

CLASS ACTIONS AND MASS TORTS - A PRIMER

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I. Introduction:

This paper seeks to provide an introduction to class actions and mass torts. The goal of the paper is to introduce the reader to the concept of the class action and the mass tort. The paper is aimed at the lawyer with no prior knowledge of the subject, but who may encounter a class action or mass tort fact pattern in his or her practice. This paper may assist such a lawyer to both recognize this category of case, and to give basic advice to a client who may potentially become involved in a class action or mass tort.

II. What is a “class action”?

Since 1995 in British Columbia (somewhat earlier in Quebec and Ontario, and later in several other Provinces) we have had the benefit of a “Class Proceedings Act”. The Act seeks to provide a procedural framework for the conduct of judicially-managed multi-party proceedings. In 2001, meanwhile, the Supreme Court of Canada created a “common law” class action in *Western Canada Shopping Centres v. Dutton*, [2001] 2 SCR 534. These statutes, and this decision of the Supreme Court of Canada, reverse the previous law, as articulated in *Naken v. General Motors of Canada* (1978), 92 DLR (3d) 100, which had placed barriers in the path of the multi party proceeding. In the result, throughout Canada, in all Provinces and Territories, class actions are an available remedy, either through statutory law reform, or by common law.

Class actions have existed in the United States of America for much longer. However, class actions in Canada have developed as a unique body of law, and there are significant differences even between the class action legislation in the various Provinces.

A class action involves very specific steps and procedures dictated by the Class Proceedings Act. The result is that one person (the representative Plaintiff) can bring one action on behalf of a group of persons (the class) to resolve some or all of the common issues bearing upon the class. The hallmarks of the class action are the attempt to resolve, through one proceeding, legal and factual issues affecting numerous persons, without the direct involvement of those persons.

III. What is a “Mass Tort”?

A mass tort refers to a circumstance where a series of individual claims are related to a single event. For example, a drug company may produce a drug which causes injury. The case could proceed as a class action—with one person representing the entire class in an attempt to resolve the rights of the whole class. On the other hand, a lawyer could collect a group of such claims, and pursue them individually. Such a group of individual claims, brought together, and relating to a common subject matter, is what is often called a “mass tort”.

IV. How does a class action proceed in practice in British Columbia

One of the most common misunderstandings about class actions relates to the need to “sign up members of the class”. We are often been asked, “how many cases have you signed up,” when in a class action, just the opposite is true—there is no need to sign up any client except the representative Plaintiff.

In British Columbia, if a case is to be brought pursuant to the Class Proceedings Act, the first step is to prepare and serve a Statement of Claim. This document will describe the action as being brought pursuant to the Class Proceedings Act, and designate a proposed representative Plaintiff. The next step is to secure the appointment of a Case Management Judge. This generally takes a month or two. Then a date will be set for the first Case Management Conference. At this proceeding, a schedule will be worked out dealing with the necessary steps to bring the case to a “Certification Hearing”, which is a Chambers application at which both sides argue the merits of the case proceeding as a class action. The most important steps leading to the Certification Hearing are the exchange of affidavit materials bearing upon the issues relevant to the certification of the case as a class proceeding, and the conduct of depositions at which the authors of the affidavits can be cross examined.

Generally, a Certification Hearing in British Columbia will be set for approximately five days. The depositions often take several days. The Certification Hearing itself is usually set down close to a year after the conduct of the first Case Management conference.

Once the case is certified as a “class proceeding,” the case continues towards judgment under the judicial supervision of the Case Management Judge. At any stage of the litigation, the claim may settle, subject to Court approval of the settlement and counsel fees. In a class action, the Court maintains an ongoing responsibility to ensure the fairness of any settlement on behalf of the absent class members and the fairness of the legal fee notwithstanding that a reasonable retainer agreement may exist between counsel and the representative Plaintiff.

V. How does a “mass tort” proceed in practice in British Columbia?

In a mass tort, there are none of the set procedures which define a class action. A lawyer will simply have a group of Plaintiffs whose injury or harm relates to a common fact pattern (passengers on the same aircraft which crashed; customers swindled by the same stock broker, or patients with the same defective pacemaker). The lawyer will bring this group of case as a “mass tort.” In fact, they are individual claims. Each client will have a retainer agreement with the lawyer. There will therefore be no judicial overview of the cases as there would be in a class action, where there is an “absent class” whose interests must be protected by the Court.

VI. When will a Court certify a case as a “class action”?

The Class Proceedings Act vests a broad discretion in the Chambers Judge to decide whether the case is most appropriately brought as a class action. The case law has stated the goals of the class action legislation to be:

- a) Judicial efficiency—better to have one case proceed on behalf of many, than to clog the Courts with identical or similar claims;

- b) Improved access to Justice—smaller cases will not go to verdict or judgment without the economies of scale of the class action;
- c) Modification of the behaviour of mass wrongdoers—large wrongdoers inflicting numerous but small damages might be more inclined to mend their ways under the persuasion of a potential judgment in a class action.

These goals must, the case law says, guide the Chambers Judge in his or her deliberations. The Class Proceedings Act, meanwhile, defines five criteria to consider in either certifying or refusing to certify a class action:

1. Do the pleadings disclose a cause of action?
2. Is there an identifiable class of two more persons?
3. Is the proposed representative Plaintiff appropriate?
4. Are there common issues to be resolved in a class action?
5. Is a class action a preferable procedure? (Preferable to multiple individual claims).

In practice, the Court weighs the merits of the case, its suitability as a class action, and the goals of the class action legislation, in making the determination whether or not to certify the case. The more numerous and better defined the class, the more easily defined the common issues, and the more meritorious the claim, the more likely the case is to be certified as a class action. On the other hand, if a claim is lacking merit, if the class is small or hard to describe, and if the common issues are hard to define or less weighty than the anticipated individual issues, the case is less likely to be certified as a class action. There is now a fairly substantial body of case law, in British Columbia and across Canada, touching on the issue of Certification. Nonetheless, the decision whether or not to certify is always somewhat subjective, and discretionary, and will reflect the Court's view of the "preferability" of a class action weighing all the circumstances.

VII. What are some of the specific features of the Class Proceedings Act in British Columbia?

1. Limitation Periods

If a case is certified as a class action in British Columbia, the limitation period tolls for all members of the class from the date of the filing of the original Statement of Claim; if the case is not certified, no such tolling occurs.

Other Provinces have different rules pertaining to limitation periods, such as Ontario which provides that the limitation period for the class stops running for all proposed class members on the filing of a proposed class action, and then resumes to run should the case not be certified.

2. Fees

All fees earned by class counsel must be approved by the Court as part of the settlement process. Generally, this can be a percentage of the amount recovered on behalf of the class. However, Courts are wary of fees which greatly exceed the total of the lawyers fees at an hourly rate. A “multiplier” of two or three times an hourly rate is quite standard; it is unlikely that a Court would approve a fee exceeding five times an hourly rate in any circumstances.

Accordingly, it is necessary for a lawyer in a class action to keep track of his time, even if he intends to bill on a contingency fee basis.

3. *Opting out; Opting in*

Under the British Columbia legislation, class members within the Province are automatically included in the class action unless they “opt out”; class members outside of the Province are excluded unless they “opt in”.

In certain other Provinces, all class members are included no matter where in Canada they reside. This makes these Provinces (notably Manitoba and Ontario) better suited at least by virtue of their legislative framework to the so called “National Class action”.

4. *Costs*

In British Columbia, a representative Plaintiff will not be liable for the costs of an unsuccessful certification hearing; nor will such a person be liable for the costs of the action if it is dismissed on its merits after having been certified as a class action.

This makes British Columbia a so-called “no costs” regime.

5. *Compensation to the Representative Plaintiff*

Our legislation makes no specific provision for payment to the Representative Plaintiff for his or her services rendered during the class proceeding. However, case law has held that in appropriate cases, a class representative can be paid for his or her services to the class in pursuing the action.

6. *Multiple Defendants*

British Columbia is unique in permitting a case to proceed against a group of Defendants even if the representative Plaintiff only has a cause of action against one Defendant directly. This permits a class action to proceed in British Columbia against an industry (say, all distributors of a dangerous product) or the sellers of a defective product under the Sale of Goods Act, even though the representative Plaintiff only purchased the product from one distributor and seller.

In all other Provinces, the representative Plaintiff must have a cause of action directly against each Defendant sued.

VIII. What cases are best suited to mass tort handling versus a class action?

The classic mass tort fact pattern involves a group of cases with large, individual damage assessments, where the Plaintiffs would naturally want to maintain control of their own claims, and where the quantum of damages is sufficient to justify individual handling of each case.

The classic class action fact pattern involves a small, discrete loss, where judgment in favour of the representative Plaintiff would mean judgment for the class, where there are few if any individual issues, and where the amount of money involved is too small to justify individual proceeding.

In between, there are many cases where the choice between class action and mass tort is less clear cut.

IX. How are damages assessed in a class action?

A class action can proceed despite the need for individual damage assessments. A class action could be “certified” with a common issue of liability, on the basis that once liability is established, the individual Plaintiffs will pursue their own cases on damages. At the same time, the Class Proceedings Act contains broad and flexible provisions for the assessment of individual damages for class members, permitting the development of “special procedural steps, including steps relating to discovery” and the appointment of “independent experts to conduct an inquiry into individual issues.”

The British Columbia legislation also has interesting provisions authorizing the use of “statistical evidence” to assess damages on behalf of the class, and provisions permitting the assessment of “aggregate” damages on behalf of the class.

Therefore, where a class action is deemed to be the “preferable procedure” based on the goals of the class proceeding legislation (judicial efficiency; access to justice; behaviour modification) the scope of the legislation is broad enough to overcome the challenge of individual damage assessments in the appropriate case.

X. What are the duties of a Representative Plaintiff in a class action?

A class representative lends his name to the law suit as the Representative Plaintiff. He or she enters into a fee agreement with the lawyer, and must participate in the class proceeding, at least to the extent of:

1. instructing class counsel as to the factual background of the claim;
2. swearing an affidavit setting out facts relevant to the certification of the case as a class action;
3. being cross examined on the affidavit;
4. instructing counsel on potential settlement offers;
5. participating in the mediation or trial of the proceeding;

6. swearing an affidavit in support of any proposed settlement and the proposed class counsel fee.

A person interested in pursuing a case as a Representative Plaintiff must have some interest in undertaking these tasks, likely without payment. We have found that many persons who are the victims of mass wrongs are happy to put themselves forward as representative Plaintiffs as a way of expressing their outrage and condemnation at the Defendants wrong doing.

XI. Conclusion:

The wide variety of subject matter potentially covered by class actions (everything from defective products to illegal bank charges to pollution spills and securities fraud) mean that virtually all lawyers will at some point encounter cases that could be brought as class action. At the same time, many cases will emerge which have potential to be handled as mass torts. When those cases do emerge, we hope that this paper will provide some reference point in considering the option available to the client