

BROADENING THE REACH

CLASS ACTIONS AFTER FIVE YEARS

by: C. Scott Ritchie, Q.C.

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INTRODUCTION

During the 1980's the impetus for class action reform in Ontario was strong. Reports of the Law Reform Commission¹ and the Attorney General's Advisory Committee on Class Actions² as well a decision of the Supreme Court of Canada³ all indicated that the need existed for a procedural vehicle which would allow claims to be brought forward on a class basis.

There were three proposed goals of class action reform:

1. To increased access to the court system;
2. To increase judicial economies;
3. To modify the behaviour of potential defendants.

The second and third objectives are undoubtedly significant. In this era of public restraint taxpayers, lawyers and the judiciary are all concerned that repetitive court processes can place a burden on our legal system and class actions can reduce these burdens. In addition, class actions increase the probability that large corporate

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defendants will be held accountable for inappropriate conduct even when the individual claims of class members are small.

However, the first objective of class proceeding legislation, which was to increase access to the justice system, seems to have been the most important motivation for class proceedings to date.⁴ Class proceeding legislation was designed to reduce the social, psychological and economic barriers to litigation.

Some cases could not be litigated on an economic basis, absent class proceedings, because of the small value of individual claims. Consider the *Bausch and Lomb* contact lens consumer recovery case in which the damages arose as a result of inappropriate pricing; average claim recoveries will be less than \$100.00.⁵

Other claims could not be litigated on an economic basis because of the extraordinary expense associated with assembling the required medical and scientific evidence. Consider the *Telectronics* heart pacemaker class resolution and the resolution of breast implant litigation each of which involved disbursements in the amount of hundreds of thousands of dollars.⁶

Despite the increasing willingness of our society to litigate, the social and psychological barriers to litigation remain very real as well. Such barriers are obvious in matters where class members are concerned about their privacy. The breast implant litigation presents an indisputable example, however, few people outside the legal profession find the

⁴ *Bendall and Wise v. McGhan and Dow Corning Corporation*, Court file #14219/93, (1993), 14 O.R. (3d) 734 (Gen. Div.).

⁵ Order of Justice Haines dated October 17, 1997

Munro v. Bausch & Lomb Inc., Court File No. 22610/96
(Ont. Ct. Gen. Div.)

⁶ *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.)

Serwaczek v. Bristol Myers Squibb Corp. Court File No. 17629/94 (Ont. Ct. Gen. Div.).

litigation process to be attractive and often claims (especially those of modest size) are not pursued simply because of the inconvenience and emotional drain often associated with legal processes.

A CHECKER BOARD SYSTEM

To date the only provinces in Canada having the necessary statutory authority to authorize class proceedings are Ontario, British Columbia and Quebec. Further, and unlike the legal system in the United States, there is no Federal court in Canada with jurisdiction over the subject matter generally addressed by class actions. However, in light of the fact that the chief objective of class proceedings reform is to provide increased access to the court system. It makes sense to consider ways in which the benefits of class actions can be extended to the non class action provinces. In other words, the rationale for adopting seems relevant to an attempt for potential class members in other provinces.

Further, in recognition of the extent to which Canada is a national economy, courts have increasingly displayed a willingness to extend their jurisdiction beyond provincial borders.⁷

In addition, defendants (who often distribute products across provincial borders) are generally concerned to secure a broad release. Particularly for those defendants who are concerned about the optics of providing benefits only to a selected group of clients or customers (class members.)the settlement of an inter-jurisdictional class action may be attractive. It would simply not make business sense for compensation to be made available to Ontario consumers which is not made available to residents of Manitoba.

In light of these issues and concerns, the legislature in British Columbia and the Courts in Ontario have already recognized the fairness and utility of allowing residents of non class action provinces to be able to participate in class proceedings which are rooted in either British Columbia or Ontario.

POTENTIAL PROBLEMS

The creation of national classes or non-resident subclasses does raise certain concerns. These have been recently addressed in the United States where there is a Federal class action statute.⁸ The most significant of these problems involves the diversity of state law. The Supreme Court of the United States recently expressed this concern relative to the asbestos class settlement.⁹ This settlement involved resolution of asbestos related injury claims on a national basis. The court stated that the applicable state laws were sufficient varied that certification of a national class may not be appropriate. In Canada, the choice of law would be an important issue to consider. For example limitation periods vary according to provincial statute.

Further, although principles of comity are being extended in Canada, serious matters of provincial sovereignty arise. It must be seriously questioned whether, for example, a resident of Saskatchewan who had neither opted out or into an Ontario class proceeding could be bound by a decision of Ontario court.

However, it must be noted that class litigation has displayed itself to be peculiarly appropriate for issues related to consumer products. In this era of increasingly

8 *U.S. Federal Rules of Civil Procedure*. Rule 23. Class Actions;

9 *Georgine et al v. Amchem Inc.*, [1996] W.L. 242442.

unrestricted global trade the subject matter of class litigation has tended, on a practical basis, to transcend national and international boundaries.

EXAMPLES OF INTER-JURISDICTIONAL APPROACHES

Ontario/Quebec Inter-Jurisdictional Settlement

The first settlement of an Ontario class action included Quebec and Ontario women who had received breast implants manufactured by Medical Engineering Corporation.¹⁰ In this case, class counsel in Ontario and Quebec brought separate actions in their respective provinces. The settlement was negotiated jointly by plaintiffs counsel in those provinces and the settlement was conditional upon receiving court approval in both provinces. (Had either court failed to approve the settlement, the defendant would have had the right to terminate the Agreement.)

Separate Ontario and Quebec classes were defined and the definitions were broad and inclusive.

“All persons, residents in the Province of Ontario as of April 18, 1994 who received their implants in the Province of Ontario, who have had silicone gel breast implants placed in their bodies, whose implants were manufactured, developed, designed, fabricated, sold, distributed or otherwise placed into the stream of commerce by the named Defendants.”¹¹

At the time of the breast implant litigation settlement only Ontario and Quebec had class action statutes. British Columbia's statute has come into force since that time and the

¹⁰ Order of The Honourable Mr. Justice Winkler dated July 31st, 1995

Serwaczek v. Medical Engineering Corporation et. al., Court File No. 17629/94 (Ont.Ct. Gen.Div.).

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recent settlement of the *Bausch and Lomb* class action utilizes a similar approach, however, it was extended to all three provinces.¹²

National Classes

The Ontario Act does not specifically provide for certification of non-resident classes. However, in *Nantais v. Telectronics Proprietary (Canada) Ltd.*, a class action against the manufacturer of cardiac pacemaker leads was certified on behalf of a national class.

Speaking as a single judge of the Divisional Court Zuber J. stated:

"The Class Proceedings Act, 1992 is a relatively new statute and the mere fact of novelty does not suggest error. There are two aspects to the concern respecting a national class, one legal and one practical...In my respectful view the order of Brokenshire J. setting out a national class, finds powerful support in judgment of La Forest J. in Morguard Investments Ltd. V. De Savoye..."

On a more practical level it is argued that a court attempting to try this class proceeding will face a multiplicity of laws from all of the provinces, which may confuse the manner. This argument, in my view, is largely speculative. 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

12 Order of Justice Haines dated October 17, 1997

Munro v. Bausch & Lomb Inc., Court File No. 22610/96 (Ont.Ct. Gen.Div.)
Order of Justice K.C. MacKenzie dated October 24, 1997
Ernewein v. Bausch & Lomb Canada Inc. et al, Court File No. C065586 (Supreme Court of B.C.)
Order of Justice dated October , 1997
Gordon v. Bausch & Lomb Inc., et al, Court File No. 200-06-000002-975 (Quebec District Court)
These actions were based on the plaintiffs' allegations that the defendant had charged different prices for contact lenses which were in fact identical.

real difference between the common law on this matter and the law of the Province of Quebec.¹³

British Columbia Class Proceedings Act

Section 6(2) of the British Columbia Act specifically provides for certification of a non-resident subclass:

“A class that comprises persons resident in British Columbia and persons not resident in British Columbia must be divided into subclasses along those lines.”¹⁴

The British Columbia statute has been in force only since August of 1995, however a number of non-resident subclasses have already have been certified.¹⁵ In *Harrington v. Dow Corning Corporation et al*, the court certified a non-resident subclass for recipients of breast implants. Although the certification was rooted in the B.C. statute, interestingly the British Columbia court explicitly followed the Ontario case of *Nantais*.

The demands of multi-claimant manufacturers' liability litigation require recognition of concurrent jurisdiction of courts within Canada. In such cases there is no utility in having the same factual issues litigated in several jurisdictions if the claims can be consolidated. I do not think that *Nitsuko* and *Con Pro* stand in the way of concurrent jurisdiction as they do not deal with claims inside and outside the province which raise the same common issue. It is that common issue which establishes the real and substantial connection necessary for jurisdiction. *Nantais* is a considered decision on the question which is otherwise largely a matter of first impression. I am not persuaded that *Nantais* is clearly wrong or inapplicable and accordingly I intend to follow it.

13 *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.) p.350. Note that the settlement of this national class action was recently approved by Brokenshire J.

14 British Columbia Class Proceedings Act, s.6(2) Bill 16-1995

15 *Chase v. Crane Canada Inc.* [1996] B.C.H. No. 1606

Harrington v. Dow Corning Corporation et al. [1997] B.C.J.

Once jurisdiction is established, the question remaining is forum convenes. I am satisfied that the Class Proceedings Act facilitates the efficient litigation of multiple claims and this jurisdiction is therefore a convenient forum.

In British Columbia, non-resident members of the class must opt in if they wish to participate. This must be done in the manner and within the time specified in the certification order this taking an affirmative step by a non-resident enables the court to properly assume jurisdiction over the claims.

Perhaps surprisingly, the *Nantais* court did not require non-resident plaintiffs to opt into the Ontario action. Non-residents were permitted to opt out in the same manner as resident class members. The court seemed to recognize the uncertainty associated with this arrangement.

“Whether the result reached in Ontario court 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 laws of res judicata may have to adapt itself to the class proceeding concept.”

As a practical matter opt in provisions may be preferable to provide greater certainty.

“Part of the proposed plan of the plaintiffs is the sending of questionnaires to each class member. Perhaps prudence would indicate that such questionnaires include an opting in provision of non-residents, to avoid any doubt as to jurisdiction.”

A Practical Approach

Apart from the civil law jurisdiction of Quebec, both the *Harrington* and *Nantais* courts adopted practical approaches to these problems. In most cases there will be no significant difference in the substantive law underlying the class litigation.

In fact class proceedings are designed to move the common issues forward.

Both the British Columbia and Ontario statutes indicate that certification is to be granted if a class proceeding is the preferable procedure **for the resolution of the common issues**

(emphasis added)¹⁶

CONCLUSION

The objectives of increasing access to the court system, promoting judicial economies and modifying the behaviour of potential defendants are worthy objectives and apply notwithstanding interprovincial boundaries. Indeed, in this era of increasingly open global trade forums for broad based resolution of claims and potential claims must be found. To date creative class counsel and flexible legal arrangements have displayed that class proceedings may provide important vehicles for such resolutions. Without question, further certainty would be achieved if a national statute were to be adopted.

Doc.# 82927