

**The Newfoundland and Labrador Class Action Experience
and the Risks of Jurisdictional Competition**

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This paper is prepared for the panel topic “National Update on Class Actions”, part of the Canadian Institute’s 2004 Forum on “Litigating Class Actions”. The paper will give some background on the origins of the Newfoundland and Labrador *Class Actions Act*, SNL 2001 C-18.1, contrast it with the legislation of other major jurisdictions, review the early jurisprudence, and offer comment on the risk posed by overlapping class actions being launched in multiple jurisdictions – a risk which affected the first Newfoundland case to achieve certification.

Background to the Newfoundland and Labrador Act

The Newfoundland and Labrador *Class Actions Act* is based on the Model Class Proceedings Act adopted by the Uniform Law Conference of Canada in 1996. The Uniformity Commissioners left three areas of policy choice open to legislative consideration dealing with appeal provisions, whether extra-provincial class members would be under an opt-in or opt-out regime, and the question of costs. Draft legislation had occupied a file cover in the Department of Justice for several years, until the Premier of the day decided to bring class action legislation forward as a government initiative. The background to this is set out at www.chescrosbie.com:

“On April 1, 2002, the Class Actions Act became part of the law of Newfoundland and Labrador. By permitting numerous individuals who have suffered a common wrong to join hands in one proceeding, the Act puts the little guy on a more even playing field with the big defendant.

Newfoundland and Labrador is the fifth province to put such a consumer-friendly law into effect. We have this progressive legislation (referred to by Premier Grimes as the “Bill Kelly Bill”) thanks to the courage of Bill Kelly and his Hiland Consumers Association. Several years ago, at great personal risk, Bill asked Ches Crosbie Barristers to help him take up the cause of thousands of policyholders against a failed insurance company. When owing to the inadequacy of our laws at the time, the court ruled that the case would not proceed as a class action, Bill ended up with a very large cost award against him (later reduced through negotiation).

Undeterred, Bill Kelly lobbied Premier Grimes for modern legislation to ensure justice would not be frustrated by inadequate laws. . . . And the Act contains a “no costs” provision, so that no class representative will ever again come under threat of financial ruin should a deserving cause not succeed.”

And so, decades behind the United States and ten years behind Ontario, Newfoundland and Labrador had class legislation. The legislature chose a “no costs” regime and an “opt-in” regime for extra-provincial class members. The test for certification is as follows:

“5(1) On an application made under section 3 or 4, the court shall certify an action as a class action where

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise a common issue, whether or not the common issue is the dominant issue;
- (d) a class action is the preferable procedure to resolve the common issues of the class; and,

- (e) there is a person who
 - (i) is able to fairly and adequately represent the interests of the class;
 - (ii) has produced a plan for the class proceeding that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.”

The direction as to preferability is contained at s. 5(2), and mirrors the British Columbia Act. Ontario’s legislation lacks this provision.

“5(2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether

- (a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;
- (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) the class action would involve claims that are or have been the subject of another action;
- (d) other means of resolving the claims are less practical or less efficient; and
- (e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.”

Early Activity

A review of the matters on the Class Actions List as of September 2004 reveals the following activity:

- *First Light Productions Inc. v. Her Majesty in Right of Newfoundland* – A non-profit arts group sued the Department of Tourism, which operates the Arts and Culture Centres. The group had made a booking at the Centre for Performing Arts, which was cancelled by the government in order to accommodate a favored exhibit. A breach of contract/misrepresentation is alleged. Application pursuant to 17A for judgment after summary trial was taken and consent judgment on liability was granted to each of the seven plaintiffs. This did not involve a consent certification.
- *Fleming v. Her Majesty the Queen in Right of Newfoundland* – A solicitor contended his office was illegally searched by the police in violation of solicitor-client privilege. The representative for the class is currently a guest at Her Majesty's Penitentiary. A certification application has been adjourned *sine die*.
- *Pardy v. Bayer Inc.* – Claims for personal injury caused by Baycol, an allegedly defective anti-cholesterol drug withdrawn from the market in August 2001. Certification granted, but see below.
- *Brown v. Eileen Dwyer et al.* – An oil tank on the defendant's property ruptured and the contents escaped into surrounding soil/sewer. Resulted in pollution, odor, fumes, etc.

- *Bailey v. Archibald Drilling and Blasting* – Blasting/construction done for a new retail development, which allegedly resulted in property damage to nearby homes.
- *Davis v. Attorney General of Canada* – Aboriginal law claims against the federal government for breach of fiduciary duty. Motion to strike the statement of claim granted in part, with extensive amendment imposed.
- *Martin v. Matchless Group Inc.* – Employees of Matchless Paints claim that toxic chemicals from the plant caused health problems in the workers, including cancer. The provincial Department of Labour is also a defendant. Three insurance companies have been third-partied.
- *Rideout v. Health Labrador Corporation* – Several hundred women exposed to infection by improperly sterilized gynecological instruments. A variety of causes of action are raised, including nervous shock, medical battery, and breach of privacy arising from alleged mishandling of notification of the exposure. Negligence in the breach of sterilization procedures is admitted, with certification being heard in late September 2004.
- *Bellows v. Quik Cash Ltd.* – A predatory lending case in which breaches of the criminal interest rate provisions of s. 347 of the *Criminal Code* and of provisions of the provincial *Trade Practices Act* are put forward. Two other similar suits against similar lenders were also filed. Decision on a motion to strike is on reserve.
- *Sparkes v. Imperial Tobacco* – A claim based on the provincial *Consumer Protection Act* alleging deceitful marketing of light cigarettes, recently filed.

Of the twelve putative class actions commenced, six were commenced by the same firm. One of these has come to successful certification, and one to consent judgment on liability, without certification. None have achieved final resolution. Three pre-certification interlocutory decisions have been filed in the Baycol litigation, including one dismissal of a leave to appeal application.¹ One dismissal of a motion to strike has been handed down, although extensive portions of the statement of claim were struck.² Excepting the Baycol matter, the size of plaintiff classes ranges from a handful to several hundred, and there are no extra-provincial classes.

Early Jurisprudence

The first and so far only certification decision is *Pardy v. Bayer Inc.*, 2004NLSCTD72, decided April 19, 2004. This suit claimed injury from consumption of the anti-cholesterol drug Baycol, which was withdrawn from the market in August 2001. *Pardy* launched decisional law on certification in a liberal direction. As to the evidentiary requirement for successful certification, Barry J. stated:

“[91] I agree with the Plaintiffs that this test establishes a “low threshold” for class certification. This was confirmed in *Hollick* where the Chief justice noted the evidentiary threshold is not an onerous one. Canadian courts have tended to give class proceedings legislation a large and liberal interpretation to insure that its policy goals are realized. Courts must be mindful not to impose undue technical requirements on plaintiffs.”

¹ *Pardy v. Bayer Inc.*, 2003 NLSCTD 109; *Pardy v. Bayer Inc.*, 2003 NLSCTD 130; and *Pardy v. Bayer Inc.*, 2004 NLSCTD 72.

² *Davis et al. v. Attorney General of Canada et al.*, 2003 04T 0269.

The decision in *Pardy* displays a textbook grasp of the caselaw on certification and resolved every important issue in favour of the plaintiffs in this pharmaceutical liability action. The decision to certify in a defective product action (which Winkler J. called the “quintessential class proceeding” in *Ontario New Home Warranty Program v. Chevron* (1999), 46 O.R. (3d) 130, para. 95) is perhaps not surprising, but the reasons are noteworthy as an overall vote of confidence in class procedure as a form of action, and in its policy goals. It is a solid foundation for the future direction of Newfoundland law.

Litigation by Instalment

The brochure description of the previous panel’s topic on preliminary motions referred to this issue as “short circuits vs. aversion to litigation by inches”. The unrest over protraction of class proceedings, which has occasionally stirred in lower courts, was captured by the Supreme Court of Canada in *Garland v. Consumers Gas Co.*, 2004 SCC 25, para. 90, when it adopted the comment of McMurty C.J.O. at para. 76 of the reasons appealed from:

“In this context, I note the protracted history of these proceedings casts some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.”

Although there arguably now may be a judicial policy to discourage instalment litigation in class proceedings, the issue remains as to whether the legislature has, by reserving the issue of whether the pleadings disclose a cause of action to the certification stage, pre-empted motions to strike pleadings for failure to disclose a reasonable cause of action. Curiously, this does not appear to have been the subject of judicial decision in Canada to date.

The issue arises in this way. The test for certification requires that the court shall certify an action where:

“5(1)(a) The pleadings disclose a cause of action.”

The other four criteria as to numerosity, common issues, preferable procedure, and suitable representative plaintiff, are set out thereafter. The argument is that, as a point of statutory interpretation, the legislature has mandated that the issue of disclosing a cause of action be dealt with at the certification hearing, and not before by way of motions to strike. A decision on this issue is pending in a Newfoundland s. 247 criminal interest rate case.

A decision is also pending in a second Newfoundland certification hearing, in *Rideout v. Health Labrador Corporation*, above. The focus in this case is on the disclosure of a cause of action, rather than on satisfaction of the other four statutory criteria for certification.

Jurisdictional Competition

Lawyers in the other common law jurisdictions are critical of the willingness of Ontario courts to assume national class action jurisdiction. An impressive academic debate has commenced as to the issues posed by overlapping class actions in multiple jurisdictions, for example in several articles in The Canadian Class Action Review, Vol. 1, No. 1, January 2004, edited by Harvey T. Strosberg, QC. The present paper was written for a panel discussion and will refrain from scholarly generalization. But an observation from local Newfoundland experience may be of value.

It is commonplace that class actions are risky. From a plaintiff perspective, every issue is heavily overlawyered by defendants, certification is uncertain, the resolution of the merits is uncertain, the timing of milestone events is uncertain, sometimes collection on a judgment is uncertain. Perhaps this is obvious. What may not have been obvious before the Baycol litigation was that prior to certification, the defendant might chose a preferred jurisdiction (Ontario in this case) in which to settle the overlapping claims brought in several jurisdictions.

Pardy v. Bayer was one of six separate class proceedings arising from the Baycol withdrawal and the fourth to be filed against Bayer. The other proceedings, in order of filing, were taken in Quebec, Ontario, British Columbia, Newfoundland and Labrador, Saskatchewan and Manitoba. The British Columbia action was the first to be certified, in a contested application. Shortly before the hearing date for the Manitoba certification

application, Bayer announced that it had reached a settlement with the representative plaintiffs in the Ontario, British Columbia and Quebec actions. Initially, the Manitoba, Quebec and Ontario actions each claimed to represent a national class, although the eventual Ontario proposed settlement excluded British Columbia (already certified) and Quebec. The settlement was entered on behalf of a defined class of injury sufferers which was narrower than the broad class of all injury sufferers originally claimed for. (The Manitoba action now has been modified to seek a multi-provincial class that would exclude residents of Quebec and the Atlantic Provinces and would exclude those who qualify for payments as members of the narrower class. The other Atlantic Provinces form an extra-provincial class in the Newfoundland action.)

In response to the news of a proposed multi-jurisdictional settlement in Ontario, which would include settlement of the claims of qualified (ie. included) Manitoba plaintiffs, the Manitoba court adjourned the certification application. Bayer brought application to adjourn the Newfoundland certification hearing until after court consideration in Ontario of the proposed settlement, but adjournment was refused by Barry J., who, weighing the balance of convenience, emphasized the interests of the plaintiffs in avoiding delay. Barry J. subsequently certified the Newfoundland action, but stayed his order until the Ontario court had a reasonable chance to decide the approval of the proposed settlement. This was based on judicial comity and the attitude of “respectful cooperation” mandated by the Supreme Court of Canada in *Morguard*: paras. 177-179.

Soon after, Cullity J. heard the approval application in Toronto, with numerous interventions. As to the principal objection, Cullity J. ruled at para. 36 of *Coleman v. Bayer Inc.* (2004), 2004 CarswellOnt 1889 (Ont.S.C.J.) that:

“[36] It was not disputed that the settlement class would include only a small percentage of the members of the original putative class and I am satisfied, on the evidence, that it is probable that it would exclude a majority of such members who would make claims for compensation if the defendants were found liable in negligence. Such persons would obtain no benefits under the settlement and, in that sense, it cannot be regarded as being in their interests. As I have indicated, however, I do not believe that is the test. The question is whether they would be at all prejudiced if I were to certify this action in favour of a narrower class. The fact that they would be excluded from the settlement class and obtain no benefit from the settlement, is not, in my opinion, sufficient prejudice in and of itself.”

At paras. 48 and 49 the learned justice supported the idea of national classes:

“[48] I believe certification in favour of national classes in one Canadian jurisdiction, or another, is, as a general rule, to be encouraged. If a court in another province believed it should certify an action for persons within its own territorial jurisdiction, this court would normally amend its certification order in favour of a national class to exclude such persons.

...

[49] Problems of overlapping class actions in different provinces have usually been avoided in the past through the co-operation of counsel...[C]o-operation to the same extent did not occur in this case. This has transferred the task to the courts.”

Cullity J. listed a number of defects in the proposed settlement, and adjourned the hearing for a brief period in order to give the proposing parties an opportunity to address them. This was accomplished to the learned judge's satisfaction in *Coleman v. Bayer Inc.*, 2004 CarswellOnt 2694. The submissions of the objectors had an obvious effect on improving the settlement, and costs of the intervention were awarded to them in a substantial amount. Class counsel in the jurisdictions not included in the settlement were of opinion that the settlement was in the best interests of such of their clients who qualified, and recommended to such clients that they accept.

Unresolved issues yet remain. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), Wood J. stated at p. 16:

“A time-honored litigating tactic for a defendant encircled by multiple claimants is to weaken the total force of the attack little by little. The defendant first enters into settlements with the strongest of the plaintiffs. Then it faces the remaining plaintiffs, now isolated and abandoned, with the threat of long and lonely litigation to force a final round of settlements at terms favorable to the defendant.”

Another time-honoured litigating tactic is for the defendant to pick the most pliable of several plaintiff counsel with overlapping claims, with whom to settle (a strategy sometimes called “reverse auction”). It should be stated that Cullity J. found that there was nothing improper in the Ontario/Quebec/British Columbia Baycol settlement. However, these litigating tactics remain available and will arise in other cases in future.

Nation-wide litigation on behalf of the non-qualifying Baycol plaintiffs continues, so it would appear that in this case, Bayer has not bought the peace presumably it had hoped for.

The *Coleman v. Bayer* outcome may be satisfactory for the qualified plaintiffs, and many of the non-qualifying plaintiffs may yet achieve satisfaction. However, one might suppose that it was the total force of the attack brought to bear on the defendant that was responsible for the proposal of settlement delivered to Ontario counsel. Counsel whose efforts may reasonably be thought to have contributed to the settlement did not participate in any class counsel fee (nor in this case, in which the excluded class members were deserving of continuing representation, did they seek such participation). If the combined force of multiple attacks in multiple jurisdictions may reasonably be thought to contribute to settlement, then access to justice may suffer should a mechanism not be developed by which value created by contributing counsel in multiple overlapping class actions is rewarded. In the meantime, the risk of non-payment by reason of settlement in a competing jurisdiction, must be added to the already long list of risks facing plaintiff class counsel.

The United States experience provides little assistance in identifying a formalized mechanism for participatory cooperation. The U.S. Federal Court system with its administration of multi-district litigation (“MDLs”) has no parallel in the Canadian

judicial structure, and the state courts have no super-dominant jurisdiction such as Ontario constitutes in Canada.

Putative and certified class counsel may obtain some protection by pleading local legislation, relevant to the cause of action. The issue posed by provincial legislative variation arose in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 112 (S.C.J.). The claim, brought in Ontario, relied in large part on alleged breach of statutory condition contained in policies of automobile insurance and on the interpretation of relevant provincial legislation. The claim was brought on behalf of residents of a number of provinces. The court refused to assume jurisdiction over claims of persons in jurisdictions where the statutory provisions were materially different from the Ontario provisions: para. 38, or (as in the case of Newfoundland) there were unique interpretative arguments: para. 46. The extra-provincial claims were accordingly stayed. Astute counsel wishing to protect their position and that of their provincial class should be vigilant to include available allegations in their pleadings which rely on local statute. Sometimes one province may even have a favorable statute that another province lacks altogether, eg. the *Trade Practices Act*, in force in a number of common law provinces, does not exist in Ontario.

Class counsel to an action already certified in a competing province, would be in a stronger position to lay claim to participation in any negotiation and settlement which might take place in another jurisdiction with an overlapping claim, than would counsel

who has commenced such an action but not achieved certification. This notion receives some reinforcement from *Wilson v. Servier* (2000), 50 O.R. (3d) 219, para. 94:

“If a non-resident of Ontario wishes to commence an action in another province, that person can opt out of the Ontario action. If a class action is commenced and certified in either British Columbia or Quebec, that certified class proceeding will take precedence for the residents of that province.”

However if a court in, say, Ontario decides it is an appropriate exercise of its jurisdiction to certify a national or extra-provincial overlapping settlement class, the position of class counsel in the overlapped jurisdiction is not impregnable. A court could well proceed to approve an overlapping settlement despite a certification in another province, although one might expect the approving court to view any claim to a role in the settlement and to participation in the class counsel fee, made by class counsel in the overlapped province, with some sympathy.

In the new age of competing class action jurisdictions, a few precepts for risk control come to mind. Prudence dictates that all class counsel representing plaintiffs with potentially overlapping or overlapped claims should inform themselves of the existence and nature and extent of claims in other jurisdictions, and open lines of communication with the relevant counsel. (This assumes that the information is available which is not always the case!)³ Agreement between counsel on the nature and extent of cooperation is

³ Plaintiff firms may decide not to publicize the existence of a class action, precisely for competitive reasons, and defendants may have their own motives for secrecy. I am informed that in eg. Ontario, court registry searches may be unwieldy and not fully reliable.

desirable. In the absence of agreement, counsel prior to certification have little or no protection of their valuable efforts. Even counsel for a certified class have no guarantee of protection in the event the defendant chooses to settle with counsel elsewhere who represent an overlapping class, particularly an “opt-out” overlapping class (eg. Ontario). (The Merchant Law Group has elected to manage inter-jurisdictional risk by filing their class action against Conrad Black/Hollinger both in the firm’s home base, Saskatchewan, and in Ontario: <http://www.merchantlaw.com/hollinger.html>.) Should preferred jurisdiction settlement occur, the settlement approval court could be asked to grant extra-jurisdictional class counsel an appropriate participating role, but this is unknown territory – and here be monsters.

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