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Class Actions in Alberta

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INTRODUCTION

Class action proceedings in Alberta are in their emerging stages. Although bringing representative actions has long been possible, it is only recently that the procedure has been refined and facilitated. Alberta's *Class Proceedings Act*[2] received Royal Assent on 16 May 2003 and was proclaimed in force 1 April 2004. Since its proclamation, there have not been any cases that have progressed to judgment. Rather, the bulk of decisions address how the *Class Proceedings Act* will be interpreted in regard to the important certification stage of any action. These decisions provide similar direction respecting certification as the *Class Proceedings Act* is explicit in certification requirements and as a result of the limited number of judges assigned to hear class actions decisions. Some important aspects of the *Act*, such as which action should proceed when there are competing class actions, have yet to be judicially considered. In such cases, Alberta courts have taken guidance from other jurisdictions who have similar legislation and from the Alberta Law Reform Institute Final Report on Class Actions[3]. Although similarities to legislation in other Canadian jurisdictions are profuse, Alberta has distinguished itself by its purposive approach to the legislation, the specific considerations that a judge must have in mind when deciding whether a proceeding should be certified and on the issue of costs.

CERTIFYING CLASS ACTIONS IN ALBERTA

The mandatory requirements for certification of a class action are set out in sections 5(1), 5(2) and 5(3) of the *Class Proceedings Act*. Some highlights of case law considering these sections are set out below.

Section 5(1)(a) - The Pleadings must disclose a cause of action

The purpose of this requirement is to dispose of actions that are clearly frivolous or that do not disclose a cause of action[4]. That the pleadings must disclose a cause of action is a "low bar" to be met. Most defendants concede this point[5].

Additionally, in order for a cause of action to proceed, the pleadings must show that the representative plaintiff has a cause of action against all named defendants[6]. For the defendants to be liable, appropriate plaintiffs need to be named in the style of cause *prior* to a determination of who should be named as a representative plaintiff to represent the class.

Section 5(1)(b) – The class must be identifiable

The definition of a class must be precise, objective and presently ascertainable. The criteria must also bear a rational relationship to the common issues asserted by all class members. The Supreme Court of Canada's requirement of an identifiable class, enunciated in *Dutton*, has been adopted in Alberta:[7]

> While the criteria should bear a *rational relationship to the common issues asserted by all class members*, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however,

> that any particular person's claim to membership in the class be determinable by stated, objective criteria.

Whether a class is over or under-inclusive is not ordinarily fatal at this stage as the Act permits amendments to the class if it is found to be imprecise[8].

There has been a tendency by some counsel to define the class by reference to whether they claim damage. To gain membership in the class, a person would be required to "claim" that between certain dates their interest had been adversely affected. In a recent Alberta case[9], Justice Slatter observed that "claims based" class definitions are subjective and *prima facie* problematic. Generally, these types of definitions are unnecessary. Slatter J. noted that the source of these definitions appeared to be an attempt to avoid merit based class definitions. To resolve this issue he explained:

> There is however a difference between "damage" and "damages". Damage is an injury to person or property. "Damages" is a legal remedy, consisting of a sum of money paid to someone who has suffered compensable damage. It is merit based to define the class as "all those who are entitled to damages" from the defendant, because the entitlement to those damages depends on a finding of liability. It is not merit based to define the class as all those who suffered "damage" or "personal injury". Damage is an essential element of tort . . .the suffering of damage does not always result in compensation (ie: damages), or does not always result in compensation from the named defendant. In my view the resort to "claims based" class definitions is an attempt to avoid an artificial problem, and there is nothing wrong with requiring the members of the class be only those who have suffered injury.[10]

Identifying a class based on whether they claim damage should be avoided when possible. Though it is not fatal, it does raise suspicion that the class is not properly identifiable.

Section 5(1)(c) - The claim must raise a common issue

The *Class Proceedings Act* defines a common issue as "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"[11].

For a claim to be common, a purposive enquiry should be made. However, the issue need not be central to resolving the litigation but its resolution should be essential to each class members' claim. Again this is a "low bar" to certification; even if substantial issues remain to be decided at an individual level this will not be fatal[12].

Section 5(1)(d) - A class proceeding must be the preferable procedure

A class proceeding is the preferred method if it is a "fair, efficient and manageable" method of deciding the common issues and if it is preferable to other reasonably available means of resolving the claims of class members[13].

The Alberta *Class Proceedings Act* is unlike class action legislation in other Canadian jurisdictions in that the *Act* provides statutory directives on what a court must consider under this requirement. Other provinces leave the inquiry into whether a class action is a preferable procedure to be assessed through the lens of the fundamental advantages of class actions, namely: 1) judicial economy, 2) access to justice and 3) behaviour modification. However, because the *Act* gives a wide discretion to the courts to consider "any relevant matter" most of the decisions weigh the three advantages listed above in addition to the following five mandated considerations[14].

Section 5(2)(a) - Whether common issues of fact and law predominate over individual issues

As previously noted, the court cannot refuse certification solely because of a need for individual assessments. However, the inquiry at this stage is not

a simple balancing act on the relative quantity of issues. The courts have warned against over-emphasizing the importance of individual issues. The correct inquiry should be based on the more fundamental issue of whether the class proceeding is preferable. It is acknowledged that individual assessment may always be an issue and that irrespective, the focus should be on what the proper forum is to decide the common issues[15].

Section 5(2)(b) - Whether a significant number of class members have a valid interest in controlling prosecution of separate actions

The concern with respect to this issue is whether there are proposed class members who have a legitimate interest in controlling separate prosecutions of the action. Even where this is the case, there remains the possibility for them to opt-out in accordance with the *Act*[16].

Section 5(2)(c) - Whether the class proceeding would involve claims that are or have been subject to other proceedings

In *Windsor*, supra, the court considered whether multiple other actions should be a bar to certification of the class action. The court found that they were not. Even when the action was certain to become "complex and bulky" the court found that this was to be expected. It was held that "the Court cannot deny access to justice for claimants with justiciable claims simply because they have the misfortune of being swept up in complex, voluminous factual and legal issues. The purpose of judicial economy is to seek to relieve the complexity and volume by properly hiving off and determining common issues that advance the claims of all members of a class."[17]

Section 5(2)(d) - Whether other means of resolving the claims are less practical or efficient

Alternate procedures that might be available to a court to resolve the claims could include multiple separate actions, multiple actions consolidated and tried together or a test case which could lead to further actions. If a class proceeding is not certified, the courts run the risk of having multiple claims on the same facts which in turn may lead to different results[18]. Even if a class proceeding saves the court a few hours or days judicial economy will be served[19].

Section 5(2)(e) - Whether the administration of the class proceeding would create greater difficulty than if relief was sought by other means

Given that having multiple proceeding creates enormous difficulty, as might be expected, this item is generally not a significant hurdle for a Plaintiff to clear. As was observed by the court in *Investplan*[20]:

> …the only advantage of a multi-party action would appear to be that some plaintiffs might be discouraged and walk away, which is an advantage only to the Defendants, and which is not a legitimate reason to refuse certification given the goal of 'access to justice.'

Section 5(1)(e) – The representative Plaintiff must be suitable

A plaintiff's suitability is not dependant on the question of whether their individual claim will ultimately be successful[21]. Special considerations arise when the representative plaintiff is not a class member. This circumstance is permissible pursuant to section 2(4) of the *Act*, which reads:

> **2(4)** Notwithstanding subsection (2), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.

This is in line with the ALRI report, which comments that "the exception could be useful in cases where a particular individual or organization possesses special ability, experience or resources that would enable it to conduct the case on behalf of all class members." [22]

Section 5(1)(e)(i) – The representative Plaintiff must fairly and adequately represent the interests of the class

Whether a representative plaintiff is adequate depends on whether it understands its duties, is willing to serve and has no conflicting interest.[23]

The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.[24]

Efforts by defence counsel to argue that a representative plaintiff is not adequate because its "zeal" for the case would prejudice the rest of the class have been rebuffed in Alberta. The Courts are more concerned to avoid a representative who is "a 'straw man' who has no particular interest in prosecuting the litigation to the fullest."[25]

Section 5(1)(e)(ii) – The representative must have a litigation plan that advances the proceedings

Litigation plans, at the certification stage, are not expected to be perfect. Section 5 of the *Class Proceedings Act* only requires that the plan be "workable". The court in *Windsor* remarked that for the plan to be "workable" it need only be "capable of implementation in the circumstances."[26]

Until recently, certification had not been refused in Alberta or Canada due to the inadequacy of a litigation plan. However, in *Paron, supra*, this was found to be one of the determining factors in the refusal of certification. The plan did not provide a means or process for collecting documents from members of the class, how class members would communicate with the plaintiff or address the complex and divergent needs of the proposed class members.

Section 5(1)(e)(iii) – The representative must not have a conflicting interest in respect of the common issues

The *Class Proceedings Act* does not define "conflict of interest" in the context of a representative plaintiff. ALRI's Final Report suggests that this concern only applies with respect to the common issues, and that an interest that is somewhat different from other class member should not disqualify a representative.[27]

Defendants have argued that a representative was inappropriate because at a future date the representative plaintiff's personal interest could come into conflict with other class members. This argument did not succeed, especially given the fact that *Class Proceedings Act* s. 13(2) allows the court to substitute the representative plaintiff if he or she no longer "fairly and adequately" represents the class.[28]

Summary - Certification

Overall, it is clear that the Courts will use a liberal and flexible approach to interpreting Alberta's class action provisions in keeping with the three fundamental advantages of proceeding by way of class action: *judicial economy*, distributing fixed litigation costs among larger numbers, thereby improving *access to justice*, and ensuring *modification of behaviour*.

This approach is predominant despite the fact that there is no room for judicial discretion in a certification application upon the Court being satisfied of the mandatory requirements in section 5 of the *Class Proceedings Act*.[29]

One other general statement of note is that the courts have been mindful that the objective of certification is not to test the merits of the action[30]. While the merits are relevant in terms of being able to identify common issues, define a class, and ascertain whether the class proceeding is the preferable procedure, the concern at this stage of litigation is rightly on the form and appropriateness of a class action[31]. However, affidavit evidence in support of the certification is required and must provide sufficient information, particulars and specificity with respect to the requirements outlined in the *Class Proceedings Act*. Similarly, those who oppose certification must put forward their contradicting evidence[32].

RESOLVING COMPETING CLASS ACTIONS

Alberta courts have not yet faced the issue of how and if to proceed when there are extra-provincial or cross-border class actions. However, the *Class Proceedings Act* does give the court broad power to stay or sever other proceedings. Section 14 provides:

> **14.** The Court may at any time stay or sever any proceeding related to the class proceeding on any terms or conditions that the Court considers appropriate.

A couple of issues arise from this section of the *Act*. First, the section requires that the severance or stay be related to a class proceeding. However, the definition section of the *Act* provides that, for a "class proceeding" to exist there must be certification[33]. Therefore the power to stay or sever actions when there is not yet certification of an action remains uncertain. Secondly, the issue of what the court may "consider appropriate" leaves considerable discretion to the court.

Complicating the issue is the fact that various Provinces have different statutory regimes describing who may be included in a certified class. In Alberta, class actions are required to be divided into resident and non-resident classes. A person who is a resident is bound by the result of the lawsuit unless they choose to opt out, while non-residents who meet the class criteria must opt-in or they will not benefit from the lawsuit. Contrast this with the legislation in Ontario[34] and Manitoba[35] which does not require the qualifying class members to opt in. Unless they specifically opt out or the court overseeing the proceeding decides otherwise, a non-resident is able to benefit by the lawsuit. These situations have been termed "national" certifications.

As long as a "real and substantial" connection can be proven, the courts may not take issue with the fact that there are similar proceedings elsewhere in the country. This has support in case law from other jurisdictions in Canada.[36]

There are different considerations that arise when multiple class action proceedings have been commenced in the same Province. Alberta has yet to grapple with this issue, however case law from other Provinces would likely be persuasive here. Relevant criteria cited by the courts include: the best interests of all putative class members , the nature and scope of the action, the involvement of the proposed representative plaintiff and the resources and experience of counsel. [37]

THE ISSUE OF COSTS IN ALBERTA CLASS ACTIONS

The *Class Proceedings Act* provides no special considerations with respect to costs. Section 37 of the *Act* merely provides that "with respect to any proceeding or other matter under this *Act*, the court may award costs as provided for under the Rules of Court." In Alberta, while costs are always a matter of judicial discretion, the general rule in civil litigation is that the unsuccessful litigant pays all or a portion of the successful party's costs. This provision went explicitly against ALRI's recommendation that Alberta should have a "no cost" regime with respect to class actions. This provision on costs was also the most contentious part of the legislation when it was debated in the legislature.[38] The government seemed to be concerned that Alberta would turn into a "cottage industry for frivolous or unmeritorious lawsuits," so a no costs model was ultimately rejected.

Alberta is unique with respect to the issue of costs when compared to the other Provinces in Canada. In Ontario, for example, where a costs regime also applies, there is a fund to assist prospective class litigants. There is no such fund in Alberta. However, in certain situations, the courts in Alberta have recognized that a no costs regime may be more appropriate. The court in *Ayrton v. PRL Financial (Alta.) Ltd*.[39] said that in Alberta, class action litigants can only avoid the risks of costs to be paid by a representative plaintiff by applying for an order for no costs in the proceedings and relying upon established common-law principles relating to costs for public interest litigation. There is nothing in the *Class Proceedings Act* that expressly prohibits such an order.[40] The court in *Ayrton* went on to discuss four criteria that ought to be considered when departing from the normal rule that costs follow the outcome: public interest, novel point of law, whether the case was a test case and access to justice.

From the few cases that are currently decided in Alberta on the issue of costs, it appears that the courts would have been more willing to accept a no cost regime similar to that which exists in other Canadian Provinces, such as British Columbia. The decisions seem to place weight on the need for allowing many claimants to pool their resources to pursue claims that

they could not pursue individually because of the small monetary amounts at stake. If the regular costs rules are followed, this may curtail access to justice because lawyers and other third parties, who might be willing to underwrite the costs of a potentially meritorious representative action, would be unwilling to do so if they knew they would face crippling costs merely because they offer this financial assistance[41].

CONCLUSIONS

The *Class Proceedings Act* in Alberta is relatively new legislation and the body of case law considering the *Act* is in its infancy. Those commencing or defending class actions in Alberta are assisted by explicit provisions in the *Class Proceedings Act* detailing what considerations the court must take into account when deciding whether to certify a class action. Despite this, the courts have considerable latitude and have adopted a purposive approach to the legislation. Many apparent shortcomings in a proposed class action will not be fatal if it can be demonstrated that amendments to the form of the claim in the future will respond adequately to concerns that might arise.

The courts in Alberta have not yet had to address which party will be permitted to proceed when there are multiple class actions that have commenced. However, it is likely that they would take the same items into consideration as courts in other Provinces have considered, in order to ensure that the class members' best interests are fairly and vigorously represented.

Alberta has a unique system of costs for class actions. Although other Provinces also have a "loser pay" system, plaintiffs in those other Provinces may be protected by funds that are set up to relieve representative plaintiffs from the potential costs burden. This type of fund does not exist in Alberta. Despite this, courts have been willing to accept a no costs regime in appropriate cases which are brought in the public interest.

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[2] S.A. 2003, c. C-16.5

[3] Alberta Law Reform Institute, Class Actions, Final Report No. 85 (Edmonton: ALRI, 2000) [ALRI]

[4] *Gillespie v. Gessert*, [2006] A.W.L.D. 2029 (Q.B.) at para. 25 [*Gillespie*]

[5] *Windsor v. Canadian Pacific Railway*, [2006] 8 W.W.R. 672 (Alta. Q.B.) at para. 49 [*Windsor*].

[6] *Gillespie*, supra.

[7] *Windsor*, supra, at 71.

[8] *Ibid.*, at para. 91; *Class Proceedings Act* section 9(3).

[9] *L. (T.) v. Alberta (Director of Child Welfare)* [2006] Alta. L.R. (4th) 23 (Q.B.) [*L.T. v. Alberta*].

[10] *Ibid.*, at 67.

[11] *Class Proceedings Act*, s.1(e)

[12] *Windsor*, supra, at para. 103; *Class Proceedings Act* section 5(1)(c).

[13] *Paron*, supra, at 90

[14] *Windsor*, supra, at 110 – 112.

[15] *Condominium Plan No. 0020701 v. Investplan Properties Inc.*, [2006] A.W.L.D. 1847, at para. 93 [Investplan]

[16] *Windsor*, supra at para. 125; *Class Proceedings Act* s. 17

[17] *Ibid.*, at para 127 – 128, see also *L.T. v. Alberta*, supra, at para. 134 – 135.

[18] *Kristal*, supra, at para. 129

[19] *Windsor*, supra, at para. 131.

[20] *Investplan*, supra, at para. 99; see also *Metera v. Financial Planning Group*, [2003] 10 W.W.R. 367 (Alta. Q.B.)

[21] *L.T. v. Alberta*, supra, at para. 117.

[22] ALRI, supra, at para. 221

[23] *Windsor*, supra, at para. 155.

[24] *Dutton*, supra at para. 41.

[25] *Windsor*, supra at para. 156-57.

[26] *Windsor*, supra, at para. 162

[27] ALRI, supra, at para. 218.

[28] *Windsor*, supra, at para. 163-64.

[29] *Kristal*, supra, at para. 84; see also *Gillespie*, supra, at para. 23.

[30] *Class Proceedings Act* s. 6.

[31] *Paron v. Alberta (Minister of Environmental Protection*, [2006] A.W.L. D. 2331 (Q.B.) at para. 35 [*Paron*].

[32] *Investplan*, supra, at para. 53. Also in *Hollick*, the court says that the affidavit evidence need not be extensive or that a detailed merits assessment be done.

[33] *Class Proceedings Act*, supra, s. 1(d)

[34] *Class Proceedings Act*, S.O. 1992, c.6

[35] *Class Proceedings Act*, C.C.S.M., c.C130

[36] *Lamb v. Bayer Inc.* (2003), 242 Sask. R. 80 (Q.B.); *Pardy v. Bayer Inc.* (2003), 229 Nfld. And PEIR 242 (S.C.Tr.Div.), leave to appeal refused 2003 NLCA 45.

[37] *Ibid.* at 48-49.

[38] *Alberta Hansard*, April 16, 2003, pp. 1081-84.

[39] [2006] A.W.L.D. 2022 (C.A.)

[40] *Ibid* at para. 31.

[41] *Ayrton*, supra.

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