



# **Class Actions** ***A Canadian*** ***Perspective***

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# Much has been said but little has been done...

- [The Rise of Group Actions in the U.K and the E.U. | The D&O Diary \(dandodiary.com\)](#)
- Disdain for American court practices does not explain the inertia – look elsewhere!
- Consider Canada!

# ***GM v Naken*, 1983 Supreme Court Canada**

- Defective 1971-1972 Firenza GM cars - 4602 claimants
- It is common in dealing with actions of this type to refer to them as “class actions”. This is an ambiguous term embracing as it does derivative actions, with which we are here not concerned, and representative actions by persons having the same interest in the subject of the litigation which is brought under the leadership of one or more representatives. It is with this type of action that we are here concerned and to which I will refer for simplicity as a “class action”.
- This undoubtedly requires legislative intervention in this country and is but a further illustration of the need for a comprehensive legislative scheme for the institution and conduct of class actions.

# Quebec First

- Quebec was first province, then *Class Proceedings Act, 1992*, SO 1992, c 6
- 1982 and 2019 reports by Ontario Law Reform Commission. Purposes:
  - Access to Justice
  - Behavior Modification
  - Judicial Economy

# The Meaning of “Common Issues”

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

# Certification

- 5 (1) The court shall, subject to subsection (6) and to [section 5.1](#), certify a class proceeding on a motion under [section 2](#), [3](#) or [4](#) if,
  - (a) the pleadings or the notice of application discloses a cause of action;
  - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
  - (c) the claims or defences of the class members raise common issues;
  - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
  - (e) there is a representative plaintiff or defendant who,
    - (i) would fairly and adequately represent the interests of the class,
    - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

# Certain Matters Not Bar to Certification

- 6 The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
  - 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
  - 2. The relief claimed relates to separate contracts involving different class members.
  - 3. Different remedies are sought for different class members.
  - 4. The number of class members or the identity of each class member is not known.
  - 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

# Statistical Evidence

- 23 (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.



# Aggregate Assessment of Monetary Relief

- 24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
  - (a) monetary relief is claimed on behalf of some or all class members;
  - (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
  - (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

# Individual Issues

- 25 (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under [section 24](#), the court may,
  - (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
  - (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
  - (c) with the consent of the parties, direct that the issues be determined in any other manner.

# Many Types of Claims

- Competition law
- Securities
- Business trust
- Consumer protection
- Crown liability
- Product liability
- Crown liability
- Environmental liability
- Music copyright

# What's in it for the Defendants?

- Effective release of all claims
- Competent representation of plaintiffs
- Judicial efficiency, a win for the defence binds all class members who do not opt out...

# Criticism and Areas of Improvement

- Cost and delay – A2J is slow and expensive
- How many dollars reach class members' pockets? Difficulties in judgment distribution.
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**Questions?**