaviour which is not anti-competitive?

(m) Should the full costs of investigation in connection with this matter and the cost of the proceedings or part thereof be assessed globally as provided for in section 36 of the *Competition Act*, and, if so, who should pay and in what amount(s)?

(n) Was there a breach of section 52 of the *Competition Act* by Bre-X and the named individual defendants giving rise to liability pursuant to section 36 if the Class member can prove damages as a result of the representation(s)?

(o) Was the conduct of the defendants, or any of them, such that they ought to pay globally to the Class members exemplary or punitive damages?

been certified, which made certifying the negligent misrepresentation claim judicially economical.

The Bre-X case is also notable for its dealing with the question of the liability of other parties who were alleged to have been involved in the chain of events leading to the losses claimed: specifically, the brokers who recommended or otherwise handled the trades in Bre-X stock. The central theme of these claims was the alleged negligence of the individual analysts employed by the brokerage firms. The plaintiffs' theory for these actions can be reduced to the two alternative submissions: misrepresentation and a breach of a duty to warn. At the Superior Court of Justice, Winkler J. struck out the claim against the brokers¹³. With respect to the duty to warn, Winkler J. found it apparent from the record that the relationships between the plaintiffs and brokers were individual in nature, that a variety of relationships would have to be examined, and that the standard of care in each case would vary widely. It followed that the duty to warn was an individual issue and that no common issue arose from the claim. Finally, while Winkler J. found common issues in respect of the claims under the *Competition Act*, he held that a class proceeding was not the preferable procedure since the common issues would occupy a relatively small part of any trial.

Future Trends

Class proceedings remain a relatively new procedure, particularly in the common law jurisdictions of Canada. As a result, the law is undergoing change and expansion on an almost daily basis.

An excellent example of this dynamic is the *Vitapharm* class action litigation. While the claims have not even been certified yet, the case has already produced five reported decisions in Ontario alone, including rulings on determining the venue for pre-trial motions, accessing documentary and deposition evidence from discovery in analogous United States' litigation, and deciding in cases of multiple filings which class action shall proceed and which shall be stayed.¹⁴ Claims are proceeding in BC and Quebec arising out of the same events: a conspiracy to fix the prices and allocate markets for bulk vitamins.

Because only three jurisdictions in Canada presently have comprehensive class proceedings legislation, the future of claims that are national in scope has yet to be determined. While both the Ontario and B.C. legislation allow for non-resident class certification, the usual procedure of claimants is to launch separate, but essentially identical, proceedings in Quebec, Ontario and British Columbia. Typically, an Ontario class claim for a price fixing conspiracy will include representatives of distinct Quebec sub-classes: corporate claimants who have no standing to sue under the Quebec legislation.

¹³ In the US proceeding arising out of the Bre-X fiasco, the brokers have also been extricated from the claims pending in Texarkana, Wall Street Journal, July 15, 1999.

¹⁴ (2000) 186 D.L.R. (4th) 549 (Ont. S.C.J.), [2000] O.J. No. 4594 (S.C.J.), [2000] O.J. No. 41 (S.C.J.), [2001] O.J. No. 237 (S.C.J.), [2001] O.J. No. 753 (S.C.J.).

With multiple jurisdictions and potentially lucrative settlement opportunities, it is not uncommon for multiple claims, in one or more jurisdictions, surrounding a particular case to arise. This has led to “turf wars” among lawyers for the claimants. An example of this situation may be seen in the ongoing actions surrounding the Walkerton e-coli outbreak. In that case, within days of the initial fatalities being reported in the news media, multiple actions had been filed in the Ontario courts, each purporting to represent the entire class of injured plaintiffs. While there are provisions in the Ontario and B.C. legislation empowering the courts to join multiple claims and appoint lead counsel, their use to date has been spotty. Instead, plaintiffs’ counsel usually settle these matters internally on a financial basis (ie one firm buys out the claims of the others or promises a portion of the settlement commensurate with the number of claimants signed up by each firm).

There are any number of unresolved questions, including threshold jurisdictional and constitutional questions about the geographical scope of a proposed class. For example, because the Quebec class legislation authorises only individuals to claim, a Quebec corporation that allegedly suffered loss will now typically be added to class claims in Ontario, which has no such restrictions. And claimants from other provinces, where there are no class proceedings legislation have been made also nominal members of class proceedings in Ontario and B.C. The ability to constitute a national class, in connection with allegations of wrongdoing of a national scope, is a very significant issue, and unlike the position in the US, there is no obvious answer as yet.

A year ago, in a speech at the CBA’s Competition Section’s Annual Conference, a prominent practitioner representing the plaintiff’s side of the incipient class action Bar described his role, with aplomb, as that of a “predator”. Certainly, that is an acknowledged characterization of the plaintiff’s Bar in the United States. Predictably, this is enormously fertile ground for the generations of litigation, both substantial and well founded, on the one hand, and nuisance-driven on the other. Equally predictably, because the Class claims process is inherently tactical in nature, there will be increasing numbers of reported decisions as this particular form of litigation evolves.