IMPROVING YOUR ODDS OF SUCCESS IN CERTIFICATION MOTIONS IN ONTARIO

by **Colin P. Stevenson**
Stevensons LLP

INTRODUCTION

Ontario's *Class Proceedings Act, 1992*, S.O. 1992 c.6, (the "Act") was intended to facilitate the pursuit of class actions and to remove the procedural barriers inherent in old rule 12 of the Rules of Civil Procedure. As Garry Watson stated in 1991, "the new Ontario legislation is clearly pro class actions and removes most procedural barriers to the bringing of class actions".[1]

The Act, of course, originated in the 1982 report of the Ontario Law Reform Commission (OLRC) and the Ministry of the Attorney General's 1990 report on class actions.[2] The OLRC report had contemplated a stringent certification procedure which required any representative plaintiff to satisfy the court of the merits of the action[3]. Ontario did not adopt this requirement, although many of the other OLRC recommendations were expressly adopted.

---

[1] *Ontario's New Class Proceedings Legislation-An Analysis 1991*: reproduced in *Watson and McGowan Ontario Civil Practice 2006 Forms and other Materials*, p. 690 at p. 691.

[2] *OLRC Report on Class Actions (1982)*; Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (February, 1990).

[3] *OLRC Report*, *supra*, Vol III at p. 862.

It is clear the Ontario Act intended class proceedings to be readily certified without an analysis of the merits for the protection of consumers, environmentalists and other such claimants, who would not previously have had their day in court:–nor any remedy from the courts.

Unlike many other pieces of legislation where there is no adequate legislative background, the purposes of the Act are clear. They comprise the great triumvirate of:

(a) optimising judicial economy;

(b) enhancing access to justice;

(c) behaviour modification and deterrence[4].

The Ontario Act was intended to be and clearly is more liberal (*i.e.,* pro plaintiff) than, for example, United States Federal Rule 23, which provides for certification in more limited circumstances. The most pertinent limitation in that rule is that common questions of law or fact should predominate over any questions affecting other individual class members **and** class actions should be superior to other available methods for a fair and efficient adjudication of the controversy.[5]

---

[4] *OLRC Report*, *supra*, Vol I, at pp. 117-45; AG's report at pp. 16-18.

[5] Rule 23 is reproduced in *Watson & McGowan*, forms, *supra* at p. 739,

While the certification standard is less demanding in various U.S. states, the different rules are such that U.S. case law should not have any great precedential value for Ontario. This has indeed been confirmed by the Ontario courts.[6]

The liberal and pro class action attitude of the Ontario Legislature, however, was not immediately accepted by all of the Ontario judiciary.[7] Indeed even by 2004, the flood of class actions feared by many doomsayers, who warned regularly of descent into the abyss of U.S.-style litigation and exorbitant judgments, was still no more than a relative trickle. While some may point to a less entrepreneurial Bar in Ontario (although many allege otherwise), it is likely it had more to do with an unduly restrictive approach to certification adopted by some judges of the lower courts up to at least 2005. This may well be directly related to U.S. experience as reported in the media, even though such reports, even if accurate, should not be relevant in Ontario where excessive awards and punitive damages are basically non-existent.

---

[6] *Hague v. Liberty Mutual Insurance Co.*, [2004] O.J. No. 3057 (S.C.J.) at para. 81, per Nordheimer, J.

[7] See, for example, *Sutherland v. Canadian Red Cross Society* (1994), 17 O.R. (3d) 645 (Ont. Gen. Div.) and *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453.

U.S. TRENDS

U.S. class action litigation has included Agent Orange, asbestos, the Dalkon Shield, Bendectin breast implants and the Bjork-Shiley heart valve. U.S. mass torts have included major disasters such as the MGM Grand Hotel fire and the Hyatt skywalk collapse. Securities cases are a daily occurrence and cases such as Enron, Worldcom and Nortel have led to massive settlements. The scope of class actions has considerably expanded over the years, although there has been an ebb and flow as the U.S. courts have warmed and cooled to class proceedings.

In the 1980s, the Federal Courts were reluctant to certify mass tort claims but a contrary trend developed in the late 1980s and early 1990s as the courts dealt with a multitude of asbestos cases. Indeed, in 1987 the Second Circuit went so far as to uphold the certification of the Agent Orange class action. Furthermore, class actions developed an impetus as defendants began to appreciate that properly structured class settlements could insulate them from continuing claims over a protracted period.

More recently the U.S. courts and legislature have retrenched and restricted the ubiquitousness of class actions. In *Amchem Products Inc. v. Windsor*[8], the

[8] *Amchem Products Inc. v. Windsor*, 521 U.S., 117 S. Ct. 2231 (1997).

U.S. Supreme Court validated the continuing efforts of the Circuit Courts of Appeals since 1995 to limit certification of class proceedings.

Notwithstanding the restrictiveness of recent U.S. judicial trends, the American Tort Law Reform Association and others, including the U.S. Chamber of Commerce, continued to press for statutory restrictions on class actions in the U.S. The *Class Action Fairness Act of 2001* was introduced as a bill on June 27, 2001 with a view to circumventing state courts and reducing the amounts of judgments and legal fees. The *Class Action Fairness Act of 2005* was pushed through by President Bush in February 2005 and ensures that class actions in the U.S. involving at least $5,000,000 are dealt with in federal court, which is more sympathetic to defendants than many local state courts. [9]

There is, of course, a widespread perception, largely speculative and ill-informed, that the U.S. tort system in general, and class actions in particular, are out of control and present nothing but an obstacle to an efficient and fair market economy. This perception could not help but influence some judges in Canada and may explain the historical tendency of some lower court judges to seek out reasons to deny certification, rather than to facilitate the pro class action objectives of the Ontario Act.

[9] It appears likely, however, that this law may only result in multiple class actions being commenced in different federal courts across the country. These will then likely be consolidated in a single Federal District Court pursuant to the multiple district litigation rules. See also Sasso and Horvat, "Class Action Fairness Act of 2005: A Canadian Perspective" (2005), Vol. 2, No. 1, The Canadian Class Action Review, p. 63.

QUÉBEC

Québec has traditionally been perceived as much more pro plaintiff in class actions when compared to the common law provinces. This is in large part due to the 2003 amendments to the Québec legislation substantially removing the need for affidavits on the authorization (certification) hearing.[10] Prior to 2003 these hearings had dragged on, as they currently do in Ontario.

The Québec courts have recently indicated that some evidence must be filed to establish the underlying basis of a proposed class action[11] and it is not uncommon to file experts' reports. Nonetheless, the Québec courts recognize they must apply the certification rules in a "flexible and generous" manner and that their role is limited to a summary examination.[12] The Québec courts have expressly noted that Québec's legislation is comparable to the Ontario Act and that both Acts take a less restrictive approach compared to the federal rules in the U.S.[13] The Ontario courts have taken some time to reach the same conclusion.

---

[10] Kugler and Kugler, "Québec: The Class Action Haven" (2004), Vol. 1, No. 1, The Canadian Class Action Review, p. 155. Québec's class action rules are in Book IX of its Code of Civil Procedure: see articles 999-1051. Pursuant to article 1002 the defendant may bring its own motion to examine the moving party at the hearing or to file its own evidence.

[11] *Option Consommateurs v. Novopharm Limited et al.*, January 17, 2006, C.S. Montréal (No. 500-06-000192-035), Claudine Roy, J.C.S. at para. 142.

[12] *Dallaire et al. v. Eli Lilly Canada Inc.*, July 10, 2006, C.S. Montréal,(No. 200-06-000050-057) Lachance, J.C.S. at para. 34; and *Hotte v. Servier Canada Inc. et al.*, C.S. Montréal,(No. 500-06-000076-980) February 21, 2005, Jasmin, J.C.S. at paras. 27 and 44-54.

[13] *Hotte v. Servier Canada Inc. et al.*, *supra*, at para. 48.

THE TIDE TURNS IN THE REST OF CANADA

In 2001, the Supreme Court of Canada trilogy reviewed certification standards across the country[14]. In *Hollick*, the Supreme Court analysed the Ontario Act and emphasized that the question on a certification motion is whether the common issues are appropriate to be disposed of by way of a class action. The court confirmed that the certification motion was not meant to involve a test with respect to the merits of the action[15].

It was only necessary for the plaintiffs to "show some basis of fact for each of the certification requirements" other than section 5(1)(a)(*i.e.*, whether there is a viable cause of action).

The Supreme Court made it clear that although certification was denied in *Hollick*, class proceedings were to be welcomed and encouraged. Indeed, in *Western Canadian Shopping Centres*, the court approved class proceedings in jurisdictions

---

[14] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534; and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184.

[15] *Hollick v. Toronto* , *supra*, at para. 16.

without a statutory procedural basis. This would have been unthinkable only a few years earlier[16].

The fact that the Supreme Court certified *Rumley* should have been recognized as a ringing endorsement of the view that a liberal interpretation must be given to class proceedings legislation across the country generally and not just in British Columbia. That case demonstrates a very liberal approach to certifying class actions as it involved common issues which were certified notwithstanding a "dramatic evolution" in the law relating to sexual abuse between 1950 and 1992 and a recognition that the nature of a school's obligation to its students had changed considerably over that time.[17] The Supreme Court found that a class action was sufficiently flexible to deal with variations in the standard of care and varying proximity of the defendants to the plaintiffs over a period of 42 years and that a multitude of individual issues could not preclude certification.[18]

Rumley was certified even though the British Columbia class proceedings legislation[19] requires the court on a certification motion to consider whether common

---

[16] See, for example, the Supreme Court's own decision in *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72.

[17] *Rumley v. British Columbia*, *supra*, at paras. 30 and 31.

[18] In this regard see s. 25 of the Ontario Act which deals with individual issues and s. 10 which deals with decertification.

[19] *Class Proceedings Act*, R.S.B.C. 1996 c. 50.

issues predominate over individual issues. This factor is not included in the Ontario Act.[20] The court in *Rumley* emphasized that access to justice and achieving judicial economy (behaviour modification was not relevant as the residential schools for native children no longer existed) would be maximized by certification.

In *Western Canadian Shopping Centres*, McLaughlin, S.C.J. noted that the class action plays an important role in today's world.[21] The court repeated the three important advantages of class actions over individual lawsuits, namely judicial economy, access to justice and deterring wrongful behaviour.[22] As this case originated from Alberta before its *Class Proceedings Act* was enacted, the Supreme Court emphasized that courts must use their inherent jurisdiction to settle the rules of practice and procedure and to fill any statutory void.[23]

Even in jurisdictions without express statutes facilitating class actions, such actions are to be permitted in a "liberal and flexible manner, like the courts of equity of old".[24]

---

[20] The Supreme Court has expressly confirmed that there is no "predominance" requirement in the Ontario system; *Hollick v. Toronto*, *supra*, at para. 30.

[21] *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, para. 26.

[22] *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, para. 27-29.

[23] *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, para. 34.

[24] *Western Canadian Shopping Centres Inc. v. Dutton*, *supra*, para. 44.

While the Supreme Court emphasized the need to strike a balance between efficiency and fairness, this had to be approached in a generous and unrestrictive manner. The court rejected any suggestion that prior jurisprudence and in particular, *General Motors of Canada Ltd. v. Naken*[25], precluded a generous approach to class actions.[26]

A SHIFT IN THE LEGAL LANDSCAPE

One might well have thought that the Supreme Court of Canada in the trilogy had definitively established that the courts must take a liberal and generous approach to certification, consistent with the purposes inherent in the underlying legislation. This was not, however, a universal view. Thus Nordheimer, J. in *Moyes v. Fortune Financial Corp.*,[27] dismissed a claim by investors against various investment companies and brokers for negligence, misrepresentation, fraud and related theories of liability.[28] Justice Nordheimer opined that the decision by the Ontario Court of Appeal in *Carom v. Bre-X Minerals Ltd.*[29] to allow a negligent misrepresentation claim as well as a fraudulent misrepresentation claim:

---

[25] *General Motors of Canada Ltd. v. Naken*, [1983] S.C.R. 72.

[26] *Western Canadian Shopping Centres*, *supra*, at para. 46.

[27] *Moyes v. Fortune Financial Corp*., 61 O.R. (3d) 770.

[28] (2002), 61O.R. 3rd 770.

[29] *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (Gen. Div.).

> "must now be re-evaluated in the light of the subsequent decisions of the Supreme Court of Canada which deal with the appropriate standard to be applied."[30]

The Divisional Court dealt with *Moyes* in October, 2003[31] but upheld the decision. The court gave deference to the motion judge and confirmed the decision, notwithstanding that certification of the case presented "certain attractions".[32]

Furthermore, certification of another residential school case was denied by the Divisional Court in *Cloud v. Canada (AG)*[33], certification of an environmental case was denied in *Pearson v. Inco Ltd.*[34] and certification of a breach of contract and misrepresentation case was denied in *Hickey-Button v. Loyalist College of Applied Arts and Technology*.[35]

---

[30] *Moyes v. Fortune Financial Corp.*, *supra*, at para. 31.

[31] *Moyes v. Fortune Financial Corp.*, 67 O.R. (3d) 795 (Ont. Div. Ct.).

[32] Leave to appeal to the Ontario Court of Appeal was refused on March 17, 2004, 44C.P.C. 5th 85.

[33] *Cloud v. Canada (AG)*,(2003), 65 O.R. 3rd (492) (Ont. Div. Ct.).

[34] *Pearson v. Inco Ltd.* [2004] 44 C.P.C. 5th 276; affirming *Pearson v. Inco*, [2002] 33 C.P.C. 5th 264 (Ont . S.C.J.) and 27 C.P.C. 5th 171 (Ont. S.C.J.). The initial decision should be considered differently as the scope of the claim was much broader at first instance but had been considerably narrowed by the time the case made it to Divisional Court.

[35] *Hickey-Button v. Loyalist College of Applied Arts and Technology*, 2004 CarswellOnt 8812, (Ont. Div. Ct.), dated November 2, 2004.

CLOUD

The Court of Appeal finally addressed the application of the Supreme Court trilogy in *Cloud*. In *Cloud*, the court reiterated the Supreme Court's requirement that the Act should be construed generously and that an overly restrictive approach must be avoided.[36] The students in this residential school case did need to "fully share a cause of action". The court referred to the fact that in *Hollick*[37] and *Western Canadian Shopping Centres*,[38] the Supreme Court had only stated that an issue can be a common issue if it is a "substantial ingredient" of the claims advanced by each class member and that the resolution of the common issue must be necessary for the adjudication of each class member's claim. Of course, the relative importance of the common issues compared to that of the individual issues is a different matter, which is to be dealt with under the rubric of preferable procedure.

The Court of Appeal concluded firmly that the shared interest of the class need only extend to the resolution of the common issues.[39] In the context of the common issues requirement (s.5(1)(c)) the Court of Appeal emphasized that the class

---

[36] *Cloud v. Canada*, *supra*, at para. 37.

[37] *Hollick v. Toronto* , *supra*, at paras. 18 and 30.

[38] *Western Canadian Shopping Centres v. Dutton*, *supra*, para. 39.

[39] *Cloud v. Canada*, *supra*, at para. 46.

representative need only show "some basis in fact" and there should be no assessment of the merits.[40] The court emphasized that the commonality requirement is a "low bar"[41] and reaffirmed the reasoning in *Rumley*.

In considering the preferable procedure requirement (s.5(1)(d)) the court in *Cloud* was clearly concerned that the Divisional Court had not applied the reasoning of the Supreme Court in *Hollick*. The Court of Appeal emphasized that one should not focus in isolation on any individual issues which existed. One must focus on whether there were issues, the resolution of which were necessary to resolve each class member's claim and were a substantial ingredient of those claims.[42] The Court of Appeal noted that neither the motion judge nor the majority of the Divisional Court had addressed the vital aspect of the preferability inquiry, *i.e.,* whether viewing the common issues in the context of the entire claim, their resolution would significantly advance the action.[43]

The Court of Appeal emphasized that this assessment is not quantitative. It is qualitative. One does not simply consider the number of individual issues remaining

---

[40] *Cloud v. Canada*, *supra*, at paras. 49 and 50 citing *Hollick v. Toronto*, *supra*, at para. 25.

[41] *Cloud v. Canada*, *supra*, at para. 52.

[42] *Cloud v. Canada*, *supra*, at para. 55.

[43] *Cloud v. Canada*, *supra*, at paras. 75-77.

after the common issues trial. The Court of Appeal concluded that the common issues in *Cloud* would take the action a long way.[44]

THE COURT OF APPEAL MAKES THE POINT CRYSTAL CLEAR

The Court of Appeal in *Pearson v. Inco Ltd.*[45] wrote that the *Cloud* decision "suggests a somewhat more liberal approach should be taken to certification of class proceedings."[46] The court even stated that "there has been a shift in the legal landscape as a result of the court's decision in *Cloud."*[47]

It can be argued that the Court of Appeal was really just endorsing the analysis in the Supreme Court trilogy and emphasizing that:

(a) class actions are to be encouraged rather than discouraged;

(b) the Act is to be liberally and generously interpreted and applied to facilitate the pursuit of such claims, in a manner consistent with the underlying purposes of the Act; namely, judicial economy, access to justice and deterrence of improper behaviour.

---

[44] *Cloud v. Canada*, *supra*, at paras. 84-85.

[45] *Pearson v. Inco Ltd.* (2005) 78 O.R. 3rd 641 (Ont. C.A.).

[46] *Pearson v. Inco*, *supra*, at para. 3.

[47] *Pearson v. Inco*, *supra*, at para. 44.

The Court of Appeal acknowledged that the motion's judge in *Pearson* had not had the benefit of either the considerable restrictions in the scope of the plaintiff's claim that had been adopted by the time the case reached the Court of Appeal or the 2004 decision of the Court of Appeal in *Cloud*.[48]

The Court of Appeal, however, drove home its point that the Act should be generously applied and liberally interpreted. The case was adequately pleaded (paragraph 5(1)(a)), the class objectively identified (paragraph 5(1)(b)) and the court noted that an underinclusive class should not generally be of any great concern.[49] Furthermore, the court reiterated that individual limitation defences and discoverability issues would not necessarily negate a finding that the case is suitable for certification.[50]

Justice Rosenberg wrote at paragraph 65 in *Pearson* that:

> "I did not understand Inco to dispute that there remained common issues despite the recasting of the claim. Inco does, as noted above, take the position that many of the common issues are of no real moment to the litigation because the case will stand or fall on the *Rylands v. Fletcher* claim. That is a matter to be considered in discussing the preferable procedure. The common issue requirement is a 'low bar to certification: *Cloud*, *supra* para. 52. As Goudge J.A. wrote in *Cloud* at para. 53, 'an

[48] Of course everyone had read the trilogy of Supreme Court decisions. In any event, while the Divisional Court did not have *Cloud v. Canada*, *supra*, it did have the restricted claim but nonetheless certification had been denied.

[49] *Pearson v. Inco*, *supra*, at para. 61.

[50] *Pearson v. Inco*, *supra*, at para. 63; *Cloud v. Canada*, *supra*, at paras. 61, 81-82 and 95.

> issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and event though many individual issues remain to be decided after its resolution'. Further, as he wrote at para. 58, 'the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure.'"[51]

The Court distinguished *Chadha v. Bayer Inc.*[52] and simply noted that the appellant in *Pearson* had supplied expert evidence to show a link between the 2000 Ministry of Environment announcement and the decline in property values which was the fundamental common issue in the case. Interestingly, the court also considered that in looking at "behaviour modification" the court should look not only at a particular defendant but more broadly at the impact on similar defendants, such as, in this case, other operators of refineries who could avoid the full costs and consequences of their activities if class claims were not available.[53]

Finally, the Court of Appeal emphasized the courts must not take too rigid a view of the litigation plan. The elements of the litigation plan need not be found entirely within the plan itself. It is sufficient, taking the generous approach mandated by

---

[51] *Pearson v. Inco*, *supra*, at para. 65, applied by Cullity J. in *Murphy v. BDO Dunwoody LLP*, [2006] O.J. No. 2729 paras. 36-38.

[52] *Chadha v. Bayer Inc.* (2003) 63 O.R. 3rd 322; *Pearson v. Inco*, *supra*, at para. 75.

[53] *Pearson v. Inco*, *supra*, at para. 88.

the Court of Appeal, that one can find sources for the litigation plan in the materials before the court.[54]

In short, *Cloud* and *Pearson*, while simply applying the law as stated by the Supreme Court in the trilogy, effected a "shift in the legal landscape" to the extent that these decisions bring home to everyone the fundamental proposition that class actions are to be encouraged and supported, rather than assessed in a restrictive fashion. Indeed, *Pearson* was the first environmental case to be certified in Ontario.[55]

This message has been applied in subsequent cases.[56] This is not to say that class actions will be approved irrespective of the materials put before the court. Where the evidence on a generous and liberal view does not satisfy the requirements in the Act, certification will and should be denied.[57]

---

[54] *Pearson v. Inco*, *supra*, at para. 97.

[55] It has historically been difficult to certify environmental cases in Ontario. The courts have usually concluded that there were too many issues requiring individual adjudication. See *Sutherland v. Canada*, [1997] B.C.J. No. 2550; *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475; and, *Hollick v. Toronto.* In Alberta certification has now been granted in *Windsor v. Canadian Pacific Railway Ltd.*, [2006] A.J. No. 584, a case involving groundwater contamination from the escape of a solvent from railway yards over the course of a period of years. This case should be contrasted with *Paron v. Alberta (Environmental Protection)*, [2006] A.J. No. 573 where certification was denied in respect of the alleged thermal contamination of a lake and surrounding property. See also *McLaren v. City of Stratford*, [2005] O.J. No. 3388 and *DuMoulin v. Ontario*, [2006] O.J. No. 1233. Environmental claims will have to be narrowly and precisely drafted to be certified in Ontario.

[56] [2006] O.J. No. 2729 (Cullity J.); *Lewis v. Cantertrot Investments Ltd.*, [2006] O.J. 1061 (Cullity J.); *McCutcheon v. The Cash Store Inc.*, May 10, 2006 (Cullity J.); and *McLaren v. City of Stratford*, [2005] O.J. No. 3388 (Jenkins J.).

[57] *DuMoulin v. Ontario*, [2006] O.J. No. 1233 (Cullity J.); *Cassano v. Toronto-Dominion Bank*, 2005 CarswellOnt 857 (Cullity, J.); aff'd. 2006 CarswellOnt 4337 (Ont. Div. Ct.).

EVIDENCE TO BE FILED

Irrespective of whether *Cloud* shifted the legal landscape,[58] it is clear that evidence filed in support of a certification motion need not necessarily be extensive and should not directly address the merits.[59] It need only provide some basis in fact for the components of s. 5 of the Act. As a practical matter, affidavits in support of certification should be shorter rather than longer, although expert evidence will often be necessary to avoid certification being dismissed on the basis that there is no evidence whatsoever to support some integral component of the common issues.[60]

As a liberal approach must be taken to certifying any class proceeding,[61] limited evidence only should be required to show some basis in fact[62] for each of the elements in s. 5 of the Act (other than the tenable cause of action required by s. 5(1)(a), which will be established from a review of the pleading and associated documents). I will now consider each of the components of s. 5 briefly.

---

[58] *Pearson v. Inco*, *supra*, at para. 44.

[59] *Hollick v. Toronto*, *supra*, at para. 16; *Cloud v. Canada*, *supra*, at para. 50.

[60] See, for example, *Chadha v. Bayer Inc.*, *supra*, and *Ernewein v. General Motors of Canada Ltd.*, (B.C.C.A.), 46 B.C.L.R. (4th) 234, although the latter decision could be said to be suspect based on the analysis in this paper.

[61] *Pearson v. Inco*, *supra*, at para. 3.

[62] *Hollick v. Toronto*, *supra*, at para. 25.

s. 5(1)(a): There must be a tenable cause of action. This does not require any evidence, but the material facts and the legal basis of the claim must be carefully and properly pleaded, although the courts should read the pleading generously and the claim should be rejected only if it is "plain and obvious" it will not succeed.[63] Thus one should compare *Mondor v. Fisherman*[64] where a claim for misrepresentation was allowed to proceed through certification with *Menegon v. Philip Services Corp.*[65] where a similar claim failed because it was not adequately pleaded. Novel causes of actions of course will be allowed to proceed, if properly pleaded.[66]

s. 5(1)(b): An identifiable class must be established. The test is objective[67] but not onerous.[68] One must have "some showing" that the class is not "unnecessarily broad" but there is little risk in being rejected because of an underinclusive class.[69] The question of a national class will often be raised here but is probably better discussed as part of "preferable procedure".

---

[63] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[64] *Mondor v. Fisherman*, [1991] 15 C.P.R. (4th) 289 (Ont. Sup. Ct.).

[65] *Menegon v. Philip Services Corp.*, (Jan. 9, 1993 O.C.A.).

[66] *Serhan v. Johnson & Johnson*, [2006] (Ont. Div. Ct.).

[67] *Hollick v. Toronto*, *supra*, at para. 17.

[68] *Hollick v. Toronto*, *supra*, at para. 21.

[69] *Cloud v. Canada*, *supra*, at para. 61.

For a national class one must file evidence of a real and substantial connection between the chosen forum and each of the other jurisdictions within the proposed class. A national class must be shown to be consistent with concepts of "order and fairness", recognizing that Québec may not accept a national class being imposed on it; at least until the Supreme Court intervenes.[70]

s. 5(1)(c): Common Issues:–The question of the existence of common issues is a "low bar" to certification.[71] The common issues must be a substantial ingredient of the claims, albeit they may still be a very limited aspect of the liability question.[72] The description of the common issues must be carefully connected to the definition of the class, but ultimately this is primarily a question for legal argument.

s. 5(1)(d): Evidence must be directed primarily to establish the preferability requirement in both its guises. Thus the evidence must persuade the motion's judge (who has the most significant discretion on this issue), first, that the class action is fair, efficient and manageable and, secondly,

---

[70] *HSBC Bank Canada c. Hocking*, [2006] J.Q. No. 507; *Lépine c. Société canadienne des postes*, [2003] J.Q. No. 18920.

[71] *Cloud v. Canada*, *supra*, at paras. 52-53.

[72] *Cloud v. Canada*, *supra*, at paras. 51-53.

that the class action is preferable to other reasonably available means of addressing the claims.

Affidavits must use *admissible* evidence to show how the common issues will be established and why this is preferable, but one need not set out the details of the proof. The question of admissible evidence at the certification stage will be discussed below. One must identify the means by which all aspects of the common issues will be proven at trial. An inability to establish the means to prove causation or to prove an actual loss, will lead to a claim being rejected.[73]

In *Chadha v. Bayer*, the plaintiffs failed to establish any methodology which could prove that the extra costs arising from alleged price fixing had flowed through to the plaintiff class, as opposed to being absorbed by intermediate entities in the production and distribution chain in respect of the bricks and paving stones supplied to the ultimate consumer (the class). As noted above, it is worth contrasting *Chadha* with *Pearson* where the court acknowledged that there was expert evidence filed to show the link

[73] *Chadha v. Bayer*, *supra*; *Ernewein*, *supra*.

between the 2000 Ministry of Environment announcement and the declining property values.[74]

One must also file evidence to show why trial of the common issues will not be overwhelmed by the individual issues. In other words, one must show why determination of the common issues moves the trial a long way.[75]

The evidence is this regard should address in particular the policy considerations of access to justice, judicial economy and the deterring of improper behaviour on the part of the defendant or that category of defendant. One must carefully consider the qualities of class members such as age, lack of education and lack of financial resources. One must also address any concerns about multiplicity of proceedings and any failed attempts to resolve the issues in other forums. One must address inadequacies in the alternatives. One should put in evidence of complaints by members of the class or, failing that, some evidence as to why such complaints have not been forthcoming.

---

[74] *Pearson v. Inco*, *supra*, at para. 76.

[75] *Cloud v. Canada*, *supra*, at paras. 82 and 85.

s. 5(1)(e): One must file evidence from the representative plaintiff to show that they are a member of the class as well as that they will fairly and adequately represent the interest of the class and have no conflict of interest with the other class members.

For example, in a pharmaceutical product liability case, the plaintiff need not produce all the representative plaintiff's medical records. One must establish, however, that the representative plaintiff ingested the drug and suffered the detrimental consequences alleged in the claim.[76] An inadequate evidentiary record can, however, lead to an "exceptional" order for discovery.[77]

Evidence should also establish that the representative plaintiff will vigorously and capably prosecute the claim. The main concern is that the representative plaintiff has an interest in the litigation.[78] Finally, note that the capacity of the representative to fund the litigation is only one factor to be considered in whether the

---

[76] See *Pardy v. Bayer Inc.*, [2003] N.J. No. 210 (Mercer, J.) at paras. 49-52. See also the decisions refusing production of medical records in *Pearson v. Inco*, [2002] 22 C.P.C. (5th) 167; *Anderson v. Wilson*, [1996] 7 C.P.C. (4th) 244; and *Segnitz v. Royal & Sun Alliance*, [2003] O.J. No. 78.

[77] See the comments of Winkler, J. in *Caputo v. Imperial Tobacco*, *supra* at pp. 319-320, that the adequacy of the record will vary in the circumstances of each case. See also *Hollick* at para. 23.

[78] *Pearson v. Inco*, *supra*, at para. 98.

plaintiff will adequately represent the class, although this issue must be expressly addressed.[79]

The litigation plan must also be filed. The litigation plan is most important probably in the context of addressing the preferable procedure. If one can satisfy the court that the class action is the preferable procedure, it is unlikely that any defects in the litigation plan will derail certification. The courts have recognized that litigation plans may well have to be amended as actions proceed.[80]

In *Pearson*, the Court of Appeal stated that lower courts should not take an "unreasonably rigid view" of litigation plans. It is sufficient if the details of the plan are to be found within the motion materials, even if not expressly set out in detail in the litigation plan itself.[81]

---

[79] *Pearson v. Inco*, *supra*, at para. 94.

[80] *Cloud v. Canada*, *supra*, at para. 95.

[81] *Pearson*, *supra*, at para. 97.

SPECIFIC EVIDENTIARY ISSUES

A solicitor's affidavit based on information and belief may be insufficient to support certification, but this will depend on all the circumstances.[82]

The following general principles were stated recently by C. Campbell, J.:

> "1. A solicitor's affidavit may be used to provide a sufficient evidentiary record for a certification motion.
>
> 2. Whether a solicitor's affidavit or that of another witness is used, the affidavit should generally conform to the requirements for affidavits as set out in rule 4.02 of the Rules of Civil Procedure confined to statements of fact within the personal knowledge of the deponent. See *White v. Merk Frosst Canada*, [2004] O.J. No. 623 (S.C.J.) per Winkler, J., at paragraphs 7 and 8.
>
> 3. Exceptions to the requirement of personal knowledge rule may be permitted where the facts attested are:
>
> (a) not contentious;
> (b) clearly relevant; and
> (c) not purposely put forward to avoid cross-examination of the real deponent. See *Chopik v. Mitsubishi Paper Mills Ltd.*, [2002] O.J. No. 2780 (S.C.J.) at paragraph 26."[83]

---

[82] *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314. See also *Taub v. Manufacturers' Life* (1998), 40 O.R. (3d) 379, aff'd. 42 O.R. (3d) 576 where there was a complete lack of evidence that the mould, which was the subject of the claim, had been found anywhere but in the plaintiff's own apartment. Ultimately, therefore, there must be some evidence which shows that a class action, as opposed to an individual claim, is the appropriate means to proceed.

[83] *Punit v. Wawanesa Mutual Insurance Company et al.*, reasons released January 4, 2006, court file number 01-CV-21546CP *et al.*

Solicitors' affidavits have had paragraphs struck if they contain materials that should properly only be included through experts or contain contested statements of fact without any adequate basis for having stated them and having a belief in their contents as being true.[84]

Nonetheless, such defects should seldom be fatal. As Justice Cullity has noted, if there is insufficient basis in fact to establish some particular component of the s. 5 test for certification then it will be appropriate to adjourn the hearing with leave to the plaintiff to file further evidence.[85] Indeed, motions striking out affidavits in advance of certification are generally frowned upon, as they only contribute to inappropriate delay and are inconsistent with the recent shift in the legal landscape. At worst, they should simply be adjourned to the certification motion.

Some courts have previously not been prepared to take a liberal and generous approach to the admissibility of evidence in support of the various components of s. 5 of the Act (other than s. 5.1(a)). Thus, in *Robb Estate v. St. Joseph's Healthcare Centre*[86], the court did not accept the *Krever Report* as evidence of the truth of its contents. Similarly, although reports from the Ombudsman and former Justice Berger

---

[84] *Pardy v. Bayer*, *supra*, at paras. 56-68.

[85] *Murphy v. BDODunwoody LLP*, [2006] O.J. No. 2729 at para. 33; *Hollick v. Toronto*, *supra*, at para. 25.

[86] *Robb Estate v. St. Joseph's Healthcare Centre*, [1998] 31 C.P.C. (4th) 99 (Ont. Gen. Div.).

were adopted by the Supreme Court of Canada in *Rumley v. B.C.*, it now appears that the Crown did not intend to admit the truth of the contents of those reports. In subsequent de-certification proceedings the British Columbia Supreme Court noted that the evidence at the two inquiries was confidential, untested and did not make findings in the usual sense. Justice Humphries also stated that notwithstanding previous comments by the Supreme Court in *Rumley*, the defendant had not made the admissions now sought by the plaintiff and that they were still subject to proof. Justice Humphries further stated:

> "It is clear that there is no basis upon which to admit the contents of the two reports for the truth of their contents. Further, given the contents it is difficult to imagine what probative value the reports could have for the purposes of this litigation."[87]

Of course, an expert could probably have attached the reports as an exhibit and relied on them as a partial basis for their opinion on a material issue.[88] The expert should state that such evidence is available and accurate and is the basis for the expert's opinion on the specific issue before the court. Notwithstanding any liberalization in certification standards, experts' reports will still be commonplace to establish the means by which the common issues will be proven and to put the common issues in context.

---

[87] Humphries, J. at paras. 51-53. See also *Ernewein* at paras. 27-32.

[88] Even if reports attached to an affidavit contain opinion evidence the information may still be admitted on a motion. *Ontario (Ontario New Home Warranty Program) v. Montgomery*, [1987] O.J. #657 (Ont. Div. Ct. per Rosenberg, J.) at p. 8.

Given that the certification motion does not involve any determination of the merits of the claim, it is difficult to see, however, why some judges have insisted on the strict application of rules of admissibility that might apply at trial in respect of evidence relevant to the merits. Nordheimer, J., has, in my submission, stated the proper approach as follows:

> "Principles such as the 'best evidence' rule, therefore, have limited if any application. Similarly the scope for putting information before the court on a certification motion given its procedural nature is considerably broader than it would be on a motion going to the actual determination of the merits of the claims advanced."[89]

In the same decision Justice Nordheimer was of the view that there was nothing improper in filing various reports (obtained from the internet and specifying the consequences of using non-original equipment parts on motor vehicles) as such evidence is relevant simply to establish that there is a common issue which is appropriate to be resolved on a class-wide basis.[90]

Justice Nordheimer also stated in the later certification motion in that proceeding:

> "I will say that I find nothing improper in the plaintiffs making reference to evidence in other proceedings in order to demonstrate that there are other witnesses or other sources of evidence that may be available to them

---

[89] Nordheimer, J., *Hague v. Liberty Mutual*, October 11, 2001, at para. 7.

[90] *Hague v. Liberty Mutual*, *supra*, at para. 8.

> for the purposes of establishing their contentions in a common issues trial."[91]

As a general proposition the certification motion should be the first motion in the proceeding. It is not generally appropriate to have preliminary motions to "vet" the evidence. The certification motions judge should consider the evidence and, if inadequate, it may lead to an unsuccessful certification motion.[92]

This issue was addressed by Cullity J. on a motion to strike, in advance of a certification motion involving medical issues. His Honour commented:

> "For the reasons just stated, I reject also the suggestion that it is appropriate to decide questions of admissibility at this stage in order to save further delay and expense. Moreover, I cannot assume that, if the affidavit evidence was expunged, the plaintiffs would not wish to substitute other affidavits and, as I have indicated, the defendants have stated that they are likely to adduce more evidence if the motion is dismissed. The values of efficiency and economy suggest strongly that motions like this–which may lead to further evidence and, possibly, further motions to strike–should not be encouraged."[93]

---

[91] Nordheimer, J., in *Hague v. Liberty Mutual*, *supra*, at para. 49, also cited by C. Campbell, J., in *Punit v. Wawanesa*, *supra*, at para. 10.

[92] Nordheimer, J., *Hague v. Liberty Mutual*, *supra*, at para. 10. But *cf.* C. Campbell, J., *Punit v. Wawanesa*, January 4, 2006 at paras. 8-22 where Justice Campbell, although purporting to agree with Justice Nordheimer, struck out identical documents on the unusual basis that he would not be the certification motion judge. See paras. 12-13.

[93] *Andersen v. St. Jude*, *supra*.

In *Andersen* v. *St. Jude,* Cullity J. articulated another reason to defer the issue of the admissibility of evidence proffered on a certification motion to the judge hearing that motion. As His Honour stated therein:

> "This, I believe, is a case where evidence that is relevant to the merits may also be relevant to the issues that will, or may, arise under subsection 5(1) on the motion for certification. I say 'may arise' because at this stage I have not been informed of the precise grounds, if any, on which the defendants intend to oppose certification. I can only infer from the contents of the affidavits filed to date that certain grounds may be relied upon. Whether evidence will be relevant to the issues raised on the motion to certify may depend, to a significant extent, on the position adopted by the defendants with respect to the application of section 5(1) of the CPA in the circumstances of the case. The court should not be expected to speculate about this. This difficulty, by itself, persuades me that it would not be appropriate to decide questions of admissibility based on the requirement of relevance at this stage and I do not intend to do so."[94]

It will generally be inappropriate for the defendants to argue that an expert put forward by the plaintiffs is not properly qualified.[95] The certification motion judge should not evaluate the strength and weakness of the expert evidence filed on each side of the issue. One must remember that the certification motions judge is not even engaged in a preliminary review of the merits. The question is simply whether there is "some evidence" to support the plaintiff's argument that the matter is properly to be dealt with as a class action. The plaintiffs should be careful not to fall into the trap of filing

---

[94] *Andersen v. St. Jude*, *supra*, at para. 10.

[95] Nordheimer, J., *Hague v. Liberty Mutual*, June 14, 2004, at paras. 74-76; supplementary reasons released November 22, 2004, see paras. 9-12. See also *Andersen v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 at paras. 46 and 81 (although note, however, that the evidence of one medical expert was excluded on the basis of lack of any connection between his expertise and the opinion expressed).

comprehensive expert's affidavits analysing all aspects of the merits. The reports should frame the debate, explain the relevant common issues and how they can be proven in a rational and efficient manner.

The Act is a procedural and not a substantive statute. The analysis at the certification stage focuses on the form of the action and is directed not at the question of whether the claim is likely to succeed, but whether the action is appropriately prosecuted as a class action.[96]

Nonetheless, evidence proffered on a certification motion may touch on the merits of the case. This is not grounds for striking that evidence from the supporting affidavits as long as it also touches on factors relevant to certification.

> "Indeed the court must have a good sense of all of the issues that will be raised in order to foresee the future conduct of the litigation. Without a complete presentation, the court will be unable to assess manageability or preferability."[97]

Smith J. in Saskatchewan put the matter even more strongly (and perhaps too strongly) when he stated:

---

[96] Nordheimer J. endorsement in *Hague v. Liberty Mutual*, October 11, 2001, at para. 7.

[97] *Class Actions in Canada*, Ward K. Branch, (Toronto, Canada Law Book Inc.) pp. 4-59, paras. 4.1530 and 4.1540; and *Andersen v. St. Jude*, [2003] O.J. No. 4314, 2 C.P.C. (6th) 1 at paras. 8-10.

> "In addition, it is now widely accepted that, despite the mandatory language of s.6 [the Saskatchewan equivalent to s. 5 in the Ontario Act] ('The court shall certify an action as a class action…if the court is satisfied that [the five criteria are satisfied]'), the court has relatively wide discretion in relation to the requirement in s. 6(d) of the Saskatchewan Act that a class action be the preferable procedure, and that the exercise of this discretion requires consideration of the scope and nature of the proposed litigation as a whole and a balancing of the relevant factors. Accordingly, the desirability of providing, on the certification motion, as complete a picture as possible of the proposed action, including the scope of the issues raised both in the claim and in defence, has generally been viewed by the courts as helpful in determining whether class action proceeding is the preferable procedure.
>
> These authorities support the view that, on a certification application, the court will be assisted by as full a picture as possible of the nature and scope of the proposed litigation, including an indication of the nature of the evidence that may be relevant to both the claim and the defence with respect to both the common and the individual issues."[98]

ADMISSIONS

In filing evidence in support of certification note also that admissions of a defendant are generally admissible so long as it has "something to do with the case".[99] The admission need not be based on personal knowledge. It is sufficient if the defendant adopts the statements of a third party. Admissions may also be implied from a party's conduct and in certain circumstances from a party's silence.

---

[98] *Hoffman v. Monsanto Canada Inc.*, (2003) 233 Sask. R. 112 (Sask. Q.B.) at paras. 43 and 46.

[99] D.M. Paciocco and L. Stuesser, *The Law of Evidence*, 3d ed. (Concord, Ontario: Irwin Law, 2002) citing Professor Younger, c. 5, p. 1.

Although it is much less likely to be useful, one should also remember that declarations against interest by **non-parties** will even be admissible at trial where:

(c) the declarant is unavailable to testify;

(d) the statement, when made, was made against a declarant's interest; and

(e) the declarant had personal knowledge of the facts stated.[100]

It should be noted that:

> "An admission may consist of an oral or written statement or conduct made directly by or on behalf of a party litigant and tendered as evidence at trial by the opposing party."[101]

Thus, one should be able to file the defendants' own documents which are adverse to the defendants' interests. Such documents are often available from U.S. civil, criminal or regulatory proceedings.[102]

REPRESENTATIVE ACTION

The distinction between representative actions and class actions will be discussed in more detail in David Stamp's paper. It will only be noted here that the term

---

[100] Paccioco and Streusser, *supra*, c. 5, s. 7. See also John Sopinka, Sidney N. Lederman, Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, c1999) at pp. 286-309.

[101] Sopinka, Lederman, Bryan, *supra*, at para. 6.304.

[102] But *c.f. Edwards v. LSUC*, [1995] 40 C.P.C. (3d) 316.

"representative action" is often used synonymously with "class actions", especially in cases prior to the introduction of the Act in 1992. A brief history of the origin of class actions over the years is set out by the Chief Justice in the *Western Canadian Shopping Centres* case.[103]

In current cases, however, a distinction is usually made between class actions and representative claims. The latter are not the appropriate subject of class proceedings by virtue of s. 37 of the Act. Section 37 provides that the Act does not apply to any case that may be brought as a representative action under any other statute.

An illustration of a successful motion to prevent a claim being brought as a class action, as opposed to a representative action, is *Potter v. The Bank of Canada et al.*[104] In this case a claim, essentially for a declaration that certain monies had been inappropriately paid out of a pension plan, was found to be more appropriately dealt with under the less involved rules of a representative claim.[105]

August 11, 2006

---

[103] *Western Canadian Shopping Centres*, *supra*, at para. 20.

[104] *Potter v. The Bank of Canada et al.*, 2006 CarswellOnt 1077, February 22, 2006 (Ellen Macdonald, J.).

[105] See also *Crawford v. London (City)* (2000), 47 O.R. (3d) 784 at 787 and *Paramount Pictures (Canada) Inc. v. Dillon*, [2006] O.J. No. 2368, Cullity, J., where a representation order was rejected in favour of certification. For a discussion on the limitations of another alternative:– test cases, see Klein and Lennox, "Backburners and Bellwethers: Comparing Class Actions and Test Cases" (2005), Vol. 2, No. 1, The Canadian Class Action Review, p. 85.