

## DEFENDANT CLASS PROCEEDINGS – THE CLASS ACTION JOSHUA TREE<sup>1</sup>

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Say the words “class action” to almost anyone, and the image invariably brought to mind is that of a representative plaintiff stepping forward, asking to pursue a defendant on behalf of an alleged class of similar plaintiffs, with similar claims against that defendant. These are the class proceedings that have multiplied at an exponential rate since their introduction to Ontario in 1993. If not yet a veritable forest, they clearly now are prominent features on our legal landscape, anchored in jurisprudence whose already firm roots extend deeper month after month, year after year.

However, that was not the only class action model introduced to Ontario by the *Class Proceeding Act, 1992*<sup>3</sup>. The legislation also contemplated a defendant pro-actively asking the court to elevate one of numerous proceedings against the defendant to the status of a plaintiff class action, and a plaintiff or defendant asking the court to appoint a particular defendant as a representative through which an entire class of defendants would be sued.

On any view, however, these other Ontario class action saplings planted back in 1993 simply did not take root and flourish.<sup>4</sup> The following comments aim to provide a brief overview of what happened, (or did *not* happen), suggesting some possible explanations.

### The Ontario Legislation<sup>5</sup>

With three exceptions, (discussed below), all Ontario class actions to date apparently have been advanced under section 2 of the Ontario CPA, (under the sub-heading “**Plaintiff’s class proceeding**”). It seems that little attention has been paid to sections 3 and 4 of the Act, which read as follows:

#### **Defendant’s class proceeding**

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

#### **Classing defendants**

4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

Section 5 of the legislation then makes the five well-known certification criteria, (disclosure of a cause of action in the pleadings, an identifiable class, common issues, qualification as the preferable procedure, and acceptability of the proposed representative), applicable to all three types of class actions.

The origins of the Ontario class proceeding legislation lie in the Ontario Law Reform Commission's 1982 "Report on Class Actions"<sup>6</sup>, and the "Report of the Attorney General's Advisory Committee on Class Action Reform"<sup>7</sup>, tabled in the Ontario Legislature in July, 1990. However, neither document provides much insight as to the rationale underlying the contemplated legislative provisions for defendant class actions.

The OLRC Report was "widely acknowledged as the most sophisticated and extensive analysis of class actions undertaken in the world"<sup>8</sup>, and "the definitive source on class proceedings and the experience of other jurisdictions"<sup>9</sup>, yet devoted just over three of its 880 pages to the matter of "Defendant Class Actions". This was deliberate. In particular, the Commission indicated that its report was directed "solely to an analysis of plaintiff class actions", as defendant class actions were "sufficiently discrete to merit separate treatment".<sup>10</sup> Moreover, the Commission observed that jurisprudence in Anglo-Canadian jurisdictions dealing with representative defendants had focused almost exclusively on the highly specialized area of litigation against unincorporated associations and unions; (i.e., claims seeking to impose liability on the members of such organizations for wrongs done by those acting on their behalf). Defendant class actions involving suits against a large number of defendants with no pre-existing relationship, sued for some wrong they allegedly have committed in common, had "received very little attention in the Anglo-Canadian cases or literature".<sup>11</sup> The Commission noted that, even in the United States, with its then far more extensive and evolved class action experience, defendant class actions brought in the federal courts pursuant to Rule 23(a) of the Federal Rules of Civil Procedure had received "considerably less [attention] than that accorded to plaintiff class actions". The Commission concluded by emphasizing its view that, although plaintiff and defendant class proceedings raised many common issues, it would be unwise to assume, without further analysis and consideration, that a common approach to plaintiff and defendant class actions was appropriate:

Defendant class actions raise many issues similar to those encountered in plaintiff actions. This is apparent from a review of the case law under Rule 23. Among the issues that have arisen are the following: the adequacy of a member of the class to represent the class; the costs of the class action and the representative defendant's responsibility for these costs; the right of members of the class to remove themselves from the class by "opting out"; the determination of individual issues once the common questions have been resolved; and settlement. *However, while many of these issues are common to both plaintiff and defendant class actions, the solutions required in the defendant class action context may be quite different and, in our view, merit separate study.* [Emphasis added.]<sup>12</sup>

If such study was undertaken prior to publication of the AG Advisory Committee Report eight years later, it does not seem to have received much publication or attention.

For its part, in relation to the provisions which eventually became section 3 of the Ontario CPA, the AG Advisory Committee Report simply stated as one of its unanimous recommendations that "the procedure should contemplate the creation of *a class of plaintiffs* by either the representative plaintiff or *the defendant(s)*".<sup>13</sup> [Emphasis added.] Commenting on the provisions which combined what eventually became sections 3 and 4 of the Ontario CPA, (and which therefore went beyond classing

*plaintiffs* at the request of defendants, to include the classing of *defendants* at the request of plaintiffs or defendants), the AG Advisory Committee Report limited its remarks to the following sentence:

The Committee anticipates the need for defendant class proceedings and developed this provision to ensure that such proceedings were available and mirrored plaintiff class proceedings.<sup>14</sup>

There was no express acknowledgment by the AG Advisory Committee of the OLRC's emphasis that defendant class proceedings raised different considerations possibly requiring a different approach.<sup>15</sup>

### **Defendant's Class Proceeding: Section 3 of the Ontario CPA**

Ontario was not alone in its enactment of provisions allowing a defendant to ask for one of many similar claims against it to be elevated to the status of a class proceeding. Similar provisions can be found in most if not all of the other Canadian common law jurisdictions which have enacted class proceeding legislation.<sup>16</sup>

The widespread adoption of this additional class action model may be unsurprising, as it actually raises few of the conceptual and practical problems identified in the OLRC's comments relating to "defendant class actions". In particular:

- (a) the operation of such provisions essentially would result in a typical "plaintiff class action", (i.e., with one plaintiff representing a class of similarly situated plaintiffs claiming against a particular defendant), albeit one constituted at the request of the defendant rather than a plaintiff;
- (b) any questions of notice to the resulting class of plaintiffs, their "opt out" rights, the determination of individual issues and settlement would seem largely if not entirely the same as those that would be encountered in a "normal" plaintiff class proceeding; and
- (c) even in relation to questions of representative adequacy and the representative's exposure to adverse costs, the starting point is at least that of choosing from and/or dealing with demonstrably willing litigants, already voluntarily committed to litigation against the defendant and shouldering the implications of litigation expense.<sup>17</sup>

And yet, notwithstanding the cross-country availability of such a "defendant's class proceeding", there does not seem to be a reported instance of any defendant, in any Canadian common-law jurisdiction, stepping forward pro-actively to request certification of a class proceeding against it.

In the absence of such case law, the reasons for this necessarily must be a matter of speculation. However, the experience to date obviously suggests a practical reality that defendants will rarely (if ever) be interested in this particular class action model.

In that regard, the provisions apparently contemplated the scenario of a defendant sufficiently motivated to deal simultaneously with all possible similar claims against it; i.e., by sweeping them into one proceeding for global determination. For example, one could imagine:

- (a) an extraordinarily confident defendant, so sure of its substantive position and ultimate success that it wants to end any and all speculation as to its potential liability as soon as possible, and minimize its possible legal expense by resolving all potential disputes through one proceeding; and/or
- (b) a defendant so besieged and distracted by multiple claims and associated litigation expense that it sees an advantage in consolidating its defence to one common front.

In a litigation world of almost inevitable uncertainty and expense, it nevertheless may be difficult to find many defendants or defence counsel willing to place complete trust in a “sure thing”. Litigation temerity usually will be tempered by prudence and at least some degree of caution, particularly if the defendant already is facing two or more individual actions, screened and supported by plaintiff counsel; circumstances that would be surprising if the claims had no merit whatsoever and the outcome was a foregone conclusion.

Moreover, one has to consider the implication of limitation periods. To the extent they are running against potential claimants who have not yet launched individual actions, (e.g., where the underlying facts are reasonably well known and not likely to justify arguments of discoverability), the defendant increasingly will be able to defeat future claims by remaining passive and relying on the passage of time. Such a defendant is unlikely to “throw away” such a valuable defence by pro-active attempts to constitute a plaintiff class action that will suspend the operation of applicable limitation periods.<sup>18</sup>

From a business perspective, (particularly in an economy marked by troubled shareholders and cautious financial institutions), it similarly may be hard to locate many corporate defendants interested in wilfully expanding the scope of threatened liabilities to be reported in their financial statements.

From an insurance perspective, (e.g., in cases where the targeted defendant enjoys liability coverage for the claims in question and the defence is being controlled by the insurer), a deliberate expansion of the defendant’s liability exposure may not only be anathema to the adjuster or claims manager setting reserves and reporting to head office, but also arguably a violation of the insurer’s duty of good faith to its insured.

The practical realities therefore are such that defendants and their counsel may be extremely reluctant to pro-actively widen the scope of claims against the defendant to include claims that otherwise might never have been advanced; i.e., to adopt a strategy of dealing with isolated leaks in the defensive wall by throwing open the floodgates. Even if the number and size of existing claims threaten to overwhelm a defendant, the more likely recourse may be a request for temporary protection available through other legislation<sup>19</sup>, rather than a defendant request for certification of a class proceeding against it.

#### **Classing Defendants: Section 4 of the Ontario CPA**

In Canada, class proceeding legislation permitting the classing of *defendants*, (at the request of either plaintiffs or defendants), is relatively rare. Such provisions apparently exist only in the provinces of Ontario and Nova Scotia, and in the *Federal Courts Rules*<sup>20</sup>; a consideration which, in the abstract, might favourably differentiate these jurisdictions in an environment of mounting cross-country competition for class proceeding litigation.

Yet these provisions also have failed to generate much interest; e.g., producing only three reported decisions, (over the sixteen-year history of the Ontario legislation), involving certification of a defendant class.

There seem to be two principal underlying reasons for this highly constrained use of the provisions allowing for the classing of defendants:

1. the ability of class members to “opt out” of any certified class; and
2. effective application of what has come to be known in Ontario as “the *Ragoonanan* principle”.

On the first point, as noted above, the AG Advisory Committee did not acknowledge any distinction between plaintiff and defendant class actions, and instead recommended application of the same “mirror” provisions, (including an unfettered right of any putative class member to “opt out” of any certified class proceeding), to both types of class litigation.<sup>21</sup> In the result, the Ontario legislation expressly provides that any certification order “shall ... specify the manner in which class members may opt out of the class proceeding”, and that “any member of a class involved in a class proceeding may opt out of the proceeding”<sup>22</sup>. There is nothing whatsoever in the legislation to limit application of these provisions to plaintiffs, or to restrict availability of the express “right of opt out” in defendant class proceedings.

Moreover, in Ontario at least, any attempts by the court to restrain exercise of “opt out” rights indirectly, (e.g., through a purported exercise of the court’s general power under section 12 of the Ontario CPA to make “any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination”<sup>23</sup>), would run counter to the apparent legislative intent. In particular, the OLRC expressly recommended that Ontario’s new class proceeding Act “should give the court a discretion in all cases to determine whether class members should be permitted to exclude themselves from a class action”<sup>24</sup>, but the AG Advisory Committee did not embrace the recommendation, and it therefore was omitted from the legislation.

The practical upshot is that parties and the courts therefore might go to considerable lengths to certify a class of defendants, only to have the ostensible class then wither and/or vanish completely through extensive opting out by defendants; (e.g., because they have no faith in the named representative defendant to protect their interests, wish to control their own defence, and/or, like most defendants, simply have no desire to be sued directly or indirectly if that possibility can be avoided).<sup>25</sup> The prospect of such an outcome likely deters many/most plaintiffs from making the effort.

As for the second point, the “*Ragoonanan*” constraint on classing defendants has not received the same amount of attention, although it actually seems to have been the subject of intuitive application in relation to defendant class proceedings even before the principle had been confirmed by authority and given a name.

For those unfamiliar with “the *Ragoonanan* principle”, it boils down to this: the Ontario CPA has been repeatedly and conclusively interpreted as requiring, for each defendant to any proposed class action, a named representative plaintiff having an individual claim against that defendant. It is not enough that some unnamed member of the putative plaintiff class might have a cause of action against such a defendant.<sup>26</sup>

As far as defendant class proceedings are concerned, application of the *Ragoonanan* principle therefore suggests that the classing of defendants will be permitted only where one or more of the named representative plaintiffs has an individual cause of action *vis-à-vis* each and every member of the proposed defendant class; a prerequisite that effectively narrows the situations in which a defendant class proceeding will be allowed.

As noted above, these apparent constraints seem to have limited attempts at “classing defendants” to a mere handful of cases here in Ontario.<sup>27</sup>

### ***Chippewas of Sarnia Band v. Canada (Attorney General)***<sup>28</sup>

This 1996 decision of Justice Adams dealt with the first plaintiff effort to class defendants under section 4 of the Ontario CPA.

The sole plaintiff was a First Nation Band, which claimed that title to certain lands in and around the city of Sarnia had never been lawfully surrendered or conveyed. As all competing title and interests in the lands could be traced to the same letters patent, this gave the named plaintiff a claim against each and every individual and/or corporation, (approximately 2,200 persons), claiming such a competing title or interest. In effect, this meant that there were no “*Ragoonanan*” concerns, (although that case and the express consideration of such issues would not emerge for another four years).

Nor, on the particular facts of the case, does there seem to have been any serious concern about the probability and practical implications of massive “opting out” by defendant class members, (although the suggestion was advanced by defence counsel). This was because the Band’s motion for defendant class certification effectively had “closed the net” on all defendants in any event. In particular, the motion requested alternative relief adding each and every member of the proposed defendant class as a named defendant to the proceeding, or the consolidation of thousands of separate lawsuits to be brought against each of the individual defendants, if the court did not grant the proposed defendant class certification order.<sup>29</sup> (Defendants “opting out” of any certified defendant class therefore still would face the same claims, but with the added burden and expense of individually participating in the litigation. This inevitably would have reduced or eliminated the incentive for many defendants, and smaller corporations or individuals in particular, to opt out of a certified defendant class proceeding.)

As it was clear that all defendants definitely would be sued in some fashion by the plaintiff Band, the real question was preferable procedure. The Band’s primary submission supported defendant class certification via section 4 of the Ontario CPA, and proposed that specified named defendants be appointed to represent six defendant sub-classes, (covering the various types of institutional, industrial, commercial/retail, utility, residential and encumbrancer defendants that would be affected by the litigation). The 21 defendants named in the Band’s initial pleading, including the unwilling proposed defendant class representatives, opposed class certification and instead argued that the matter should be dealt with by way of a traditional “representative order” under Rule 12.07, or by way of amendments to the statement of claim adding all 2,200 of the remaining defendants as named parties to the litigation. Both sides had made clear their intention, in any event, to then deal with the central substantive issues by way of motions for summary judgment.

In the circumstances, Justice Adams rejected the defendants’ suggestion of multiple joinder and consolidation, or resort to “representative litigation” contemplated by Rule 12.07. (The Rule and its

essentially identical predecessor were described as a “relatively slight provision” that had been subjected to a “conservative judicial approach”, “probably because of its slender nature in comparison to the exceedingly complex implications of representative litigation”).<sup>30</sup>

Having regard to the facts and the purposive interpretation required by the goals and remedial nature of the relatively new Ontario class proceeding legislation, Justice Adams instead embraced application of the comprehensive features of the CPA and its defendant class mechanism in particular, which he described generally as follows:

A defendant class action is a civil action brought against one or more persons defending on behalf of a group of persons similarly situated. It provides an efficient procedural mechanism for the determination of common issues in a complex proceeding involving multiple parties. It offers a means of binding all interested parties and, therefore, prevents relitigation of the same issues in a multitude of lawsuits. The advantages of a defending (sic) class action include the conservation of judicial resources and private litigation costs, both absolutely, by preventing relitigation of the same issues, and relatively, by spreading expenses and resolving common issues over a large number of defendants. In this sense, greater access to the courts, by plaintiffs and defendants alike, is achieved.<sup>31</sup>

In the case at hand, classing of defendants pursuant to the Ontario CPA clearly was the preferable procedure, at least for the time being:

Clearly, if it applies, the C.P.A. is the most comprehensive regulatory vehicle for this type of litigation. While I accept that a representation order could be crafted to achieve many of the advantages of the C.P.A., it seems preferable to at least first use the C.P.A. with its available procedures and policy balances, if at all possible. Because of the greater uncertainty which can arise in the administration of proceedings involving a multiplicity of parties, a court should prefer the most comprehensive regulatory regime reasonably available to it. This approach will promote economy, efficiency and expedition. These goals are of interest to all affected parties and the public at large. I would say, however, that the issuance of a rule 12.07 representation order may be revisited should opting out be so extensive that a supplementary representative structure is called for in the interests of justice. I therefore conclude that, at this time, a class proceeding is the preferable procedure for the resolution of the common issues.<sup>32</sup>

Justice Adams found that all elements of the Ontario CPA certification test were satisfied in the case before him, and indicated his intention to appoint specific defendants to represent the defendant sub-classes proposed by the plaintiff.<sup>33</sup>

**Berry v. Pulley**<sup>34</sup>

This 2001 decision of Justice Cumming was noted to involve what was then “a unique certification motion in Canada in that it [was] a contested motion to class both plaintiffs *and* defendants”.<sup>35</sup>

The dispute stemmed from Air Ontario’s acquisition by Air Canada, and resulting pilot seniority issues amongst members of the pilots’ common trade union following merger of the two employer airlines. In the ensuing class proceeding litigation, five Air Ontario pilots asked to represent a suggested plaintiff class of 179 similar Air Ontario pilots. They also asked that four named Air Canada pilots be appointed to represent a suggested defendant class of 1,682 Air Canada pilots.

The torts alleged in the statement of claim included unlawful conspiracy, wrongful interference with economic relations and wrongful interference with contractual relations. Inherent in these claims was an allegation that each and every member of the suggested plaintiff class had a claim against each and every member of the suggested defendant class, (although variations in the underlying facts suggested the advisability of defendant subclasses). Although the topic was not expressly considered, this effectively meant that the proposed class action presented no “*Ragoonan*” issues.<sup>36</sup>

The prospect of substantial “opting out” by defendant class members, however, was raised as a concern. Indeed, the plaintiffs sought an order from the court, (pursuant to the general case management authority conferred by section 12 of the Ontario CPA), prohibiting defendants from opting out of any certified defendant class. Noting that this raised an issue of first impression, Justice Cumming held that the wording of the Ontario legislation and its history nevertheless led to the conclusion, (similar to that reached in the United States), that such formal restrictions on the right of opt out simply were not possible.<sup>37</sup>

The likelihood of defendants opting out also was greatly reduced by the prospect of measures by plaintiff counsel, (similar to those taken in the *Chippewas* litigation), to “close the net” around all defendant class members in any event. In particular, plaintiff counsel were about to commence a second “protective” plaintiff class action individually naming each of the 1,682 Air Canada pilots as a defendant.<sup>38</sup> Justice Cumming noted the probability of that action being joined or consolidated with the initial class proceeding, pursuant to Rules 5 and 6 of Ontario’s *Rules of Civil Procedure*, and the “considerable economy in respect of costs” that individual Air Canada pilots would achieve by remaining in the certified defendant class proceeding.<sup>39</sup>

In the result, Justice Cumming felt that the criteria for certification were satisfied, or capable of satisfaction, in relation to both the plaintiff class *and* the defendant class. In particular, the suggested bilateral class action clearly was the preferable procedure in the circumstances:

A class proceeding seems to be the only practical way by which to resolve the proposed common issues. Certification of the plaintiff class serves the policy objectives of the CPA of access to justice for claimants and judicial economy. ... A multiplicity of possibly 1,682 actions by the plaintiff class against each individual defendant makes no sense. If the plaintiffs’ class did sue the individual defendants in separate actions, the costs to both plaintiffs and each defendant would be horrendous. The financial burden could easily consume the proceeds of any judgments. As well, a single plaintiff class action with some 1,682 individual

defendants would lead to excessive, burdensome costs and complications. Failure to certify as a practical matter may insulate the defendants from any determination of liability. ...

Certification of a defendant class provides an efficient procedural mechanism for the determination of the common issues in a complex proceeding involving multiple parties. ...

A certified class proceeding will bind all interested parties (plaintiff class members and defendant class members) and avoids a potential multitude of costly lawsuits which may lead to inconsistent results.<sup>40</sup>

### ***Lupsor Estate v. Middlesex Mutual Insurance Co.***<sup>41</sup>

This 2003 decision of Justice Haines involved another request for “bilateral” certification, (i.e., to class both plaintiffs and defendants), and was a by-product of the extended and extensive “salvage interest” class proceeding litigation; litigation in which it was alleged that insurers wrongly had applied deductibles and/or improperly claimed rights of salvage in damaged automobiles when processing insurance claims for the loss of vehicles damaged beyond economic repair.

Although it eventually grew to involve multiple similar actions, the salvage litigation began with one plaintiff class proceeding against one insurer; i.e., a class of aggrieved plaintiffs insured by the Co-operators, who commenced a class proceeding targeting that particular insurer. Shortly after an initial ruling by the Ontario Court of Appeal in that case, favouring the plaintiff’s substantive argument<sup>42</sup>, over 30 identical or similar plaintiff class actions, separately targeting other individual insurers, were commenced across the province in at least seven judicial regions and nine individual trial centres.<sup>43</sup> Similar class proceedings also were launched in British Columbia, Alberta and Saskatchewan.

In Ontario, a number of defendant insurers moved under Rule 37.15 for an order directing co-ordinated case management of the various salvage class proceedings; a request strongly opposed by plaintiff counsel. In their material, the moving defendants noted the strong probability of further actions; e.g., against the remaining 65 to 141 automobile insurers operating in Ontario that had not yet been sued. In an effort to counter such arguments, (prior to the motion for co-ordinated case management being heard), the next salvage class proceeding commenced by plaintiff counsel requested certification of a plaintiff class *and* a defendant class. In particular, the claim suggested that:

- (a) the named representative plaintiff, (insured by Middlesex Mutual), would represent a class of plaintiffs comprising the aggrieved insureds of all automobile insurers not already individually named as a defendant or respondent in a separate salvage class proceeding; and
- (b) Middlesex Mutual would be appointed as a representative defendant, to defend on behalf of a putative defendant class including all automobile insurers not already individually named as a defendant or respondent in a separate salvage interest class proceeding<sup>44</sup>.

The strategic move was unsuccessful, in that the various salvage interest class proceedings were subjected to co-ordinated case management in any event<sup>45</sup>. However, this still left lingering questions

as to the propriety of the “representative defendant” and “defendant class” allegations advanced in the claim against Middlesex Mutual. To address these, Middlesex Mutual moved under Rule 21 for an order striking the allegations on the basis they constituted a violation of the *Ragoonanan* principle<sup>46</sup>. In particular, as the named representative plaintiff was alleged to have an individual cause of action only against Middlesex Mutual, there were no named plaintiffs having a cause of action against any other defendants to the proposed class proceeding.

At first instance, Justice Haines nevertheless declined to strike the “representative defendant” and “defendant class” allegations. Although he acknowledged the *Ragoonanan* principle established by the Ontario authorities, Justice Haines noted the potential utility of a defendant class action to contain the prospect of further salvage class actions, observed the right of defendant insurers to opt out of any such defence class action, and felt the law was not sufficiently settled as far as application of the *Ragoonanan* principle to defendant class proceedings was concerned:

It is accepted that *Ragoonanan* and *Hughes* have established that there must be a representative plaintiff with a claim against each defendant in a proposed class action. However, I am not satisfied that the law is sufficiently settled for me to conclude on a r.21.01(1)(b) motion that it is plain and obvious that the plaintiff in an intended class action must have a cause of action against each member of a putative defendant class in order to proceed with a motion for certification and the appointment of a representative defendant.<sup>47</sup>

Middlesex Mutual nevertheless then sought and obtained leave to appeal Justice Haines’ decision to the Divisional Court. The motion for leave was heard and decided by Justice Winkler, (as he then was), who reasoned as follows:

In paragraphs 18 and 19 of the motions judge’s reasons, he adverts to the objectives of the CPA of access to justice and judicial economy, in the context of the other proceedings similar to this one. Those cases were brought by plaintiffs with claims against the named defendants in those proceedings. With respect, this analysis begs the question. If the unnamed defendants against which there is no plaintiff with a cause of action ought not to be part of the class of defendants, then this “case management” issue does not arise. This response applies with equal force to the point made by the motions judge that defendants have a right to opt out of the class. Having a right to opt out is no answer to a defendant if it were not properly included in the class in the first place.

The law [concerning the *Ragoonanan* principle] is clearly and unequivocally stated in *Sunbeam* and is not qualified in any respect.

To the extent that the motions judge espouses a different principle in the instant case, which I am satisfied that he does, from that expressed in *Sunbeam*, *Sunbeam* is a conflicting decision within the meaning of Rule 62.02(4)(a) and I find it desirable that leave to appeal ought to be granted.

Moreover, given the reasons in *Sunbeam*, there is good reason to doubt the correctness of the order in question to the extent that the motions judge felt the law in question not to be sufficiently settled. If the principle in *Sunbeam* were not to be applicable with equal force and effect to a defendant class, then the *Sunbeam* decision would be effectively nullified, because a plaintiff could circumvent it by merely asserting a defendant class, as opposed to naming the defendants, thus avoiding the necessity of naming a plaintiff for each defendant against which a cause of action is asserted. A plaintiff could do indirectly what it could not achieve directly.

The instant issue is one which affects the entire class proceedings regime in Ontario. As such, the present motion meets the second requirement of Rule 62.02(4)(a) and (b). Leave to appeal is granted.<sup>48</sup>

Middlesex Mutual then was successful in obtaining an order transferring the resulting appeal from the Divisional Court directly to the Court of Appeal, for simultaneous hearing with other substantive appeals in the salvage litigation.<sup>49</sup> Before the appeal could be heard, however, all of the Ontario salvage interest class proceedings (and related appeals) collapsed with release of the Court of Appeal's decision revisiting the central substantive issue, and finding that there was no underlying cause of action after all.<sup>50</sup>

In the result, there was no formal determination by the Court of Appeal as to whether Justice Winkler's views on the first instance decision by Justice Haines should be accepted. However, the former's extensive experience with class proceedings, and subsequent elevation to the Court of Appeal with his appointment as Chief Justice, no doubt may suggest to many that further attempts to circumvent the *Ragoonan* principle through use of defendant class proceedings will not be looked upon favourably if the question again reaches the Court of Appeal.

## Conclusion

"Defendant class actions" therefore are rare trees in the Canadian class proceeding forest, and seem destined to remain that way.

While a legislative possibility across the country, the classing of plaintiffs at the request of a defendant is not something defendants have embraced or seem likely to embrace, having regard to numerous practical considerations.

The classing of defendants is a legislative possibility in only a few Canadian jurisdictions, and seems to have been attempted only in Ontario. However, even in Ontario, where the *Ragoonan* principle is now settled law and the unfettered right to opt out of a defendant class is guaranteed, the combined effect of these two restrictions seems to make the classing of defendants impossible and/or impractical unless:

1. the facts are such that one or more of the named representative plaintiffs individually has a cause of action against each and every member of the defendant class, (thus satisfying the demands of the *Ragoonan* principle); and

2. plaintiffs realistically are able to reduce or eliminate the incentive to “opt out” of any certified defendant class by credible threats of continued litigation against any individual defendants who do.

Such restraints obviously do not suggest fertile ground for the growth of defendant class actions. However, the possibility is still there in an appropriate case. Although it seems to blossom only now and again, there may yet be life in this particular Joshua Tree.

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<sup>1</sup> A monocot tree native to the barren grasslands and deserts of the southwestern United States. Named by Mormon settlers, to whom the tree's unique shape looked like the prophet praying to the sky, and therefore suggested a symbol of hope in a harsh environment. In reality, however, the Joshua Tree is an extremely slow growing one that does not bloom every year. It is top heavy with a shallow root area, not very sturdy and, owing to climate change, now faces eventual extinction even in the National Park that bears its name. Also, of course, a landmark album by the Irish rock band U2.

<sup>2</sup> My thanks to Chris Dawson and Alfonso Campos Reales, summer students with Lerner LLP, who assisted with research for this article.

<sup>3</sup> *Class Proceedings Act, 1992*, S.O. 1992, proclaimed January 1, 1993. Hereinafter referred to as the “Ontario CPA”.

<sup>4</sup> It should be noted that the “old” Rule 12 of Ontario’s *Rules of Practice or Rules of Civil Procedure*, substantially unchanged from 1881 to 1993 and permitting representative civil proceedings, allowed for “representative defendant” actions as well. In particular, until amendments introduced with Ontario’s new class action legislation, Rule 12.01 (formerly Rule 75) provided as follows: “Where there are numerous persons having the same interest, one or more of them may bring *or defend* a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.” [Emphasis added.] R.R.O., Reg. 194, Rule 12.01, rep. & sub. O.Reg. 770/92, s.5. Moreover, residual provisions relating to representative defendant actions were retained in the “new” Rule 12.07, which reads as follows: “Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.” There are numerous cases in the Anglo-Canadian jurisprudence dealing with “representative defendant” actions brought or at least attempted under the old Rule, its equivalents in other jurisdictions, and/or the earlier practice of the courts of Chancery. This article nevertheless restricts its focus to “class actions” *per se* following introduction of the “new” legislation in Ontario.

<sup>5</sup> Ontario CPA, ss. 3-5.

<sup>6</sup> Ontario Law Reform Commission, “Report on Class Actions”, 3 vols. (Toronto, Carswell, 1982), hereinafter referred to as the “OLRC Report”.

<sup>7</sup> Ministry of the Attorney General, Policy Development Division, “Report of the Attorney General’s Advisory Committee on Class Action Reform”, (Toronto, Queen’s Printer, 1990), hereinafter referred to as the “AG Advisory Committee Report”.

<sup>8</sup> AG Advisory Committee Report, *supra*, p.20.

<sup>9</sup> AG Advisory Committee Report, *supra*, p.77.

<sup>10</sup> OLRC Report, *supra*, vol. 1, p.2.

<sup>11</sup> OLRC Report, *supra*, pp. 41 and 43.

<sup>12</sup> OLRC Report, *supra*, vol. 1, pp. 43-44.

<sup>13</sup> AG Advisory Committee Report, *supra*, p.8.

<sup>14</sup> AG Advisory Committee Report, *supra*, pp. 29-30.

<sup>15</sup> As summarized by Rachel Mulheron at p.44 of her book *The Class Action in Common Legal Systems: A Comparative Perspective*, Hart Publishing, 2004, “the differences between plaintiff and defendant class actions have been judicially and academically stated to include the following: unlike a representative plaintiff, a defendant representative does not voluntarily undertake that role as ‘champion of the absentee class members’, but is selected perhaps unwillingly; a representative plaintiff who brings proceedings on behalf of a class subjects the class members to the risk that their claims will be lost, but no personal liability attaches - - whereas proceedings against a representative defendant expose class members to the risk of direct liability for damages, which suggests that greater protection is required for absent class members;

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the effect of opting out by defendants would be to force plaintiffs to bring individual actions against them; to require that the defence raises 'common issues' is not to the point, [as] it is more likely that the defences of the class raise a common issue because the claims *against them* raise a common issue; to require court approval for discontinuance seems unnecessary in the case of a defendant class actions - - 'how [would] the represented defendants be prejudiced if the plaintiff was simply permitted to discontinue the action?' asks the Alberta Institute; and the suspension of limitation periods as against class members during the class proceedings would work injustice if it applied to defendant class actions."

<sup>16</sup> See *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s.3; *Class Proceedings Act*, S.A. 2003, c.C-16.5, s.3; *Class Actions Act*, S.S. 2001, c.C-12.01, s.5; *Class Proceedings Act*, C.C.S.M. c.C130, s.3; *Class Proceedings Act*, S.N.B. 2006, c.C-5.15, s.4; *Class Proceedings Act*, S.N.S. 2007, c.28, s.5(1); *Class Actions Act*, S.N.L. 2001, c.C-18.1, s.4. See also *Federal Courts Rules*, SOR/98-106, as amended, Rule 334.13.

<sup>17</sup> Imposition of a supervening class proceeding dimension obviously will entail additional expense, (if only in relation to certification and notice matters), and a corresponding increased exposure to adverse costs, (at least here in Ontario). It may or may not be appropriate to visit such exposure on the new "representative" plaintiff, who originally chose to litigate a purely individual claim, having regard only to the cost consequences of "normal" litigation. However, elevation of the hitherto individual claim to the status of a plaintiff class proceeding is also not without potential offsetting benefits; e.g., the possibility of enhanced overall recovery, potential augmented reward for plaintiff counsel willing to operate via contingency fee arrangements, and therefore a corresponding increased willingness of plaintiff counsel to underwrite and pursue such litigation on behalf of the representative plaintiff and members of the newly constituted class.

<sup>18</sup> See, for example, Ontario CPA, *supra*, s.28(1), which reads in part as follows: "[A]ny limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding ...".

<sup>19</sup> See, for example, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36.

<sup>20</sup> See Ontario CPA, *supra*, s.4, *Class Proceedings Act*, S.N.S. 2007, c.28, s.5(2), and *Federal Courts Rules*, *supra*, Rule 334.14(2). The failure of most other Canadian common law jurisdictions to adopt similar provisions may stem from the influence of the *Uniform Class Proceedings Act*, drafted in 1996 by the Uniform Law Conference, which did not include provisions for the classing of defendants.

<sup>21</sup> The Committee's comments and recommendations speak without differentiation to all types of class proceedings; e.g., to a fundamental parameter that "all class members *who do not specifically opt-out* of the class action procedure would be included in it", and the Committee's recommendation that "*any person who is a member of a class should be permitted to opt-out* by a means and within a time established by the order of certification". [Emphasis added.] AG Advisory Committee Report, *supra*, at pp.6 and 9.

<sup>22</sup> Ontario CPA, *supra*, ss. 8(1)(f) and 9.

<sup>23</sup> Ontario CPA, *supra*, s.12.

<sup>24</sup> OLRC Report, *supra*, Vol. II, p.491.

<sup>25</sup> See Vince Morabito, "*Defendant Class Actions and the Right to Opt Out: Lessons For Canada From the United States*", 14 Duke Journal of Comparative & International Law, Vol. 14, p.197, where the author argues that the Ontario and Federal Court legislation should be amended to reinstate the restrictions on defendant opt out that effectively were applied in the context of "representative defendant" proceedings, prior to introduction of the class proceeding legislation.

<sup>26</sup> The leading appellate authority is *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.), at paragraphs 41-42, affirmed (2002), 61 O.R. (3d) 433 (C.A.), at paragraphs 17-18, but the principle takes its name from the earlier decision in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.), at p.616, wherein a representative plaintiff with an individual claim against just one particular tobacco company unsuccessfully sought to include additional tobacco company defendants which the plaintiff had named in the statement of claim.

<sup>27</sup> In addition to the three cases discussed below, the possibility of classing defendants pursuant to s.4 of the Ontario CPA was addressed briefly in *Sutherland v. Hudson's Bay Co.* (2005), 74 O.R. (3d) 608 (S.C.J.). The central focus of the litigation was a traditional "plaintiff class proceeding" relating to the surplus assets in an employee pension plan, and the certification proposed by plaintiff counsel actually was supported by each of the named defendants. However, concerns were raised, (apparently by the court), that certain individuals were interested persons who nevertheless had not been named as parties to the proceedings. It seems the named defendants took no position as to the possible involvement of these other individuals as parties, while plaintiff counsel strenuously opposed the suggestion. In the result, Justice Cullity ordered the addition of defendants who might be affected by the proceeding, which then raised a further question as to how this should best be done; i.e., the precise manner in which the interests of the additional parties should be represented by existing parties to the proceeding. The named defendants again took no position. Plaintiff counsel suggested the formal appointment of representative defendants

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and the constitution of defendant classes, pursuant to section 4 of the Ontario CPA. Justice Cullity nevertheless felt that the adequate and proper approach was the making of an order under Rule 10 of Ontario's *Rules of Civil Procedure*, (generally permitting the appointment of someone to represent a person potentially interested in the outcome of a proceeding who can not be readily ascertained, found or served, and a Rule regularly employed in relation to matters concerning trust beneficiaries), rather than a resort to section 4 of the Ontario CPA. ("Counsel have been appointed to represent the defendant classes and they have raised no concerns that a representation order under Rule 10 will not permit them to provide adequate representation or that any additional protection for the interests of the class members would be provided by certifying representatives pursuant to the CPA. In these circumstances, where the responsibilities of counsel are not dissimilar to those of a watching brief, the provisions of the CPA do not appear to be appropriately designed for application to a case like this.") Having regard to the somewhat unusual way in which the possibility of defendant classes arose in this case, the particular nature of the trust issues which triggered the potential application of Rule 10, the apparent absence of adversarial argument on the point, and Justice Cullity's decision, further discussion is limited to the three cases in which the defendant class provisions of the Ontario CPA were actively engaged, notwithstanding defendant opposition.

<sup>28</sup> (1996), 29 O.R. (3d) 549 (Gen.Div.).

<sup>29</sup> The compilation of a list individually naming all possible defendants was possible on the facts of this particular case as the claim was being asserted against all those currently asserting competing title to the lands in question, and the identity of those persons could be determined through title searches carried out by the Band using the Province's land title registration system. A complete list of all members of a proposed defendant class may not be available in many/most cases.

<sup>30</sup> *Chippewas of Sarnia Band v. Canada (Attorney General)*, *supra*, pp.559-560.

<sup>31</sup> *Chippewas of Sarnia Band v. Canada (Attorney General)*, *supra*, at pp.558-559.

<sup>32</sup> *Chippewas of Sarnia Band v. Canada (Attorney General)*, *supra*, at p.568. In the result, none of the threatened defendant opt outs materialized, probably for the reasons outlined above. See the later reported decision, *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] O.J. No. 1406 (S.C.J.), at para. 772.

<sup>33</sup> In doing so, Justice Adams rejected arguments that application of section 4 was confined to willing or consensual representative defendants, or the classing of defendants actually named in a pleading. Nothing in the wording of the legislation suggested such limitations, which "would have the effect of preventing the application of this comprehensive statute to circumstances where even rule 12.07 and its predecessor would apply", and "unduly limit and ... undermine the very purpose of s.4 and its related provisions". *Chippewas of Sarnia Band v. Canada (Attorney General)*, *supra*, p.563. In this particular case, the title issues facing every defendant were common and identical, the proposed representative defendants had their own significant land interests to protect, and the vigorous defence of their own interests therefore effectively would ensure protection of the defendant classes as well.

<sup>34</sup> (2001), 197 D.L.R. (4th) 317 (S.C.J.).

<sup>35</sup> *Berry v. Pulley*, *supra*, at paragraph 1. Emphasis added. As noted below, the same type of "bilateral" class action was proposed later in *Lupsor Estate v. Middlesex Mutual*, *infra*.

<sup>36</sup> Justice Cumming would have been alert to the possibility of such issues, as he was the judge who had decided the *Ragoonanan* case, just ten weeks before hearing of the certification motion in *Berry v. Pulley*, *supra*. In fact, Justice Cumming cites the earlier *Ragoonanan* decision in his reasons, but only for the general principle that a pleading is not to be struck out where the law has not been fully settled or a novel cause of action is presented. See *Berry v. Pulley*, *supra*, at para. 21.

<sup>37</sup> *Berry v. Pulley*, *supra*, at paras. 38-45.

<sup>38</sup> As in the *Chippewas* litigation, a complete list of the prospective defendants was available; (in this case, through union membership lists).

<sup>39</sup> *Berry v. Pulley*, *supra*, at paras. 48-49.

<sup>40</sup> *Berry v. Pulley*, *supra*, at paras. 34-36. There is no indication, in any reported subsequent decision from the ongoing litigation, as to whether or not any defendants subsequently opted out of the certified defendant class.

<sup>41</sup> [2003] O.J. No. 1038 (S.C.J.).

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<sup>42</sup> *McNaughton Automotive Limited v. Co-Operators General Insurance Company* (2001), 54 O.R. (3d) 704 (C.A.), leave to appeal to S.C.C. refused March 7, 2002, [2001] (sic) S.C.C.A. No. 451.

<sup>43</sup> At least 43 separate salvage interest class proceedings eventually were commenced in Ontario before the litigation collapsed in the circumstances described below.

<sup>44</sup> Note that a complete list of the insurers in question could have been compiled from the registration of those automobile insurers licenced to issue policies in Ontario and the other relevant provinces of Canada.

<sup>45</sup> *Segnitz v. Royal & SunAlliance*, [2002] O.J. No. 2137 (S.C.J.).

<sup>46</sup> Middlesex Mutual also moved for summary judgment and/or an order pursuant to section 12 of the Ontario CPA dismissing the "representative defendant" and "defendant class" allegations. This was done on the basis that Middlesex Mutual would not be a suitable representative defendant in any case having regard to its relatively small size and its minimal exposure to salvage interest claims; (a total exposure within the jurisdiction of the Small Claims Court).

<sup>47</sup> *Lupsor Estate v. Middlesex Mutual Insurance Co.*, *supra*, at para. 21.

<sup>48</sup> *Lupsor Estate v. Middlesex Mutual Insurance Co.*, [2003] O.J. No. 3745 (Div.Ct.), at paras. 5-9.

<sup>49</sup> *Lupsor Estate v. Middlesex Mutual Insurance Co.*, Court of Appeal File No. M30458A; Order issued by Simmons J.A. on October 14, 2003, pursuant to ss.6(2) and 6(3) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, and entered October 23, 2003.

<sup>50</sup> *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (C.A.). Coincidentally, on the same day, Justice Haines released another decision at first instance confirming that the claim against Middlesex Mutual was barred in any event by operation of the applicable limitation period, and that Middlesex Mutual also would not have been a suitable representative defendant having regard to all the circumstances. ("In my view, the analysis of this issue is not particularly complicated. The defendant is a minnow in the automobile insurance ocean. It makes no sense to saddle it with the burden of defending the interests of perhaps 60 class members when it has such a minimal financial interest in the ultimate outcome of the litigation. I therefore find that the defendant is not an appropriate party to be certified as a representative defendant.") See *Lupsor v. Middlesex Mutual Insurance Co.*, Superior Court of Justice File No. 39181 (at London), unreported decision of Justice Haines released June 15, 2005. Throughout the course of the litigation, plaintiff counsel never brought a motion for certification of the action against Middlesex Mutual as a class proceeding; a factor which Justice Haines cited when eventually striking the "representative defendant" and "defendant class" allegations.