

Class Actions in British Columbia

by

Derek J. Mullan Q.C.

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Introduction

- 7 Provinces have statutes permitting class actions:
Quebec Saskatchewan Alberta
Ontario Manitoba Newfoundland
B.C.
- B.C.'s Class Proceedings Act came into effect August 1, 1995.
- No new cause of action is created by this legislation.
- Legislation is a set of procedural rules.

What is a Class Action?

It is an action where one person who has suffered damage sues a defendant and in addition claims to represent a number of other individuals who have suffered damages at the hands of the same defendant.

Example

- Helen Harrington v Dow Corning
- Harrington claimed damages for injuries she suffered from breast implants.
- In addition, she claimed to represent a number of other women in similar circumstances as her.
- Court certified her case as a class action.

Requirements for Class Action

1. Cause of action
2. Identifiable class of 2 or more
3. Representative Plaintiff
4. Common issues of fact or law
5. Preferable procedure

U.S. v B.C.

Policy decision by B.C. Legislature to make certification EASIER to obtain in B.C.

Example: Numerosity

Under U.S. Federal Rule 23, a class representative can ONLY sue on behalf of a class if the class is so numerous that joinder is impracticable.

In B.C., you only need 2 people for a class.

U.S. v B.C.

Example: Superiority

In the U.S.:

The class action has to be the SUPERIOR method to resolve the CONTROVERSY (U.S. Federal Rule 23)

In B.C.:

The class action has to be the PREFERABLE procedure for the resolution of the common ISSUES

Move the litigation forward is the threshold in B.C.

U.S. Position

- Trend in U.S. now is to move away from certification of mass tort cases.
- Key Reason: requirement that the common issues predominate over the individual issues.

Rule 23 requires:

questions of law or fact common to the members of the class **PREDOMINATE** over any questions affecting only individual members.

Georgine v Amchem

(83F. 3d 610 (3rd cir. 1996))

The Court stated:

“[i]n products liability actions . . . individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No set of operative facts establishes liability.

and further on:

“Turning to predominance, we hold that the limited common issues identified, primarily the single question of the harmfulness of asbestos, cannot satisfy the predominance requirement in this case. Indeed, it does not even come close.”

B.C. Position

A. “Common issues” means:
common but not necessarily identical issues of fact
or
common but not necessarily identical issues of law
that arise from common but not necessarily identical
facts

Sec 1 Class Proceedings Act

B. “Common issues” do not have to predominate

Sec 4(1)(C) Class Proceedings Act

Osgoode Hall Study (2001)

Since inception of the legislation in Ontario and B.C.

	<u>No of Filings</u>	<u>Rate</u>
Ontario	287	40/yr. Average
B.C.	108	20/yr. average

<u>Main Types of Cases</u>	<u>B.C.</u>	<u>Ontario</u>
Negligence	24	49
Investors	15	24
Misrepresentation	11	19
Breach of Contract	7	25
Competition Act	2	20

Advantages to Certification

1. Everyone is in the class unless they opt out.
2. Representative Plaintiff is not liable for costs of determining the common issue.
3. Limitation period is suspended.
4. Statistical evidence to determine award of damages.
5. Aggregate award of damages is possible.

Toshiba Class Action Settlement (Forbes April 16, 2001)

- 5 million laptops sold by Toshiba in U.S.
- allegation - flaw in software controlling floppy disk drive
- Judge Heartfield ordered the two sides to negotiate
- October 1999 - Settled before Certification for \$2.1 Billion

Class Counsel Fees

A. Vanishing Premium Class Actions

<u>B.C. Settlements</u>	<u>Class Counsel Fees</u>
January 1997 Sun Life	\$600,000
September 1998 Manulife	\$675,000
June 2000 Mutual of Omaha	\$250,000

Time spent by Class Counsel on Mutual of Omaha Case was 410 hours.

Class Counsel Fees

B. Breast Implant Settlement

- May 15, 1995: Dow Corning filed for Chapter 11 Protection
- Plan of Reorganization: Pay out \$3.04 Billion over the next 16 years
- Approval Hearings before U.S. Courts
- B.C. Settlement: \$25 Million U.S. (approx. \$40 Million Cdn)
- B.C. Court Approved: 15% Contingency Fee
- Class Counsel Fee \$6 Million Cdn

Class Counsel Fees

C. Hepatitis C Settlement

- January 22, 2000: \$1.6 Billion from Federal, Provincial and Territorial Governments
- B.C. Class 22,000 members receive \$352 Million
- B.C. Class Counsel Fees: \$15 Million

Vancouver Sun (May 9, 2001)

- Class action against Maxim's Bakery in Richmond
- August 25, 2000: Salmonella poisoning of 60 customers

Assume average value of each claim = \$2,500

Total value $\$2,500 \times 60$ = \$150,000

Potential Class Counsel Fees 1/3 = \$50,000

Goals

1. Judicial economy
2. Access to Courts
3. Modification of behaviour

Access to justice is given more weight than judicial economy.

Summary

1. Certification is easier in B.C. than in U.S.
2. Ontario average 40 cases/year
 B.C. average 20 cases/year
3. Driving force is Class Counsel Fees

These materials are necessarily of a general nature and cannot be regarded as legal advice. Clark, Wilson will be pleased to provide additional details on request. Inquiries or comments concerning these materials should be directed to Derek J. Mullan Q.C.

*Clark, Wilson
800 - 885 West Georgia Street
Vancouver, BC V6C 3H1
Direct Telephone: (604) 643-3162
Fax Number: (604) 687-6314
email: djm@cwilson.com
Website: www.cwilson.com
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