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AN INTRODUCTION TO CLASS ACTIONS

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OVERVIEW

Brief History of Class Actions in Saskatchewan

- *Conceptual Overview*
- *How they have been used to date*

Basic Concepts

- *Overview of the Act*
- *What it is?*
- *Steps of a class action*
- *The national class action*

Practical Issues to Consider

SOME HISTORY

January 1, 2002, Saskatchewan becomes fourth Canadian province to pass class proceedings legislation

Quebec (1975), Ontario (1992) and British Columbia (1996).

All provinces except PEI have followed

Saskatchewan *Class Actions Act* based on ULC Model

INDIVIDUAL UNTIL CERTIFIED

Same basic test under all common law legislation:

1. *the pleadings disclose a cause of action;*
2. *there is an identifiable class;*
3. *the existence of common issues (whether or not they predominate)*
4. *a class action would be the preferable procedure*
5. *existence of a suitable representative plaintiff with an adequate litigation plan*



MASS ALLEGED WRONGS

- mass wrongs breed the pursuit of class actions, particularly where a large number of small or modest claims exist that would be difficult to pursue individually
- One classic example is a train wreck
- *Brooks v CPR*, 2007 SKQB 247, a train derailment by Estevan may have been certifiable but for the Defendant proactively taking steps to implement a claims resolution process with local residents prior to the commencement of the action

MASS ALLEGED WRONGS

- *Thorpe v Honda Canada*, 2011 SKQB 72
- Alleged common defect of premature tire wear for certain car models
- “unrealistic to expect, in these circumstances, that Honda Canada’s voluntary customer service program would provide fair and appropriate redress to aggrieved class members”

LOCAL VS. NATIONAL

- The proposed class may be strictly Saskatchewan residents as would have been the case in *Brooks* or pan Canadian as in *Thorpe*
- The proposed class must include Saskatchewan residents but can include any resident of Canada
- If a class is certified both resident and non-resident are considered class members unless they “opt-out”

ARC OF CLASS ACTIONS IN SASK AND CANADA

- Supreme Court guidance remains critical given the similarity of class action legislation across Canada
- Overriding guidance is that certification of class actions should generally not be a difficult hurdle. Relatedly, the evidentiary burden at certification is lower than the balance of probabilities
- However, each application is still dependent on the manner in which it is framed and the evidence tendered

ARC OF CLASS ACTIONS IN SASK AND CANADA

- Examples include an important trilogy of SCC cases *Hollick*, *Rumley* and *Dutton*
- *Hollick* – nuisance claim by residents living near a landfill – not certified
- *Rumley* – claim by disabled students at an institution for sexual abuse dating back decades – certified
- *Dutton* - 229 investors in federal Business Immigration Program claiming fund mismanagement - certified

ARC OF CLASS ACTIONS IN SASK

Complexity explains some decisions to refuse certification

Hoffman v Monsanto - Claim by a proposed class of organic farmers that release of open pollinating GMO herbicide resistant canola see destroyed their organic market

Proposed certification would have encompassed:

- *Potentially thousands of individuals in Sask and other jurisdictions*
- *8 ½ year time span*
- *At least six different private organic certifying agencies, each with different standards*
- *At least six different alleged causes of action*

HOFFMAN V MONSANTO
(CERT. JUDGMENTS – CONT.)

Multiple defendants and seed varieties

Evidentiary record correspondingly voluminous

39 affidavits from lay and expert witnesses
(experts in agronomy, marketing, international
and national law, genetics and economics)

Cross-examination on affidavits, resulting in
over 600 pages of additional sworn evidence

ARC OF CLASS ACTIONS IN SASK

Alves v First Choice Canada Inc., 2011 SKCA 118 – claim against several tour companies denied certification. Claim involved water shortages at various resorts in a region of Cuba. However, too many differences existed between resorts to certify against multiple companies

Contrast, *Microcell v Frey*, 2011 SKCA 136 where an action was certified against 6 companies engaged in providing wireless services across Canada in relation to certain charges in service contracts over a 20 year period

ARC OF CLASS ACTIONS IN SASK

Wuttunee v Merck, 2009 SKCA

Overtured certification of a claim involving an anti-inflammatory drug, Vioxx

Ultimately, a product of excessive ambition by plaintiffs

- *Smith JA: criticism of “two choices made by the respondents in fashioning this action: (1) the choice to combine in one action a number of diverse and not necessarily related claims; and (2) the choice to define those claims vaguely so as not to confine the plaintiffs to particular factual allegations.”*

ARC OF CLASS ACTIONS IN SASK

More recently, actions involving prescription drugs have been certified

Dembrowski v Bayer, 2016 SKQB 324 – action involving a birth control pill

Tluchak v Bayer, 2018 SKQB 311 – action involving an anti-coagulant

G.C. v Merck Canada, 2019 SKQB 42– action involving a prostate and hair loss drug

ARC OF CLASS ACTIONS IN SASK

Actions involving institutional abuse continue to be certified

Pederson v Saskatchewan (Minister of Social Services), 2016 SKCA 142

Ross v Canada (Attorney General), 2018 SKCA 12

FOUR BASIC CONCEPTS

What is a “class action”?

“Certification”

“Representative plaintiff”

“Class”

WHAT IS A CLASS ACTION?

Class actions are (almost) entirely procedural:

“The Act and rules governing class actions deal with procedures; they do not create substantive rights.

Hoffman v Monsanto and Aventis, 2002 SKCA 120

Class actions are an aggregation of claims: i.e. the efficient and appropriate adjudication of disputes involving multiple parties, involving “common issues”

“... the object of the Act is not to provide perfect justice, but to provide a ‘fair and efficient resolution’ of common issues. It is a remedial, procedural statute and should be interpreted liberally to give effect to its purpose. It sets out very flexible procedures and clothes the court with broad discretion to ensure that justice is done to all parties.”

Endean v Canadian Red Cross Society, 1997 CanLII 2079 (BCSC)

WHY CLASS ACTIONS?

- Judicial economy: aggregation of similar claims avoids duplicative fact-finding and legal analysis
- Improved access to justice: making small claims economical
- Behavior modification: of those who cause wide-spread, but individually small claims

Western Canadian Shopping Centre v Dutton, 2001 SCC 46

CERTIFICATION

Procedural step that results in a Court order determining if the action can proceed as a class action

Certification is not a merits test:

- “The application for certification is not a merits hearing...”

Hoffman v Monsanto and Aventis, 2002 SKCA 120

Certification has traditionally been the principal battleground

REPRESENTATIVE PLAINTIFF

Represents him/herself and all members of the class

Prosecutes the common issues (only)

Authority to settle – subject to court approval after notice to the Class

CLASSES AND SUBCLASSES

The individuals who are “in” the action

Determines who:

- *is subject to procedural regulation*
- *is bound by the decision on the common questions*
- *can have their claim disposed of through judgment or settlement*

Subclasses required when:

- *Where a sub-set of the class have claims that raise common issues not shared by all in the class and the protection of the interests of subclass members requires separate representation*

STEPS TO A CLASS ACTION

Commencement (Statement of Claim)

Appointment of case management judge

Certification motion

Common Issue discovery (oral and documentary)

Trial of common issues

Trial or other process to determine individual issues

(There is no mandatory mediation)

COMMENCEMENT

Must be Saskatchewan-resident representative

No requirement for leave to commence the action -- but need Certification order before the action is a “class action”

Time limits for certification :

- *Theoretically only, within 90 days of delivery of defence/time for delivery*
- *any time with leave of court*

APPOINTMENT OF CASE MANAGEMENT JUDGE

Once all defendants have been served with Statement of Claim, plaintiff can apply to Chief Justice Popescul for appointment of case management judge

Application is made *ex parte*

Case management judge determines certification application and any other applications brought by either party

Other applications may be determined at the same time as certification or occasionally before

5 PART TEST FOR CERTIFICATION

The Class Actions Act, SS 2001, c C-12.01

- *Came into force in Saskatchewan on January 1, 2002*
- *See also Part 3, Division 6 of the QB Rules*

Test for Certification is set out in s. 6(1):

The court shall certify an action as a class action... if the court is satisfied that:

- (a) the pleadings disclose a cause of action;*
- (b) there is an identifiable class;*
- (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;*

5 PART TEST FOR CERTIFICATION

(d) a class action would be the preferable procedure for the resolution of the common issues;

(e) there is a person willing to be appointed as a representative person who:

- (i) would fairly and adequately represent the interests of the class;*
- (ii) has provided a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action;*
- (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.*

#1: IS THERE A “CAUSE OF ACTION”?

“Pleadings disclose a cause of action”

- *Test in Saskatchewan is now whether it is “plain and obvious” that the claim cannot succeed*

Pederson v Saskatchewan (Minister of Social Services), 2016 SKCA 142

Issue of law, not fact

- *No evidence is filed*
- *Determined assuming every factual allegation made in the Statement of Claim is true*

#2: IS THERE AN “IDENTIFIABLE CLASS”?

Evidence based inquiry

Existence of an “identifiable class” is dependant upon establishing the existence of a class that is identifiable by objective criteria composed of members who share a “colourable claim”.

To establish a “colourable claim” there must be a rational relationship between the class and the proposed common issues to be decided in the common issues trial

Hollick v City of Toronto, 2001 SCC 68

#3: ARE THERE “COMMON ISSUES”?

Evidence based inquiry

Issues that are common (apply) to all class members

Definition (s. 2):

- *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*

Common issues need not predominate (s. 6(1)(b))

#4: IS A CLASS ACTION A “PREFERABLE PROCEDURE”?

Evidence based inquiry

Focus of many certification applications

Class action must be a preferable
procedure for resolving the claims of the class

Hollick v City of Toronto, 2001 SCC 68

Plaintiff must not only show that a class
action is preferable – but that the proposed
class action is the preferable procedure

#5: IS THE PLAINTIFF SUITABLE AS A “REPRESENTATIVE PLAINTIFF”?

Evidence based inquiry

Fairly and adequately represent the interests of the class

- *Plaintiff's ability*
- *Counsel's ability*

Existence of a personal cause of action

Plan for the class action that sets out a workable method of advancing the action

Absence of conflict with interests of other class members

NATIONAL CLASS ACTIONS

Certification of a class action that extends not only to residents of this province, but also non-residents (in appropriate cases not just other Canadian residents, but also persons resident in other countries)

Different rules in different jurisdictions:

- *opt-in and opt-out models*

Saskatchewan is now an “opt-in” province

EVIDENCE ISSUES AT CERTIFICATION

Test 1 (cause of action) is a legal question

Tests 2-5 are evidence-based and have imbedded a significant element of discretion

Standard of proof for the plaintiff to establish tests 2-5 is “some basis in fact”

- *Low threshold for plaintiff, but requires more than symbolic scrutiny by the Court*

Pro-Sys Consultants Ltd. v Microsoft Corporation, 2013 SCC 57

Plaintiff and defendant file affidavits focused on, *inter alia*:

- *Number and complexity of individual v common issues*
- *Idiosyncrasies of the plaintiff and his/her claim*

Cross examination on affidavits is more routine than other types of proceedings

CONTENTS OF CERTIFICATION ORDER

Class: identifying characteristics

Appoint representative plaintiff

Set out the nature of the claims

State relief claimed on behalf of the class

Set out the common issues

Manner and time for opting out

NOTICE ISSUES

Court approval required before notice is given
Defendant can be required to participate in the notice:

- *“The court may order a party to give the notice required to be given by another party pursuant to this Act” (s. 25(2))*
- *Court can apportion costs of notice among parties (s. 26(1))*

DISCOVERY

Same rights as any other action (s. 19)

Discovery of non-representative plaintiffs

- *only with leave (s. 19(2))*
- *Where leave granted, limits on use of evidence (R. 3-95)*

TRIAL(S)

Unless court orders otherwise, common issues to be determined together (s. 13(1))

- *Common issues trial judge can be the case management judge*

Individual issues to be determined by:

- *Queen's Bench judge;*
- *Inquiry pursuant to The Queen's Bench Rules*
- *Other manner of determination -- but only with consent of the parties*
- *Procedure subject to court direction (s. 29(2) and (3))*

DISPOSITION OTHER THAN VIA TRIAL

Once an action is certified, settlement, discontinuance or abandonment require court approval (s. 38)

Individual claims can be settled individually

Judicial control over communications to class members

COSTS

Pursuant to s. 40, court can now award costs for any application, action or appeal

- *Change introduced in 2015*
- *Previously Saskatchewan was a no costs jurisdiction*

In determining if costs award should be made, court looks at number of factors (s. 40(2)):

- *Including public interest, if action involves novel law or was a test case, access to justice concerns and any other factor the court considers appropriate*

Class members (other than representative plaintiff) not liable for costs, except relative to individual claims

LEGAL FEES

Contingency fees continue to be allowed

Court supervision of fees and fee agreements

PROCEDURAL AND PRACTICAL IMPLICATIONS

Pursuing national actions raises very complex issues particularly when the same Defendant is sued across the country and multiple plaintiff law firms have commenced action

Outside counsel may appear here and attempt to obtain “carriage” - *Baumung v Bayer Inc.*, 2016 SKQB 221

Our legislation allows an outside plaintiff to appear at the certification and argue the Court should stand down in favour of another jurisdiction - *Ammazzini v Anglo American PLC*, 2016 SKQB 53

If actions previously certified in certain jurisdictions the Saskatchewan court can carve out those jurisdictions – ex. *Dembrowski*

PROCEDURAL AND PRACTICAL IMPLICATIONS

As with regular actions, most certified cases tend to settle. However, even settlement approval is not guaranteed. *Perdikaris v Purdue Pharma Inc.*, 2018 SKQB 86

The summary judgment procedure applies to class actions and can be used to dispense of actions – *Holland v Sask Agriculture*, 2017 SKQB 172, *Sandoff v Loblaw Companies Limited*, 2015 SKQB 345

PROCEDURAL AND PRACTICAL IMPLICATIONS

Class actions can proceed to a common issues trial – *May v Saskatchewan*, 2013 SKCA 11, pension plan case dismissed on its merits.

We have not yet seen a situation where the court has had to grapple with handling the processes contemplated under *The Class Actions Act* for determining remaining individual issues after the determination of a common issues trial.

THANK YOU

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Q & A