

# INNOVATIVE CLASS PROCEEDINGS: RECENT TRENDS

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*Dust they are, and unto dust they shall return, yet human beings have difficulty resigning themselves to living in dust. Sometimes, weary of brooms and buckets of water, they are not unwilling to turn to the courts to get rid of it. This case is proof of that.<sup>1</sup>*

## INTRODUCTION

To a varying extent, in all Canadian jurisdictions, the class proceeding remains in its infancy. Its function and capability are increasingly contentious. The Supreme Court of Canada has described its objectives in language evocative of social utility: procedural and substantive.

Yet, the Court maintains:

The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights [...]. It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so.<sup>2</sup>

Members of the defendants' and plaintiffs' bars argue, respectively, that the class action is (a) solely the sum of individual claims, and (b) a vehicle for public litigation.<sup>3</sup>

Regardless, it must be practicably manageable.

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<sup>1</sup> *St. Lawrence Cement Inc. v. Barrette*, [2008] S.C.J. No 65, 2008 SCC 64 (CanLII) at para. 1, per LeBel and Deschamps J.J. ("*St. Lawrence Cement*").

<sup>2</sup> *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19 (CanLII) at para. 17, per LeBel J. See also C. Carron, "A Gentle Reminder that Traditional Class Action Principles are not Passe" (2006) 3 CCAR 575.

<sup>3</sup> See: C. Jones, *Theory of Class Actions* (Toronto: Irwin Law Inc., 2003) at 44-45, where he describes class counsel as "private prosecutor."

The certification stage serves as the gatekeeper by whom admittance is granted only to claims with sufficient commonality to permit a determination that will significantly advance the litigation for the class as a whole. Where the individual issues overwhelm the common issues, courts are quick to dismiss the motion.<sup>4</sup> Where the proceeding is allowed, common issues are ordered to a hearing, and individual issues left to an alternate procedure of assessment, such as mini-hearings for each class member.

Individual issues may be determinative of compensation for the class (causation, loss and damages). Consequently, in the course of the litigation, defendants emphasize the predomination of individual issues to prohibit certification, restrict common issues, or decertify the proceeding. In response, plaintiffs frame the issues to meet the commonality requirements of certification. At the crossroads of the debate, is the substantive law.

The following paper provides a brief overview of recent trends in class proceedings. Its aim is to highlight some of the innovative ways in which they are adapting to meet the exigencies of contemporary disputes in a manner that is relevant to the judiciary at large. Its focus is the social dimension of class proceedings and the interplay between procedural rules and substantive change.

## EVOLUTION OF CERTIFICATION REQUIREMENTS

### *(a) Overview of Legislation and Jurisprudence*

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<sup>4</sup> This is a broad generalization that fails to acknowledge many categories of class actions where individual issues are clearly set out in the litigation plan, or evident from the nature of the claim and are therefore considered "manageable". This generalization also fails to acknowledge recent judicial support of class proceedings as an advantageous tool for litigating residual individual issues through alternative dispute mechanisms such as mini-hearings before specially designated adjudicators. See *Cassano, infra*, note 43.

Over the past thirty years, the law of representative actions in Canada has evolved with increasing momentum. Class proceedings legislation now exists in the majority of provinces.<sup>5</sup> Where legislation is lacking, the courts are called to fill the void.<sup>6</sup> Where the statutory framework is comprehensive, it is heavily qualified by judicial interpretation. Preliminary approval to advance a class proceeding as such is a uniform requirement and subsequent judicial case management the norm.

The requirements for certification are largely consistent across the common law provinces and the Federal Court, and are modeled on the recommendations of the Ontario Law Reform Commission, *Report on Class Actions* of 1982.<sup>7</sup> Additionally, the Supreme Court has established certain elemental interpretive principles premised on the dual role of class actions: equity and economy.<sup>8</sup> Above all, courts across the country are expected to adopt a generous approach, in order to strike a balance between efficiency and fairness with respect to the court and the parties.<sup>9</sup>

The certification stage is a threshold determination of the proper procedural disposition of the action. It is “decidedly not meant to be a test of the merits [...]”<sup>10</sup> Accordingly, while the plaintiff must establish an evidentiary basis for certification, she need only show “some basis in fact for each of the certification requirements [...] other than the requirement that the pleadings disclose a cause of action.” There must be an identifiable class with common issues, the resolution of which will substantially advance the litigation so that a class action is the preferable procedure.<sup>11</sup>

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<sup>5</sup> Prince Edward Island and the territories are the sole exceptions. M. Eizenga *et al.*, *Class Actions Law and Practice*, looseleaf (Markham, Ont.: LexisNexis Canada Inc., 2008) ¶ 3.2.

<sup>6</sup> *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 (“Dutton”) at para. 34.

<sup>7</sup> Ontario, Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982). Long before the Commission’s Report, the *Code of Civil Procedure*, R.S.Q. c.C-25 stipulated specified procedures for class actions.

<sup>8</sup> See the so-called “Class Action Trilogy” which delineates the fundamental principles of class actions in Canada: *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184; and *Dutton*, *supra* note 6.

<sup>9</sup> *Supra*, note 6 at para 46; *Ibid.* at para. 14 “*Hollick*”.

<sup>10</sup> *Supra*, note 8 at para. 16 “*Hollick*”.

<sup>11</sup> *Ibid.* at para. 32.

The above is now trite law. Causes of action have been treated fairly consistently as more or less amenable to certification. Counsel has developed expertise to craft claims accordingly. Specialized judges are assigned to preside over matters prior to trial. Class actions have developed into a practice niche.

Although the topic of certification is seemingly well-worn, it is, however, as dynamic as the will of the legislature and the common law. Since the commencement of class proceedings in Canada, it has repeatedly been stated that they are a procedural mechanism alone, that they create no new causes of action.<sup>12</sup> Despite the Supreme Court's recent affirmation to that effect,<sup>13</sup> class actions do by nature share in a reciprocal relationship with the substantive law.

At certification, varying degrees of judicial flexibility and conservatism mirror substantive requirements of the claims pleaded. Likewise, deficiencies in the law are called to account through the attempted certification of novel claims. Insofar as the approval or dismissal of a class proceeding fosters substantive innovation, its influence extends beyond the practice niche into individual actions.

*(b) Suitability of Legal Claims to Certification*

Equitable considerations aside, the class proceeding is an expansion of the rules of joinder; it is the consolidation of related claims to evade duplication in findings of fact or law. Its origination is attributed to the compulsory-joinder rules of the English courts of equity in the late seventeenth and early eighteenth centuries.<sup>14</sup> The rule was one of convenience. Where it was impracticable to join all parties, it was unavailable.<sup>15</sup>

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<sup>12</sup> *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Gen. Div.) at 739, per Montgomery J.

<sup>13</sup> *Supra*, note 2.

<sup>14</sup> S. Finn, "In a Class all its Own: The Advent of the Modern Class Action and its Changing Legal and Social Mission," (2005) 2 CCAR 333.

<sup>15</sup> See: *Duke of Bedford v. Ellis*, [1901] A.C. 1, [1900-3] All E.R. 694 (H.L.) and *Adair v. The New River Company* (1805), 11 Ves. 429, 32 E.R. 1153 (Ch.).

The group action has mutated over time to account for considerations beyond convenience. Recognizing the pitfalls of compulsory-joinder, the courts of equity subsequently adopted the more malleable representative action: the archetype of our current system.<sup>16</sup>

In contemporary Canadian jurisprudence, it is accepted that class actions fulfill the triumvirate of judicial economy, behaviour modification and access to justice.<sup>17</sup> These considerations are engaged at the stage of certification when deciding whether a class action is the preferable procedure. The "preferability" criterion has become the "principle analytical threshold for class actions."<sup>18</sup>

Three ostensibly co-equal considerations. However -and despite statutory direction that a class proceeding need only be the preferable procedure for issues common to the class- when faced with evidence of individual issues, the overall "manageability" of the action remains the primary consideration in the minds of certification judges.

Consequently, causes of action requiring proof of causation and loss are viewed as less amenable to the procedure. As described from the defendant's perspective in *Defending Class Actions in Canada*,<sup>19</sup>

[An] area for the exploitation of possible weaknesses in the claim is the itemization and examination of all the causes of action that are advanced and of the key components that are necessary to establish them. The legislation states that certification should not be refused only because the claims for damages would require individual assessment after the determination of the common issues. However, if an assessment of individual damages is going to be necessary, this problem, combined with other problems, can make a determination of common issues difficult or impossible, and it can persuade a judge that a class proceeding is not the "preferable procedure". Such other problems include a need to prove actual reliance in each individual case or the

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<sup>16</sup> *Ibid.* and *supra*, note 14.

<sup>17</sup> *Supra*, note 8 "Class Action Trilogy."

<sup>18</sup> *Supra*, note 3 at 124.

<sup>19</sup> K. Jones-Lepidas, ed., *Defending Class Actions in Canada*, 2<sup>nd</sup> ed. (Toronto: CCH Canadian Limited, 2007).

need to prove the existence of a contract, the individual terms of which vary with each individual plaintiff.<sup>20</sup>

These "weaknesses" have been tirelessly disputed by class counsel in areas including: negligence, environmental claims, breach of contract and consumer transactions concerning financial services, price-fixing and misrepresentation.

In the circumstances, class counsel has increasingly asserted innovative causes of action and methodologies for proof of causation and damages. As stated from the plaintiff's perspective in *Class Proceedings, Gains-Based Claims and Deterrence*,

In order to formulate claims that predominate with common issues, legal ingenuity will be needed.<sup>21</sup>

## CLASS PROCEEDINGS AS A SOURCE OF SUBSTANTIVE LAW

There are several theoretical underpinnings for the proposition that class proceedings impact substantive law;<sup>22</sup> this paper presents a brief picture of but a few. Specifically, class proceedings favour the development of substantive law as a result of:

- (a) Novel Causes of Action
- (b) Circumventing Causation Requirements
- (c) Aggregate Damages and Changing Remedies
- (d) Favourable Costs Regimes, Funds and Fee Arrangements

### *(a) Novel Causes of Action*

The class action is unique in that causes of action must be sufficiently pleaded from the outset to proceed past certification.<sup>23</sup> Novel causes of action can assist certification of a

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<sup>20</sup> *Ibid.* at 184.

<sup>21</sup> J. Chapman & P. Shedden, "Class Proceedings, Gains-Based Claims and Deterrence" (2007) 4 CCAR 47 at 53.

<sup>22</sup> *Ibid.* at 48-51.

<sup>23</sup> *Supra*, note 8 "*Hollick*" at para. 25; and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41.

proposed class action. Courts are reluctant to decide matters of public policy on a procedural motion; uncertainty of the law is best considered on a full evidentiary record.<sup>24</sup>

By far, the most intriguing recent, novel cause of action is waiver of tort. Waiver of tort has been pleaded in several class actions across the country.<sup>25</sup> The manner in which waiver of tort is defined in the pending litigation may revolutionize private law. As stated by the Honourable Mr. Justice Todd L. Archibald of the Ontario Superior Court,

[I]f waiver of tort comes to be accepted as a standalone cause of action, it will have significance, not just for class proceedings, but for the common law generally.<sup>26</sup>

Waiver of tort is an equitable doctrine that grants disgorgement to the plaintiff of profit gained by wrongful conduct of the defendant..<sup>27</sup>The equitable objective is deterrence of wrongdoing over and above compensation. Consequently, it is unclear if the doctrine requires proof of loss. Whether it constitutes a cause of action has come to a head in the recent case of *Serhan (Estate) v. Johnson & Johnson Inc.*<sup>28</sup>

*Serhan* is a product liability case concerning defective medical devices. The plaintiffs allege that the SureStep home blood glucose monitoring system manufactured for, and distributed to, diabetics produced erroneous readings in cases of high glucose levels.

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<sup>24</sup> *Heward v. Eli Lilly & Co.* (2008), 91 O.R. (3d) 691, 2008 CanLII 32303 (Div. Ct) per Cumming J. ("Eli Lilly") at paras. 26, 32.

<sup>25</sup> *Infra* notes 28 and 31.

<sup>26</sup> Hon. Mr. Justice T. Archibald & C. Vernon, "No Harm, No Foul?: The Existence of Waiver of Tort as an Independent Cause of Action in Canadian Law" in *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2008) at 410 "No Harm, No Foul?"

<sup>27</sup> Professors of law, John McCamus and Peter Maddaugh Q.C. have published a wealth of literature on the subject. See: J. McCamus & P. Maddaugh, *The Law of Restitution*, looseleaf (Aurora: Canada Law Book Inc., 2007); and J. McCamus, "Waiver of Tort and Unjust Enrichment" (Paper presented at the 4<sup>th</sup> Annual Symposium on Class Actions, April 2007) [unpublished].

<sup>28</sup> 72 O.R. No. 2904 (S.C.J.) per Cullity J., aff'd 85 O.R. (3d) 665 (Div. Ct.) per Epstein J., leave to appeal to the S.C.C. dismissed, [2006] S.C.C.A. No. 494 ("Serhan").

The defendants to the action are a parent company and its subsidiaries. The American subsidiary pleaded guilty to strict liability misdemeanors in the U.S. following federal investigations.

On the certification motion, the plaintiffs claimed damages for negligence, negligent and fraudulent misrepresentation, breach of the *Competition Act* and conspiracy. Furthermore, they submitted that the defendants hold the revenue generated from the sale of the product in constructive trust for the benefit of the class. One requested remedy was an accounting, requiring the disgorgement of revenue.

There was little evidence that members of the putative class had suffered personal injury by using the product. Moreover, few of the class members had borne the costs of acquiring the product, which was paid for by provincial health services. Therefore, there was little evidence of damage.

In light of the evidence before him, Justice Cullity found that the proposed common issues relating to the traditional causes of action pleaded would have required individual hearings to determine the requisite causation, reliance and loss.

However, on a liberal interpretation of *Soulos v. Korkontzilas*,<sup>29</sup> Justice Cullity accepted that, for the purposes of the constructive trust or disgorgement, the plaintiff could possibly rely on the wrongful conduct of the defendant for a gains-based remedy, without proof of loss.

He found that a cause of action could possibly exist where there is a causal connection between wrongful conduct by, and gain accruing to, the defendant:

Such facts would constitute a cause of action for which the remedies of a constructive trust or, alternatively, an accounting of revenues, are claimed. Claims based on waiver of tort seek "restitution" of benefits

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<sup>29</sup> [1997] 2 S.C.R. 217.

received by the defendants, as a consequence of their tortious conduct rather than damages to compensate the plaintiffs for a loss.<sup>30</sup>

Without deciding the availability or constituent elements of the doctrine, Justice Cullity certified the action as a class proceeding on the basis that the law concerning waiver of tort is uncertain. Given the uncertainty of the law, a number of other courts have certified causes of action in waiver of tort based on a range of factual allegations.<sup>31</sup>

*(b) Circumventing Causation Requirements*

The above aside, evidently, compensation for damage is the hallmark of many civil actions. Apart from liability, compensation is predicated on proof the claimant suffered loss occasioned by the defendant. Insofar as causation necessitates assessment of each class member's claim, it can be detrimental to certification of a class action. The challenge of class counsel is to demonstrate that the breach caused a quantifiable loss in a manner that circumvents individual issues.

Causation can be divided into subjective and objective elements. In causes of action requiring the claimant prove reliance, both subjective and objective elements are essential. The reliance requirement impacts class proceedings in several substantive areas, not limited to: negligence, contract, competition, consumer protection, products liability and securities law. In many such cases, the allegation of misrepresentation is a constant.

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<sup>30</sup> *Supra* note 28 at para. 34

<sup>31</sup> See: *Supra* note 24 "*Eli Lilly*"; *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828, 2007 CanLII 53244 per Hoy J., leave to appeal ref'd, [2008] O.J. No. 1916, 2008CanLII 22910, per Carnwath J.; and *Lewis v. Cantertrot Investments Ltd.*, [2006] O.J. No. 1061, per Cullity J. Waiver of tort has not received the same reception in other provinces as evinced by the British Columbia Superior Court decisions of *Reid v. Ford Motor Co.*, [2006] B.C.J. No. 993, 2006 BCSC 712 per Gerow J.; and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG et al.*, [2008] B.C.J. No. 831, 2008 B.C.S.C. 575, per Masuhara J., both distinguished in *Eli Lilly*.

Reliance is a question of fact that will pass the cause of action stage at certification if adequately pleaded.<sup>32</sup> However, even where there is a rebuttable inference of reliance, courts have held that defendants are entitled to inquire into the motivation of each class member so that reliance cannot be a common issue whose resolution would significantly advance the proceeding for the class as a whole.<sup>33</sup> Absent a special relationship or statutory exception, misrepresentation claims are treated strictly.

Similar to those in pensions and employment law, securities disputes are particularly well-suited to proceed as class actions because the represented class can be clearly-defined with common interests. Until recently, however, they have been negatively impacted by proof of causation. Recent trends in securities litigation provide a worthy example of the influence of class proceedings on substantive law.

In *Carom v. Bre-X Minerals Ltd.*,<sup>34</sup> a class proceeding was brought on behalf of purchasers of shares in Bre-X who suffered when the Alberta company's unsubstantiated representations were exposed and share prices plummeted. Prior to certification, the plaintiffs sought to amend their statement of claim, based on conspiracy, fraud and misleading advertising, to incorporate a cause of action in "fraud on the market."

The "fraud on the market" theory has facilitated class actions involving misrepresentations in the secondary market in the U.S. by removing the necessity to establish individual reliance. The plaintiffs' explicit objective in *Bre-X* was to circumvent the reliance requirement. Justice Winkler, now Chief Justice of Ontario, dismissed the motion on the basis that the Canadian common law of misrepresentation necessitates proof of reliance.

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<sup>32</sup> Since the cause of action requirement of certification is entirely based on the pleading, it need only be pleaded that class members relied on the defendant's breach. See: *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748, 2006 CanLII 32323 per Hoy J.

<sup>33</sup> *Supra* note 28 at paras. 56-61, citing *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.) per Winkler J.

<sup>34</sup> (1998), 41 O.R. (3d) 780 (S.C.J.) per Winkler J. ("Bre-X").

After subsequent proceedings, *Bre-X* was certified on the original pleadings, including allegations of fraudulent and negligent misrepresentation.<sup>35</sup> However, causation suffered the nebulous fate of possible individual hearings after the common issues trial on liability.

Recognizing the impediment the common law poses to shareholder remedies, recent amendments were enacted to securities legislation across Canada<sup>36</sup> It is generally accepted that the "new liability regime was intended to complement the goals of [class proceedings], especially behaviour modification."<sup>37</sup>

Section 138.3 of the Ontario *Securities Act*,<sup>38</sup> waives the necessity for reliance on representations by responsible issuers for misleading secondary market disclosures.

Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages...<sup>39</sup>

While previously, there was statutory liability in respect of publicly traded companies for primary market disclosure violations (i.e. where, arguably, there is a closer

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<sup>35</sup> (1999), 44 O.R. (3d) 173 (S.C.J.) per Winkler J., aff'd (1999), 46 O.R. (3d) 315, per Campbell J. (Div. Ct.), var'd (2000), 51 O.R. (3d) 236, per MacPherson J.A.(C.A.).

<sup>36</sup> Amendments were made to the respective Securities Acts in Alberta, Saskatchewan, British Columbia, Quebec, Manitoba and Ontario. Ontario's legislation came into effect in December 2005 and the other provinces' in the following two years.

<sup>37</sup> P. Anisman & G. Watson, "Some Comparisons Between Class Actions in Canada and the U.S.: Securities Class Actions, Certification and Costs" (2006) 3 CCAR 467 at 502. See also: *Ainslie v. CV Technologies Inc.*, 2008 CanLII 63217 (Ont. S.C.J.) per Lax J. , leave to appeal granted, 2009 CanLII 7165 (Ont. Div. Ct.) per Bellamy J. ("*Ainslie*") at paras. 7-13.

<sup>38</sup> R.S.O. 1990, c.S.5

<sup>39</sup> *Ibid.*, s. 138.3 [emphasis added].

relationship of proximity), the legislation now assists investors that trade in shares on public stock exchanges, which account for 95% of capital market activity in Canada.<sup>40</sup>

To date, jurisprudence on the legislation is minimal; effectiveness is uncertain. Nonetheless, the new legislation represents a move toward increased accessibility and deterrence.<sup>41</sup>

(c) *Aggregate Damages and Changing Remedies*

In all jurisdictions, class proceedings legislation includes special provisions for the evaluation, quantification and distribution of the defendant's monetary liability on an aggregate or individual basis.<sup>42</sup> Aggregate damages glaringly illustrate the interplay between class proceedings and the substantive law of remedies.

The criteria for certification of aggregate damages as a common issue are relatively settled.<sup>43</sup> An appropriate common issue asks the trial judge to consider whether aggregate damages (a) are warranted in the circumstances; (b) can be assessed and distributed; and, if so, (c) in what amount and to whom. All questions as to the evidence, assessment, and distribution of the award are for the trial judge on a full evidentiary record. Accordingly, the common issue need not be pleaded at the certification stage. However, to the extent that recognition of aggregate damages as a common issue bears positively on the preferability of certification of a class proceeding, it is advantageous for class counsel to do so.

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<sup>40</sup> J. Sarra, "Securities Class Actions Suits, New Statutory Remedies in the Canadian Financial Services Sector" (Paper presented at the 5<sup>th</sup> Annual Class Actions Symposium, , April 2008) [unpublished].

<sup>41</sup> Unfortunately, the amendments have already been criticized for their leave requirements, caps on damages and "loser-pays" costs provisions. See: *Supra* note 37 at 520 "Watson". The effectiveness of the legislation will depend, in part, on judicial treatment. See for instance: *Ainslie*, *supra* note 37.

<sup>42</sup> See for instance: Ontario CPA, ss.23-26; British Columbia CPA, ss. 29-34; and Newfoundland CAA, ss. 29-34.

<sup>43</sup> See generally: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) ("Markson"), per Rosenberg J.A. and *Cassano v. The Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.) ("Cassano"), per Winkler J.A.

Although the term "aggregate damages" is commonly used to describe relief, the statutory language is much more expansive and can encompass relief other than damages. The relevant provisions in each jurisdiction refer to the determination of the "defendant's liability" to class members where "monetary relief" is claimed on their behalf. The court may distribute an award in any manner including, in some instances, to persons other than class members (i.e. *cy-pres* awards).

The admissibility of statistical evidence to determine the amount or distribution of a monetary award promotes judicial economy and access to justice. Its use proffers compensation and obviates the need for individual claims. Moreover, the content and language of the legislation strongly reflects the objective of deterrence and behaviour modification. After all, aggregate awards are the sum of the defendant's liability, even where they do not precisely reflect class members' loss.

It is with regard to the latter submission that aggregate awards can be viewed as a means of furthering novel claims for restitutionary relief.<sup>44</sup> There are two forms of restitutionary relief, both constituting what is referred to equally as "gains-based"<sup>45</sup> and "benefit-based"<sup>46</sup> recovery. The two forms are (a) restoration of benefits conferred and (b) disgorgement.<sup>47</sup>

The former provides restoration to the plaintiff of the benefit she directly conferred on the defendant as a result of the impugned act; the latter disgorges to the plaintiff the profit gained by the defendant. The two are not always equivalent, for instance, where the defendant earned interest on the benefit conferred, or where class members did not

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<sup>44</sup> *Supra* note 21 at 61.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Supra* note 27 "Waiver of Tort".

<sup>47</sup> *Ibid.*

incur costs, as in the case of *Serhan*. Both remedies have been successfully pleaded on certification to allege common relief and, thereby, bolster the motion.<sup>48</sup>

*(d) Favourable Costs Regimes, Funds and Fee Arrangements*

From both perspectives of class and counsel, even where costs, funds and fee arrangements do not act as a direct incentive for novel substantive claims, they can at least blunt the adverse effects of failure.

There are two class proceedings costs regimes in Canada: (a) costs following the event, and (b) no costs. The former is subdivided into costs awarded in the same manner as in traditional proceedings,<sup>49</sup> and those awarded by class actions specific provisions.<sup>50</sup> The latter, "no-costs," regime<sup>51</sup> prohibits costs respecting a class proceeding, absent abusive or vexatious conduct.

Costs are inherently discretionary. No matter the regime, in the main, that an action is or is proposed as a class proceeding is considered by the court. In the absence of class actions specific provisions, courts have adopted those of other jurisdictions.<sup>52</sup> In Ontario, s.31 of the *CPA* explicitly permits the court, in exercising its discretion, to consider whether a class proceeding was a test case, raised a novel point of law or involved a matter of public interest. The legislation is tailored to advance the substantive law through class proceedings.

Whether courts assume a conservative approach to insulating the plaintiff from a costs award is another matter altogether. An affirmative finding of s.31(1) factors has

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<sup>48</sup>See generally: H. Pitch & M. Sokolsky, "Class Action Damages: Assessing Aggregate Damages in Class Action Litigation," (2005) 2 CCAR 41; as well as: *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.), per Cullity J.; *Hague v. Liberty Mutual Insurance Company*, [2004] O.J. No. 3057, 13 C.P.C. (6th) 1 (S.C.J.), per Nordheimer J.; *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2000] O.J. No. 4594, 4 C.P.C. (5th) 169 (S.C.J.), per Cumming J.; *Markson v. MBNA Canada Bank*, *supra* note 43; *Cassano v. The Toronto Dominion Bank*, *supra* note 43 .

<sup>49</sup> Alberta and New Brunswick.

<sup>50</sup> Ontario and Nova Scotia.

<sup>51</sup> British Columbia, Saskatchewan, Newfoundland, Manitoba, and Federal Court.

<sup>52</sup> *Pauli v. ACE INA Insurance* (2004), 354 A.R. 348 (C.A.), where the court utilized s.31 of the Ontario CPA.

weighed against substantial costs to defendants.<sup>53</sup> Notwithstanding, there are exceptions that prove the rule.<sup>54</sup> Moreover, whether a legal claim falls into one of the three categories is a threshold issue that can be decided in the negative in surprising circumstances.<sup>55</sup>

Nevertheless, in the event of an unsuccessful claim, the class may be shielded from costs. Class members, other than the representative plaintiff, are liable only with respect to individual claims. In certain jurisdictions, special assistance funds may indemnify the representative plaintiff.<sup>56</sup>

As noted above, novel substantive claims are encouraged by alternative fee arrangements made available by class proceedings legislation, including percentage-based and lodestar (base fee and multiplier) contingency fees. Counsel and the class, alike, benefit: success is a prerequisite for payment, and complexity and risk of litigation are accepted quantifiers.

## INNOVATIVE CLASS PROCEEDINGS: A CASE BRIEF

### (a) *St. Lawrence Cement v. Barrette*

*St. Lawrence Cement* is a significant ruling for environmental litigation. The action highlights the utility of advancing the substantive law through aggregated claims: it radically changes the law of no-fault civil liability in Quebec, awards aggregate relief

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<sup>53</sup> *Supra* note 72 "Guindon."

<sup>54</sup> See: *Sutherland v. Hudsons Bay*, [2008] O.J. No. 602, 164 A.C.W.S. (3d) 940 (S.C.J.), per Wilton-Siegel J. (pensions); and *Ruffolo et al. v. Sun Life Assurance Co. of Canada* (2008), 90 O.R. (3d) 59 (S.C.J.) per Perell J.

<sup>55</sup> See: *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331 (S.C.C.).

<sup>56</sup> See for instance: the Ontario, Class Proceedings Fund <<http://www.lawfoundation.on.ca/cpcabout.php>> and the Quebec, Fonds d'aide aux recours collectives <[http://www.formulaire.gouv.qc.ca/cgi/affiche\\_doc.cgi?dossier=5289&table=0](http://www.formulaire.gouv.qc.ca/cgi/affiche_doc.cgi?dossier=5289&table=0)>.

and, generally, “confirm[s] the right of citizens to launch environmental class actions.”<sup>57</sup>

The plaintiffs instituted the action for neighbourhood disturbances related to the operation of a cement plant. The plant had operated for approximately forty years, during which protests were repeatedly raised by residents against the statute authorized corporation. St. Lawrence Cement had previously invested several million dollars for environmental purposes, including the installation of protective equipment and periodical cleaning in the community. Nevertheless, the community was still afflicted by pollutants, primarily cement deposits, or "dust."

Although no-fault civil liability in nuisance is an existing cause of action at common law, it was uncertain under the Civil Code. The plaintiffs submitted that art. 976 of the Civil Code grants a right of action additional to fault-based civil liability where neighbourhood annoyances suffered are excessive.

The Superior Court affirmed that submission and calculated damages on average for zones varying in proximity to the plant. The total relief was indeterminable in the absence of sufficient evidence as to zone membership. Consequently, compensation was awarded to individuals through a claims-based procedure in a set amount per zone on proof of residence. After the Court of Appeal for Quebec's rejection of the no-fault liability claim, the Supreme Court restored the trial judge's conclusions, including the acceptance of evidence as to, and quantification of, damages.

The Supreme Court accepted evidence as to causation based on the release of the impugned substances in conjunction with the "neighbour" requirement in the statute

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<sup>57</sup> Y. Faguy, "From Dust to Deluge" *CBA National*, 18:2 (March 2009) 37 at 37. See also: C. Schmitz, "Top Court Restores Damages for Environmental Nuisance" *The Lawyers Weekly* 28:30 (5 December 2008) for an account of reactions to the ruling.

which it interpreted as meaning that "the plaintiff must prove a certain geographic proximity between the annoyance and its source."<sup>58</sup>

On the actual assessment of average damages in the context of the class action, the Supreme Court pronounced:

[T]he court can draw from the evidence a presumption of fact that the members of the group have suffered a similar injury (J.-C. Royer, *La preuve civile* (3rd ed. 2003), at p. 649). It may also divide the group into subgroups, each of them made up of members who have suffered a similar injury...

At the hearing in the instant case, 62 witnesses residing in the four zones described the annoyances they had suffered (Sup. Ct., at paras. 23-24). Relying on their testimony, Dutil J. found that the evidence showed a form of injury that was common to all members of the group, but that varied in intensity (para. 398). Dust emissions, odours and noise from the plant had affected the residents of some zones less than others. For this reason, Dutil J. divided the group members into four zones to ensure that there was some basic injury common to the residents of each zone. She thus ensured that there was a common injury in each zone.

[...]

Given the trial judge's discretion and the difficulty of assessing environmental problems and annoyances, we consider Dutil J.'s use of average amounts to have been reasonable and appropriate in the circumstances.<sup>59</sup>

In concluding this paper, it is worth noting that this same decision, which awards average damages, also references "polluter-pays" and "environmental protection" principles of public policy.<sup>60</sup> In *St. Lawrence Cement*, the confluence of substance and procedure, no-fault liability and aggregate relief, realizes the judicial economy, behaviour modification and access to justice objectives of class proceedings. At once, a large class of individuals is compensated for loss and industry is encouraged to internalize the costs of public protection.

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<sup>58</sup>*Supra* note 1 at para. 96.

<sup>59</sup>*Ibid.* at paras. 108-109, 114 and 116.

<sup>60</sup>*Ibid.* at para. 80.

