Submission to the Victorian Law Reform Commission

ACCESS TO JUSTICE—LITIGATION FUNDING AND GROUP PROCEEDINGS

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This email is in response to your consultation process inviting submissions on the following questions:

> **Should the existing threshold criteria for commencing a class action be increased? If so, which one or more of the following reforms are appropriate?**
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> a) **introduction of a pre-commencement hearing to certify that certain preliminary criteria are met**
> b) **legislative amendment of existing threshold requirements under section 33C of the Supreme Court Act 1986 (Vic)**
> c) **placing the onus on the plaintiff at the commencement of proceedings to prove that the threshold requirements under section 33C are met**
> d) **other reforms**

Introduction:

I am a Canadian lawyer called it to the Ontario Bar in 1973, and practicing litigation since then. Over the years I have appeared as counsel for plaintiffs and defendants in several class actions, and have written law journal articles on the subject. I was also retained by the Law Reform Commission of Australia approximately 30 years ago to prepare a report as part of its project on class actions. Four years ago I retired as a partner in the Toronto office of the Miller Thomson law firm, and have been working as a sole practitioner in semi-retirement since then.

What is the Function of Class Actions?

Lawyers tend to look at class actions from a legal viewpoint rather than a functional one. This is a disadvantage when developing class action policy.

Lawyers tend to see class actions as permitting lawsuits in a representative capacity where one or a few class representatives represent an entire class of persons seeking redress. To follow this analysis further, however, we need to ask the question: why is it desirable to permit representatives to sue on behalf of others? The answer is that it brings down the unit cost of litigation. The next question would be: why is that desirable? The answer is that it permits recovery of damages that would not be individually recoverable because the cost and risk of litigation greatly exceeds the damages that any individual plaintiff is likely to be awarded if suing alone. Sometimes lawyers will see, and judges will write in their reasons for decision, that class actions can increase "access to justice", but it is still important to understand how and why class actions can do that. Again, the answer is that it permits actions for damages that would not otherwise be economic to bring.

What is the Effect of "Certification" on Class Actions?

Your consultation question concerns a pre-commencement hearing, to be put in place through a legislative amendment, placing the onus on the representative plaintiff to prove that certain threshold requirements are met prior to being permitted to conduct the lawsuit. The common name for this in North America is "certification". (In Québec it is called "authorization", but is otherwise substantially the same.)

The arguments in favour of certification fail to recognize that class actions are not primarily about law, they are primarily about economics. Law is the mechanism through which liability is determined, and the procedural device through which the action is brought. But the real goal is economic. It is to reduce the unit cost of litigation of an alleged mass wrong to the point that it renders economical litigation that otherwise would be much too risky and costly to bring. If the legal "safeguard" of certification is applied to the process it raises costs and risks enormously, yet provides class members with little or no material benefit in return. Rather, certification changes a balanced approach between plaintiffs and defendants to one that is heavily tilted in favour of defendants. It gives plaintiffs an uphill battle with no discernible benefit to anyone in the class.

The original English rule (adopted in Canada and Australia), limited as it was, had no requirement for certification. Certification is a US device created, I believe, in the 1950s or even earlier. It is the product of the American legal culture of its time. Since the US had what was the most advanced class action legislation at the time, Québec copied it when it made its own rules and other Canadian jurisdictions followed. The American model was simply copied, with little or no analysis. This has significantly skewed the kinds of class actions that

are now economical to bring. Certification is not just a filter; it is effectively a barrier, because of the time and money it takes to have a class action certified.

Today there are very few class actions brought in Canada that do not follow another enforcement event created by government, such as a prosecution for price-fixing under competition law, a securities prosecution or a defective product recall. Furthermore, since the fixed cost of certification is so high class actions cannot be brought for relatively small classes or for claims with an aggregate value of less than perhaps $20 million, because the risk of loss at the certification stage is not worth taking for the law firm or other agency financing the litigation. That is why most Canadian class actions are brought Canada-wide by ad hoc working arrangements among law firms in several provinces. Yet Canada, with only 36 million population, is still too small a market to permit many class actions to be worthwhile, given the cost and delay of certification. That is why Canadian class actions sometimes piggyback on US class actions, with the risk of relatively lower damage awards to the Canadian class.

If your state adopts certification while other Australian states do not, the likely result would be that plaintiffs' lawyers will bring class actions in other states, while avoiding class actions in Victoria. This would reduce the frequency and quantum of recoveries of persons who have suffered harm or injury in Victoria. If some potential Canada-wide class actions are uneconomic with a population of 36 million, how would the State of Victoria fare with a population of approximately 6 million if it had a certification requirement?

What is the Rationale for Certification?

The usual rationale for certification is that the representative plaintiff is not suing only on his or her behalf but on behalf of others, in a representative capacity, requiring judicial safeguards to protect the absentee class members. Accepting that to be true, the argument that certification is the appropriate safeguard for suing in a representative capacity is a non-sequitur. While suing in a representative capacity does require certain judicial safeguards to protect the interests of absentees, the timing of the application of such safeguards, as well as what those safeguards should be, is subject to debate.

I would agree that class actions should not be settled without judicial approval, to avoid the defendant paying off the representative or his or her counsel. I would also agree that some mechanism needs to be created for the adjudication of individual issues after the common issues have been determined in favour of the class (if that is the decision). However, certification is not the answer.

If you look at what happens in North American jurisdictions with certification, at least in Canada and in many reported US cases, it can take a decade for certification motions and their appeals to be resolved. By that time it is likely that the witnesses to some of these events will have died or forgotten what happened or be impossible to locate. The legal and expert witness fees to resolve the certification issue are often in the millions. In the vast majority of cases in which certification is granted and the appeals exhausted, the cases quickly settle. This suggests that there is little debate about the merits of the litigation or what the damages, if any, should be. The sole and principal issue is the threshold question of certification. In other words, most North American class actions are not about the substantial question of liability. They are about the procedural question of certification. That does not make sense.

There is something perverse about seeking to protect the interests of absentees with a procedural device that often ensures that the representative's law firm or funding agency will be run out of time and money. That way, no one in the class receives any compensation for their harm or injury. The cost and delay of certification is a huge deterrent to commencing a class action. This is "protection" with a vengeance.

If an opinion polling company was to ask class members whether they would prefer their interest to be protected in this manner, increasing the risk that they get nothing at all, I would think that most of them would say "No thank you, I risk nothing by being a member of the class, so don't protect me by destroying the economics of those who are prepared to assume that risk".

As I understand it, Australia at the Commonwealth level has neither adopted certification nor gone to the opposite extreme of preventing defendants from an adequate defence. Your well-balanced Commonwealth rule has left open the safeguard that the defendant can bring a motion, at its cost, risk and burden, to strike out the pleadings or to challenge the appropriateness of bringing the case in class form. But at least there is no hypocrisy in this because the rule recognizes that this is not done for the professed purpose of protecting absentee class members but rather, protecting the defendant from an inappropriate method of proceeding.

My recommendation would be that Victoria should adopt the Commonwealth rule.

I hope you find this brief submission useful. I would be pleased to answer any question you might have.