# CLASS PROCEEDING ACT, 1992, S.O. 1992, c.6 - LAW SOCIETY AMENDMENT ACT (CLASS PROCEEDINGS FUNDING), 1992, S.O. 1992, c. 7.

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Ontario has become the second Canadian province, after Quebec,[1] to follow the United States example in enacting detailed class action legislation. The Ontario Class Proceeding Act[2] is broadly similar to United States and Quebec models, in providing for preliminary judicial certification of the class proceeding (section 5), notice to class members (unless otherwise ordered ) (section 17), opting out by dissentient class members (section 9), trial of issues found to be common to the class (section 11), aggregate assessment of monetary relief (section 24), subsequent (variable) proceedings for determination of individual issues (section 25) and financial incentives for class representatives and counsel (sections 32, 33).

In view of the difficulties encountered by class actions elsewhere,[3] the Ontario Act seeks to be more facilitative, chiefly with respect to the conditions of certification. The class thus need contain no more than two persons (section 5(1)(b)), as opposed to requirements in the United States of "numerous" members of the class. The class action must be simply the "preferable"

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[1] See the Loi sur le recours collectif/Act Respecting the Class Action, L.Q./S.Q. 1978, c. 8, in force January 19, 1979, enacting articles 999-1051, Code of Civil Procedure (C.C.P.). Statistical information concerning Quebec class actions is provided each year in the annual report of the Fonds d'aide aux recours collectifs, the Quebec governmental funding agency for class actions.

[2] S.O. 1992, c. 6. See also Law Society Amendment Act (Class Proceedings Funding), 1992, S.O. 1992, c. 7.

[3] At the federal level in the United States, annual class action filings have dropped from over 3000 in the 1970s to 930 in 1991. See Annual Report of the Director of the Administrative Office of the United States Courts, Washington, D.C., 1991, p. 367; B. Garth, General Report on Group Actions in Civil Procedure: Class Actions, Public Actions, *Parens Patriae* and Organization Actions, in International Academy of Comparative Law, XIIIth International Congress General Reports, 1992, pp. 205, 226. At the state level, class actions are increasingly challenged by plaintiffs. For opposition by the American Trial Lawyers Association to certification of a class action for breast implant cases, see the National Law Journal, June 1, 1992 (noting "contentious lawyer infightings" and describing a class action advocate as being "booed ... off the podium" at an Association meeting). United States observers report increased use of consolidation procedures, as opposed to class actions, extending even across multiple federal judicial districts. See Garth, *ibid.*; M.K. Kane, Group Actions in Civil Procedure: the United States Experiences (1990), 38 Am. J. Comp. L. 163, at pp. 174-179. In Quebec, from 1979 through 1991, 263 motions

procedure (section 5(1)(d)), as opposed to also satisfying a cost/benefit analysis as proposed by the Ontario Law Reform Commission.[4] While the representative plaintiff must adequately represent the interests of the class (section 5(1)(e)(ii)), there is no requirement, again in contrast to the proposal of the Ontario Law Reform Commission,[5] that the court review the competency of the legal representation of the class. While the claims must raise "common issues" (section 5(1)(c)), these are "not necessarily identical issues" (section 1(a)) and there is no requirement, as in the United States, that the "common issues" predominate over individual issues. It is expressly provided that certification cannot be refused on the grounds that individual assessments of damages are required, that the relief claimed relates to separate contracts involving different class members, that different remedies are sought by different class members, that the number of class members or their identity is unknown, or that the class includes "a subclass whose members have claims or defences that raise common issues not shared by all class members" (section 6). Jury trials are possible, though the Ontario Law Reform Commission would have prohibited them.[6]

The hazards of class justice are multiform, however, and elimination of some often implies exacerbation of others. If certification is facilitated there is a clear danger of abuse, suggesting the need for some form of preliminary review of the merits of the claims advanced in the class proceeding. Quebec has followed this route, in requiring that "the facts alleged seem to justify the conclusions sought".[7] This requirement has allowed all possible defences, in fact and law, to be raised in the authorization proceedings, often with fatal effect. Ontario now requires that "the pleadings or the notice of application [disclose] a cause of action " (section 5(1)(a)). As is the case with the defence motion to strike a pleading for failure to state a cause of action, this provision would not allow challenge to the factual basis of the claim. Only the pleadings are to be scrutinized. The plaintiff here, however, has the burden of establishing a cause

for class action authorizations have been presented, of which sixty-seven (25.5%) were granted, eighty-five (32.3%) were rejected, with the balance settled, abandoned or pending. Sixteen judgments have been given on the merits, of which twelve were in favour of the class (usually by consent, default or in favour of small classes); one case awarded substantial damages against a union for an illegal strike; another reduced T.V. cable fees by forty cents for a two-day interruption of services to some 40,000 subscribers). In the case of a major toxic fire at Saint-Basile-le-Grand, east of Montreal, the Quebec Bar took the initiative of providing duty counsel to residents of the area, with the objective of preventing a multiplication of class or other proceedings.

[4] Report on Class Actions (1982), p. 862 (An Act Respecting Class Actions, s. 6).

[5] *Ibid.*, s. 5. The Commission recommended: "In determining whether the representative plaintiff would fairly and adequately protect the interests of the class, the court may consider whether provision has been made for competent legal representation that is adequate for the protection of the interests of the class."

[6] *Ibid.*, s. 50. Jury trials do not exist in Quebec for any civil cases. In the United States jury class action trials are possible though infrequent, since few class actions reach the stage of trial.

[7] C.C.P., art. 1003(b).

of action at the threshold of the litigation and this may prove to be an obstacle in many cases.[8]

While defendants may thus be precluded from challenging the factual merits of the class claims at the stage of certification, it is not possible to preclude them from challenging the existence of the class and the existence of issues common to its members. Ontario (section 5(3)), like Quebec, will allow defendants to file affidavits relating to class characteristics. In Ontario (section 15), unlike Quebec, it will also be possible for defendants (as well as plaintiffs) to discover prior to certification. Defendants remain therefore entitled to raise factual issues at the stage of certification insofar as such issues are "class" issues as opposed to "merit" issues. The defendant may not challenge the facts alleged, but may challenge that the facts relating to individual members of the class are the same as those alleged. Classes are thus subject to entropy. Their existence is a leap of faith, based largely on affidavit evidence. While certification of the class cannot be refused on the grounds of the legal conclusions set out in section 6 of the Ontario Act (separate claims for damages, separate contracts, different remedies, *etc.*), certification should be refused on the basis of factual differences affecting the existence of the class and common issues. In Quebec this was the reason for use of a test case relating to urea formaldehyde insulation and not a class action. It is clear that the existence of only "some" common issues will suffice to justify class authorization or certification.[9] This remains a very large question, however, in all class action applications.

In a number of other respects the Ontario Class Proceedings Act is less friendly to plaintiffs and classes of plaintiffs than legislation elsewhere. While appeals by defendants against certification orders are not possible either in the United States or Quebec, they may be undertaken with leave in Ontario (section 30(2)). Defendant's class actions,[10] precluded in Quebec, may be certified in Ontario (section 3) as in the United States, and recent United States practice

[8] The criteria under s. 5(1)(a) of the Class Proceeding Act are not necessarily the same as those used in dealing with a defendant's motion to strike a pleading which "discloses no reasonable cause of action" (Ontario Rule 21.01). In such a case plaintiffs have been allowed to proceed when the pleading discloses a question fit to be tried, and the novelty of the question is not a grounds of dismissal. See generally *Carey Canada Inc.* v. *Hunt*, [1990] 2 S.C.R. 959, (1990), 74 D.L.R. (4th) 321. In class proceedings the requirement that the plaintiff's pleadings "disclose a cause of action" is founded on the view that class actions do not effect any change in substantive law and are merely a procedural device. Plaintiffs should therefore take the substantive law as they find it and legal change should not take place in certification proceedings without benefit of trial.

[9] In Quebec see the decisions of the Court of Appeal in *Comité d'environnement de la Baie Inc.* c. *Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655; *Tremaine* c. *A.H. Robins Canada Inc.*, [1990] R.D.J. 500.

[10] The defendant's class action is one *initiated* by a defendant or defendants; the class remains a class of plaintiffs. Efforts were thus made (unsuccessfully) in the United States by defendants in the *Dalkon Shield* litigation to certify a class of plaintiffs. *In re Northern Distr. of California Dalkon Shield IUD Prods. Liability Litigation*, 693 F. 2d 847 (9th Cir., 1982), cert. denied, 459 U.S. 1171. It is also possible under the Class Proceedings Act, s. 4, to class defendants and appoint a representative defendant.

indicates major efforts by corporate defendants to use the class action, as well as bankruptcy proceedings, to define and limit their liability.[11] Perhaps most significantly, the financing of class proceedings in Ontario may prove to be too problematical for widespread use of the procedure.

In the United States the financing of class actions is made possible by the use of contingent fees and by the basic rule of United States civil procedure that the losing party does not pay the costs of the winner. The class representative thus faces no financial risk; the risk is assumed by the class counsel who expects compensation for the risk undertaken through the contingent fee. United States courts have not been generous in authorizing contingent fees, however, and the overall inadequacy of compensation to counsel has probably played a major role in the decline of class actions in the United States. In Quebec these difficulties had to be overcome, as well as the basic Canadian costs rule that the losing party is liable for the winner's costs. The Quebec solution has been to allow the contingent fee, to supply public funding for counsel fees and disbursements as a further financial incentive[12] and to hold immune from costs awards the class representative benefiting from public funding. The Ontario solution generally follows the Quebec pattern, using a $500,000 donation from the Law Foundation of Ontario as an initial source of funding,[13] but departs from the Quebec model in providing compensation for disbursements only and not for plaintiff counsel fees. The real cost of class actions in Ontario must therefore be borne by counsel, as in the United States. The contingent fee expected to fulfil this task is moreover a modified one, since counsel will not be able to charge a percentage of the total recovery, but rather only a "multiplier" (of from 1.3 to 3, according to estimates) of billable hours spent on the case, subject to judicial approval.[14] Counsel in Ontario, as in Quebec, may be held personally liable for costs incurred without reasonable cause.[15]

While much of the discussion of class actions in Quebec and Ontario now bears on techniques, the procedure ultimately raises major questions as to the role of lawyers and judges. Lawyers run class actions, and to the extent that they act on behalf of absent class members they assume a standing normally reserved to interested, lay litigants. The contingent fee further augments the stake of

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[11] See Kane, *loc. cit.*, footnote 3, at pp. 168-172 (pressure for use of class tort actions has come primarily from defendants, though "not with any marked success").

[12] The *Fonds d' aide aux recours collectifs* spent $829,316 in 1992, of which $458,506 were distributed to applicants to cover legal fees and disbursements. The balance was spent on administration of the Fund. *Fonds d' aide aux recours collectifs*, Rapport annuel 1991-92, p. 39.

[13] The initial grant is meant as seed money only and the fund is to be maintained in the future by levies on class recoveries. See generally, the Law Society Amendment Act (Class Proceedings Funding), *supra*, footnote 2.

[14] The technique, known as that of the "lodestar" in the United States, is there criticized for its "bureaucratic" character.

[15] In Ontario see Rule 57.07; in Quebec, for the costs liability of counsel for the plaintiff class, see *Laroche* c. *Ultramar Canada Inc.*, J.E. 88-498 (Montreal Sup. Ct.) (counsel held liable for costs after inciting unrepresentative plaintiff to act in name of class).

lawyers in other people's problems. As the personal interest of lawyers increases, however, so inevitably do their responsibilities. This will mean losing money, in losing class actions. In costs-shifting jurisdictions, such as Canada, it also implies greater exposure to costs awards. If the lawyer is effectively acting as a financially interested plaintiff, should the lawyer not bear a losing plaintiff's costs burden?[16]

Judicial involvement in class actions is applauded by the political left in North America, for the results sought, but by the political right in Europe, for preclusion of state activity. Both sides are correct to the extent that the judicial activity in class proceedings is more overtly political, requiring orders (and occasionally judgments) to be given according to criteria which do not meet normal judicial standards. Judges cannot be biased, however, even on questions of the extent of the judicial function. Judges will therefore continue to certify class actions, as they have done in Quebec, knowing they themselves will rarely have the means to ensure effective execution of a class action judgment. They may also certify in the hope of relieving their own litigation burden, by seeking to eliminate repetitive trials of "common issues". Over time, however, most class actions do not succeed, and there is doubt as to how to evaluate those which allegedly do. To the extent that "rough justice" thus remains the exception in our judicial system, the system is probably remaining loyal to the function for which it was created.

[16] The relation between the contingent fee and the Canadian costs rule is now being worked out by the courts. See notably the dicta of Seaton J.A. in *Coronation Insurance Company Limited* v. *Florence* (1992), 73 B.C.L.R. (2d) 239 (B.C.C.A.) (successful defendant held liable for costs not absolved where plaintiff lawyer acting on contingent fee basis).