



## **CLASS ACTIONS**

### **INDUSTRY CLASS ACTIONS: CAN YOU SUE EVERYONE AT ONCE?**

These materials were prepared by Paul Bennett, with the assistance of Mark W. Mounteer, both of Hordo & Bennet, Vancouver, B.C. for Continuing Legal Education, February 2005.

© Paul Bennett



## **INDUSTRY CLASS ACTIONS: CAN YOU SUE EVERYONE AT ONCE?**

<b>I.</b>	Introduction .....	1
<b>II.</b>	The Law in British Columbia .....	1
	A. Commencing an Action Against Multiple Defendants .....	1
	B. Joinder of Additional Defendants .....	3
<b>III.</b>	The Law in Ontario .....	5
<b>IV.</b>	The Law in the U.S. ....	7
<b>V.</b>	Approaches Contrasted .....	7
<b>VI.</b>	Practical Considerations .....	8
	A. The Common Issues.....	8
	B. Complexity .....	9
	C. Economy of Sale.....	9

### **I. Introduction**

In the recent decision of *MacKinnon v. Money Mart et al.*, [2004] B.C.J. No. 1960, 2004 BCCA 472, a five-member panel of the B.C. Court of Appeal unanimously held that in an action brought under the *Class Proceedings Act*, a representative plaintiff, who is a member of the putative class, is not required to plead a personal cause of action against every defendant provided that a cause of action is pled against every defendant on behalf of other members of the putative class. The representative plaintiff must have a clause of action against one or more of the defendants to be a member of the class. In other words, if a class of people has been harmed by a practice or product common to an industry, then a single representative plaintiff, who is a member of that class, can sue every offender in that industry in a single class action.

This paper will examine the *Money Mart* decision and contrast it to the alternative approaches to multiple defendant class actions adopted in Ontario and the U.S. In addition, this paper will identify some of the practical considerations that should be addressed in determining whether to pursue an “industry” class action.

### **II. The Law in British Columbia**

#### **A. Commencing an Action Against Multiple Defendants**

In January of 2003, Mr. MacKinnon launched an action under the *Class Proceedings Act* against the majority of the businesses providing payday loans in B.C. The Statement of Claim alleged that the 27 defendants had carried on the business of providing payday loans that required the payment of fees and interest exceeding the 60% maximum permitted by the *Criminal Code*. Mr. MacKinnon had borrowed from four businesses operated by five of the named defendants.

### 3.1.2

Mr. MacKinnon brought the action against the other defendants in a representative capacity. Section 2 of the *Class Proceedings Act* confers the right upon one person to commence an action in a representative capacity on behalf of others. Section 2(1) states:

One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.

The term “class” used in s. 2 is not defined by the *Class Proceedings Act*. Section 4(1)(b) of the Act requires that there be “an identifiable class of two or more persons” and s. 4(1)(c) requires that “the claims of the class members raise common issues.”

The Statement of Claim filed by Mr. MacKinnon stated that the action was brought by Mr. MacKinnon on his own behalf and behalf of all persons in B.C. who had borrowed a payday loan from any one or more of the defendants. The claim alleged that each defendant in the operation of their payday loan businesses had charged fees to class members which constituted interest under s. 347(1) of the *Criminal Code* and that the collection of these fees by the defendants from class members had resulted in the collection of interest at a criminal rate.

Many of the defendants from which Mr. MacKinnon had not borrowed brought an application under Rule 19(24) to have the claims against them struck. Those defendants argued that Mr. MacKinnon could not maintain an action against them because he had no personal cause of action. Mr. MacKinnon took the position that this issue had already been resolved in *Campbell v. Flexwatt Corp.*, [1997] 44 B.C.L.R. 343 (C.A.).

In *Campbell v. Flexwatt*, an action was brought on behalf of persons who had purchased defective radiant ceiling heating panels. In addition to suing the manufacturer of the panels, the plaintiffs sued the Province and 10 municipalities for their negligence in permitting the panels to be installed. The Province subsequently added additional municipalities to the action as third parties. The two representative plaintiffs only had a cause of action against the two municipalities in which they resided. At the certification hearing, the municipalities against whom the representative plaintiffs had no cause of action argued that that each representative plaintiff must have a cause of action against each defendant. Mr. Justice Cumming, for a unanimous Court, rejected that argument, holding that “[t]here is no requirement [under the *Class Proceedings Act*] that there be a representative plaintiff with a cause of action against every defendant; the legislation simply requires that there be a cause of action” (para. 42).

In *MacKinnon v. Money Mart et al.* (2004), 25 B.C.L.R. (4th) 189, 2004 BCSC 140, Madam Justice Brown dismissed the Rule 19(24) application finding that she was bound by the earlier decision of the B.C. Court of Appeal in *Campbell v. Flexwatt Corp.*, which held that the *Class Proceedings Act* did not require a representative plaintiff to have a cause of action against every named defendant. She further reasoned that to impose such a requirement through a narrow interpretation of Rule 19(24) would be “simply to impose a procedural hurdle. It would not advance the policy or purpose of the *Class Proceedings Act* ...” (para. 8).

The defendants appealed Madam Justice Brown’s decision arguing that *Campbell v. Flexwatt* should be distinguished because the Court in that decision had been asked to consider whether a cause of action existed in the context of s. 4(1)(a) of the *Class Proceedings Act* rather than under a Rule 19(24) application. Alternatively, the defendants argued that even if *Campbell v. Flexwatt* could not be distinguished, the Court of Appeal should not follow it because it was wrongly decided. For that reason, the appeal was heard before a five-member panel.

In *MacKinnon v. Money Mart et al.*, [2004] B.C.J. No. 1960, 2004 BCCA 472, Madam Justice Saunders, on behalf of an unanimous Court, rejected both of these arguments. In answer to the defendants’ contention that *Campbell v. Flexwatt* could be distinguished, the Court noted at para. 40:

In seeking to distinguish *Campbell v. Flexwatt*, the appellants correctly note that the issue there came to court as an aspect of the certification application under s. 4(1)(a)

### 3.1.3

of the Act rather than, as here, under Rule 19(24). However, the test under both is not materially different, as recognized in the passage from *Elms*, quoted above, and consideration of the possibility of success for purposes of Rule 19(24) must have an eye to s. 4(1)(a) for the reasons I have given. I, therefore, do not consider that the form of the application bringing this issue to court can or should lead to different results.

On the second ground for appeal, Madam Justice Saunders found that s. 2 of the Act supported the Court's earlier reasoning in *Campbell*. The Court set out the relevant language in s. 2, at para. 47:

The Act presumes in s. 2(1) that the representative plaintiff normally will be a member of the class, but it also contemplates in s. 2(4) that a person who is not a member of the class may act as a representative plaintiff:

2(1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.

...

(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

Madam Justice Saunders then referred to the principle of statutory interpretation set out by Mr. Justice Iacobucci in *Bell Express Vu v. Rex*, [2002] 2 S.C.R. 559, which requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Applying that principle, Madam Justice Saunders held at para. 49-50:

... the flexibility in the Act supports the result of *Campbell v. Flexwatt*. While s. 2(1) displays an intention that, in ordinary cases, the representative plaintiff or plaintiffs themselves should have a cause of action, s. 2(4) shows that such a condition is not inherent to a class action. A representative plaintiff referred to in s. 2(4) is not a member of the class and would not be linked to the defendants by a cause of action. Rather the link would be between the defendants and the class, with the representative plaintiff simply the spokesperson of the class.

Although s. 2(4) only allows a non-member of a class to be the representative plaintiff where it is necessary 'to avoid a substantial injustice to the class,' the fact that the Act allows such a situation at all indicates, in my view, that the cause of action nexus is not solely between defendants and the representative plaintiff, but also between defendants and the plaintiff class as a whole. This shifts the focus in the cause of action analysis from the representative plaintiff onto the class, and is consistent with a litigation process that seeks to resolve common issues, rather than to resolve entire claims.

As a result, the Court concluded that, "while the Act requires a cause of action against each named defendant, that cause of action must be held by class members, not necessarily the representative plaintiff" (para. 51). The Court distinguished the Ontario line of authorities (which will be reviewed below) on the basis that the Ontario *Class Proceedings Act* has no equivalent to s. 2(4), which expressly allows a person who is not a member of the class to act as a representative plaintiff.

At the time this paper was written, an application seeking leave to appeal to the Supreme Court of Canada from the Court of Appeal's decision in *MacKinnon v. Money Mart* was pending before the Court.

## **B. Joinder of Additional Defendants**

The decision in *MacKinnon v. Money Mart* established that in B.C. it is possible to commence an action under the *Class Proceedings Act* against multiple defendants in circumstances where the representative

### 3.1.4

plaintiff does not have a personal cause of action against every named defendant. However, the law as it relates to whether a defendant can be joined to such an action where the representative plaintiff does not allege a personal cause of action against that defendant remains unclear. This uncertainty is due to the decision of *MacKinnon v. Vancouver City Savings Credit Union* (2004), 24 B.C.L.R. (4th) 340, 2004 BCSC 125, a judgment issued just days before the decision of Madam Justice Brown in the *Money Mart* case.

In the course of investigating Mr. MacKinnon's claims against the payday loan industry, it was discovered that VanCity had charged Mr. MacKinnon overdraft fees on his account that appeared to result in the receipt by VanCity of interest at a criminal rate. As a result, Mr. MacKinnon commenced an action against VanCity under the *Class Proceedings Act*, which sought to recover any unlawful interest collected by VanCity from its members.

After commencing that action, it was further discovered that several other credit unions in B.C. were also charging potentially unlawful overdraft fees. An application was brought to join those credit unions to the VanCity action. These credit unions opposed the application arguing that Rule 15(5)(a) required there be a cause of action between the representative plaintiff and the party to be joined. Rule 15(5)(a) states:

- (5)(a) At any stage of a proceeding, the court on application by any person may
  - [...]
  - (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
    - (A) with any relief claimed in the proceeding, or
    - (B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.

In *MacKinnon v. VanCity*, the Chambers Judge rejected the application to join the additional Credit Unions, referred to in the decision as the "Proposed Defendants," on the basis that the plaintiff did not satisfy the requirements as set out in Rule 15(5)(a). The Chambers Judge said at para. 8 of her reasons:

In order for his application to succeed under Rule 15(5)(a)(iii), Mr. MacKinnon must first satisfy the court that there is a degree of interrelationship between the Proposed Defendants and an existing party which relates to the relief, remedy or subject matter of this action.

The Chambers Judge rejected the plaintiff's argument that *Campbell v. Flexwatt* permitted the plaintiff to advance claims against the additional Credit Unions in a representative capacity and that the nexus between the issues raised by those claims brought in a representative capacity and those raised in the action against VanCity was sufficient to meet the requirements of s. 15. The Chambers Judge said of *Campbell v. Flexwatt*:

... In summary, in the *Campbell* case there was a single class for whom there were two named representative plaintiffs who together had a cause of action against all three manufacturers. Notably, the members of that single class, in turn, had related causes of action against various defendant municipalities in addition to the municipalities against whom the representative plaintiffs had claims. The Court considered these circumstances sufficient to satisfy the requirement imposed by the Act that there exist a cause of action against those municipalities for the purposes of certification.

In the within case, not only does the assumed representative plaintiff, Mr. MacKinnon, not have a personal cause of action against any of the Proposed Defendants, there is no evidence before me to indicate that the VanCity Class or any member of it has a cause of action against any of the Proposed Defendants ...

### 3.1.5

In contrast, it is clear that in *Campbell* members of the class had causes of action against those of the defendant municipalities in respect of whom the representative plaintiffs did not have an individual cause of action.

I consider this distinction between Mr. MacKinnon's application and the scenario in *Campbell* to be compelling and significant. (paras. 13-16)

The Chambers Judge held at para. 18 that to apply the decision of *Campbell v. Flexwatt* to permit the joinder of parties “which have no connection with the action” or “to pursue claims not necessarily available to any member of the VanCity class” would be “incompatible with Rule 15(5)(a)(iii) which permits joinder in special circumstances.” Accordingly, the Chambers Judge concluded at para. 20:

... the claims sought to be raised against the proposed Defendants are not connected with or related to the claim advanced by the VanCity class with Mr. MacKinnon as representative, against VanCity in the manner required by Rule 15(5)(a)(iii). The fact that Mr. MacKinnon through his amended pleadings purports to seek the same type of relief against the proposed Defendants and raise the same cause of action against them does not establish a significant connection between those allegations and the subject matter or relief sought in this action as currently plead.

It is questionable whether *MacKinnon v. VanCity* remains good law after the decision of the Court of Appeal in *MacKinnon v. Money Mart*. Although the Court of Appeal cautioned that its “reasons do not address, and should not be read as dealing with *MacKinnon v. Vancouver City Savings Credit Union*” (para. 58), the Court also expressly refused to distinguish *Campbell v. Flexwatt* “on the basis that the circumstances and the question there considered differed materially from this case” (para. 41). In other words, the Court refused to adopt the narrow interpretation given to *Campbell v. Flexwatt* by Madam Justice Ballance in *MacKinnon v. VanCity*, which interpretation was the foundation for the Chambers Judge’s refusal to permit the joinder of the additional Credit Unions in that case.

Furthermore, the *VanCity* decision reflects an extremely restrictive view of the degree of relationship between claims required to advance them collectively in a proposed class proceeding. The Chambers Judge concluded that the “claims sought to be raised against the Proposed Defendants,” for the unlawful overdraft fees those Proposed Defendants charged their members, “are not connected with or related to the claim advanced by the VanCity class,” for the unlawful overdraft fees VanCity charged its members. This conclusion has nothing to do with whether or not the representative plaintiff had a cause of action against the Proposed Defendants. It rests upon the Chambers Judge’s reasoning that “there is nothing to suggest that the claims are related except for the fact that they all arise under the same section of the *Criminal Code*.” The same reasoning would apply even if there had been a member of the class with a claim against one of the Proposed Defendants. This view that claims alleging the precise same kind of wrong, raising the very same legal issue and seeking the very same remedy are not, because they arise under different contracts, “related” or “common” claims is inconsistent with not only the policy but also the precise terms of the *Class Proceedings Act* (see s. 7(b)). The result of this approach left the members of the Proposed Defendants to pursue their own claims in separate actions and may leave some members whose claims are now out of time without any remedy at all. This approach hardly promotes the policy objectives of the *Class Proceedings Act* of access to justice, judicial economy, and deterrence and is arguably inconsistent with the approach taken by the Court of Appeal in *MacKinnon v. Money Mart*.

### III. The Law in Ontario

In Ontario, in order for an action to proceed as a class proceeding against multiple defendants, there must be a plaintiff with a personal cause of action for each of the defendants.

The leading case in Ontario is *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (C.A.), leave to appeal dismissed [2002] S.C.C.A. No. 446. In *Hughes*, a single representative plaintiff brought a class action against four smoke alarm manufacturers. Each of these manufacturers was a subsidiary

of Sunbeam. Mr. Hughes had only purchased a smoke alarm from First Alert. Mr. Hughes claimed that the ionizing technology, component “83R,” which was used in all of the defendants smoke alarms, was unreliable and should be replaced. The defendants, other than First Alert, brought a motion pursuant to Rule 21.01(1)(b) of the Rules of Civil Procedure (the Ontario equivalent of Rule 19(24)(a) of the B.C. Rules of Court) to strike the claims against them as failing to disclose a cause of action. The Motions Judge dismissed the claim against these other defendants, holding that the plaintiff had no reasonable cause of action against those defendants who were not the manufacturers of the product purchased by the representative plaintiff; (2000) 2 C.P.C. (5th) 335 (Ont. S.C.J.) at para. 41. A similar decision was reached the same day by the same Judge in *Ragoonanan Estate v. Interlial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.):

In my view, and I so find, it is not sufficient in a class proceeding, for the purpose of meeting the requirement of Rule 21.01(1)(b), if the pleading simply discloses a ‘reasonable cause of action’ by the representative plaintiff against only one defendant and then puts forward a similar claim by a speculative group of putative class members against the other defendants. (para. 54)

The Ontario Court of Appeal in *Hughes* affirmed both the decision of the Chambers Judge in that case and the result in *Ragoonanan*, holding at para. 35 that “for each defendant who is named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant.” In so doing, the Court expressly rejected the approach of the B.C. Court of Appeal in *Campbell v. Flexwatt*, stating at para. 17:

*Hughes* relies on three decisions of the British Columbia Court of Appeal, in which that court appears to take a different view. In *Campbell v. Flexwatt Corp.*, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (C.A.), the court held that, in certifying a class action under the British Columbia *Class Proceedings Act*, ‘there is no requirement that there be a representative plaintiff with a cause of action against every defendant.’ See also *Harrington v. Dow Corning Corp.*, [2000] 11 W.W.R. 201, 193 D.L.R. (4th) 67 (B.C.C.A.). The same principle emerges from *Furlan v. Shell Oil Co.*, [2000] 7 W.W.R. 433, (2000), 77 B.C.L.R. (3d) 35 (C.A.), albeit in the context of a foreign defendant’s challenge to service outside the jurisdiction. None of these three cases is strictly analogous to the present one. None of them dealt with a motion to strike a claim on the basis that it disclosed no reasonable cause of action. Nevertheless, these cases signal that the British Columbia courts may be more willing to let a proposed class action proceed against defendants against whom no representative plaintiff has a claim. To the extent that these British Columbia decisions conflict with the Ontario cases of *Boulanger* and *Ragoonanan*, I prefer the reasoning in the Ontario cases.

An even narrower approach was taken in *Attis v. Canada* (2003), 29 C.P.C. (5th) 242 (S.C.J.), aff’d [2003] O.J. No. 4708 (C.A.), leave to appeal dismissed, [2004] S.C.C.A. No. 41. In that case, the representative plaintiff sought to bring a class proceeding against the federal government for negligence in permitting the distribution of defective breast implants. The Court ruled that the plaintiff’s class proceeding must be confined to implants manufactured by the company that produced the plaintiff’s implants. In other words, the Court refused to allow the plaintiff to bring an action under the *Class Proceedings Act* on behalf of other persons who had the very same cause of action against the very same defendant but in respect of breast implants made by different manufacturers.

This stands in sharp contrast to the approach adopted by the B.C. Court of Appeal in *Harrington v. Dow Corning*, where the Court considered and approved the certification of a claim against several different manufacturers in respect of over 80 different brands of implants. It would appear that *Attis* effectively imports into the Ontario class proceedings regime, as a rule of pleading, the requirement of typicality that was omitted from and does not form part of the B.C. *Class Proceedings Act*.

#### IV. The Law in the U.S.

In the U.S., the law is stricter than either B.C. or Ontario due to the requirement of “typicality.” The typicality requirement has been interpreted to mean that the representative plaintiffs must have the same cause of action against the defendants as all members of the class.

One leading case in the U.S. is *La Mar v. H & B Novelty and Loan Company*, 489 F. 2nd 461 (1971, 9th Cir.). A truth in lending action was brought against all of the pawnbrokers licensed to carry on business in Oregon. In finding that the typicality requirement was not met, the Court noted, “typicality is lacking when the representative plaintiff’s cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies” (at 465). The Court held at 462:

[T]he plaintiff may represent all those suffering an injury similar to his own inflicted by the defendant responsible for the plaintiff’s injury, but in our view he cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury.

The U.S. approach is further complicated by the constitutional dimension of the standing requirement in Federal Court. See *In Re Eaton Vance Corp. Securities Litigation*, 219 F.R.D. 38 (U.S. Dist. Mass; 2003).

#### V. Approaches Contrasted

As the Court of Appeal noted in *MacKinnon v. Money Mart* at para. 25, B.C. now occupies a “unique position” on the landscape of class action regimes. In both Ontario and the U.S., a class action may only be advanced against “an industry” either through a series of parallel class actions against the constituent members of the industry or through one class action with multiple representative plaintiffs, if they are available. In contrast, in B.C., one plaintiff who has been wronged by one member of the industry may commence an action against all members of the industry on behalf of those who have suffered the same kind of wrong.

These different approaches are reviewed by Prof. Vince Morabito in *Standing to Sue and Multiple Defendant Class Actions in Australia, Canada and the United States*, (2003) 41 Alta. L. Rev. 295. Professor Morabito concludes that, “courts in British Columbia have adopted the most enlightened approach” (at 332) to multiple defendant class proceedings “by refusing to erect significant barriers to the commencement of class proceedings by the application of traditional standing requirements” (at 317).

The legislative objects of the *Class Proceedings Act* support Professor Morabito’s conclusion that the approach adopted in B.C. is the correct approach to multiple defendant class proceedings. The B.C. approach best serves the legislative objects of access to justice, judicial economy and behaviour modification.

Access to justice is furthered by the B.C. approach because it enables more persons who have suffered the industry wrong at issue in the class action to receive the benefit of the action. For example, if the action in *MacKinnon v. Money Mart* is certified, those persons who have borrowed from the payday loan companies other than those from which the plaintiff Mr. MacKinnon borrowed will now benefit from Mr. MacKinnon’s action. While follow up class actions by other representative plaintiffs against these other companies could provide a benefit to some of these persons, this process still would not provide a remedy to those whose claims may become barred by the passage of time or for those who have borrowed from a small company whose scope of business may not justify a separate class action proceeding against it.

Judicial economy is best served by the B.C. approach because the claims against the industry are resolved in one rather than a series of actions. The procedural quagmire created by the Ontario

approach was identified by Mr. Justice Haines in *Lupsor Estate v. Middlesex Mutual Insurance Co.*, [2003] O.J. No. 1038 (S.C.J.), where in the context of parallel class actions brought against various insurance companies concerning a standard term in a standard form automobile insurance policy, he noted at para. 18:

The plaintiff submits that a mechanical application of *Ragoonanan* and *Hughes* will effectively prevent the classing of defendants and potentially thwart the CPA's objectives of access to justice and judicial economy. An examination of the case at hand and the other 35 intended class proceedings now before me lends some credence to this submission. They have all been commenced as separate proceedings even though all the claims and most of the issues in dispute are the same. All of the actions are based on a breach of the same statutory condition which is part of a standard form automobile insurance policy issued to each plaintiff. The only distinguishing features are the name of the plaintiff, the circumstances of the motor vehicle accident that gave rise to the loss and the name of the defendant insurer.

This state of affairs clearly does not advance the legislative objectives of judicial economy or efficient access to justice.

The B.C. approach not only avoids the obvious inefficiency in such a duplication of proceedings but also promotes economy by providing for a more equitable sharing of the cost involved in resolving a claim against an industry, both between class members and between industry members. If a class action is commenced against one or only several members of an industry engaged in a particular practice, those class members who dealt with those industry members will bear the cost of successfully pursuing a claim arising out of an industry wide practice, such as the burden of the legal fees payable to class counsel. Similarly, the defendant in that action will bear the costs associated in defending the industry wide practice. In contrast, one proceeding against all or most of the industry will distribute these costs more equitably among class members and industry members.

Finally, behaviour modification is best served by the B.C. approach because it ensures that the industry or a major part of it is held accountable for any wrong committed by the industry.

## VI. Practical Considerations

### A. The Common Issues

The main factor that must be considered in determining whether to expand a class action from the defendant who has wronged the plaintiff and others through its business practices to other defendants in the industry, who have engaged in similar practices and committed similar wrongs to other persons, is how this expansion will affect the formulation of the common issue to be certified. The common issue will often be easier to identify and formulate if the claim is confined to one defendant whose business practices will likely be identical with respect to all members of the class.

For example, in Ontario, the payday loan class actions commenced to date have been advanced against one payday loan provider (or in the case of a franchised payday loan system, against the franchisor and its franchisees). See, for example, *Smith v. National Money Mart Company*, Ont. Reg. No. 03-CV-1275 (S.C.J.). This is so even where the same borrower is acting as a representative plaintiff; see *Mortillaro v. Unicash Franchise Inc. et al.*, Ont. Reg. No. 03-CV-257364 CP (S.C.J.); *Mortillaro v. Cash Money Cheque Cashing Inc.*, Ont. Reg. No. 03-CV-257357 CP. This choice to proceed in this manner has been made no doubt, in part, to simplify the framing of the common issue. The issue in each of these actions is the legality of the particular fee charged by the particular payday loan business.

In contrast, in the *MacKinnon v. National Money Mart* action, there are several different forms of fees in issue because the claim is advanced against a variety of defendants. This expansion of the claim has

permitted those defendants to argue that there is no common issue in the action because their fees and business practices are different.

The *Class Proceedings Act*, however, does not require that the claim of the class members raises identical issues of fact or law. The Act in s. 1 defines “common issues” to mean “common but not necessarily identical issues of law that arise from common but not necessarily identical facts.” This means that there can be variation between the claims of class members such that the common issue which arises from those claims may be answered differently between class members:

... a common issue may be one where the answers are different for different class members. So long as the issue is one which is necessary to be resolved for each class member’s claim and is a substantial ingredient of the claim, the issue is common. It is not whether the answer is common, but whether the question is common.

*Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489, 2003 BCSC 1632 at para. 58

In determining whether to expand a class action from one defendant to a group of defendants that engage in similar business practices, it is important to assess the impact of those different practices on the issues in the proposed action. Do those differences between the practice undermine the commonality of the issues arising from the class members’ claim? Or do those differences simply require what the Supreme Court of Canada in *Rumley v. British Columbia*, [2001] 3 S.C.R. 180 described as “a nuanced answer to the common question.”

## **B. Complexity**

Another factor to consider in determining whether to expand a proposed class action from one defendant to multiple defendants engaged in the same business practice is the extent to which the expansion will complicate the class proceedings. A proposed class action against multiple defendants will almost certainly be met with the argument from those defendants that the proposed class proceeding will be a “monster of complexity”; *Tiemstra v. I.C.B.C.* (1996), 22 B.C.L.R. (3d) 49 (S.C.) at 61.

In proceeding against multiple defendants, it must be recognized that there will inevitably be differences between their business practices or products. It is important to assess how those differences may impact on not only the common issue arising from class members’ claims but the course of proceedings to determine those claims.

One example of the difficulties that arise from a class proceeding against multiple defendants with different practices and products is provided by the case of *Harrington v. Dow Corning*. In this case, the Court of Appeal affirmed the certification of a class action against several manufacturers of breast implants which collectively manufactured over 80 different models of breast implants, on the basis that there was a common issue as to whether silicone gel breast implants were fit for other purposes. However, at least six years later, the Supreme Court had yet to approve a Case Management Plan for proceeding with the trial of the common issue: see *Harrington v. Dow Corning Corp.*, [2002] B.C.J. No. 1667.

Factual differences between the defendants’ practices and products, however, may not create much, if any, incremental complexity in the determination of the common issues. If the facts relating to the standard practice of the defendants are relatively uncontroverted and if those facts are easily amenable to expert evidence, then there is little complexity added to the class proceeding by increasing its scope from one to multiple defendants.

## **C. Economy of Sale**

The other main factor to consider in determining whether to expand a proposed class action from one multiple defendant is whether there is an economy of scale to be enjoyed by the expansion. Clearly,

### 3.1.10

expanding the claim to multiple defendants will increase the scope of the remedy provided by the action. The question that must be considered is whether one proceeding is the efficient and economic way to achieve this end rather than multiple class proceedings.

One class proceeding with multiple defendants has significant advantages over multiple class proceedings against individual defendants. For one, grouping defendants in one action may create more practical pressure upon the defendants to coalesce under one defence counsel. Second, one class proceeding with multiple defendants is better suited for case management than multiple proceedings against individual defendants, which may be commenced at different times and proceed in different stages.