

# GUIDING PRINCIPLES REGARDING THE CONSTITUTION OF A REPRESENTATIVE DEFENDANT AND A DEFENDANT CLASS IN CLASS ACTION PROCEEDINGS

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## The Albertan Context

Interesting things have been happening in Alberta recently regarding class action proceedings. Alberta is handicapped to a certain extent in that it does not have class action legislation to guide procedures akin to that in Ontario, British Columbia, Quebec and Saskatchewan, for example. Rather, Alberta must rely on Rule 42 of the Alberta *Rules of Court* to provide the basic framework for a class action proceeding, which is advanced by way of a representative action.<sup>2</sup> In the absence of legislation, however, the courts have been articulating a blueprint for class action proceedings in Alberta.

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<sup>2</sup> Rule 42 of the Alberta *Rules of Court* provides:  
42 Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The cornerstone of this blueprint was recently established by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere et al.*,<sup>3</sup> a decision of McLachlin C.J. In this case the two representative plaintiffs, together with 229 other investors, had become participants in the federal government's Business Immigration Program by purchasing debentures in Western Canadian Shopping Centres Inc. ("WCSC"), which was incorporated by Dutton, the sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings for the purpose of exploring for gold in Northern Saskatchewan. After the investors' funds were deposited it entered into agreements with Claude Resources Inc. ("Claude") for the purchase of rights to a crown surface lease and committed monies for further surface improvements and for the construction of a gold mill. To finance these obligations of WCSC Dutton directed that Series A debentures be issued in an aggregate principal amount of \$22,050,000 to some of the investors. Dutton advanced more funds and corresponding debentures were issued. Eventually, the debentures were pooled. Claude had leased the lands and facilities back from WCSC and the payments required of Claude under the lease matched the payments required of WCSC under the debentures. Claude then announced that it could not pay the interest due on the debentures.

The two representative plaintiffs commenced a class action complaining that Dutton and various affiliates and advisors of WCSC had breached fiduciary duties to the investors by mismanaging their funds. The defendants responded by applying to the Alberta Court of Queen's Bench for a declaration and an order striking out the portion of the claim in which the individual plaintiffs purported pursuant to Rule 42 of the Alberta *Rules of Court* to represent the class of investors. The Chambers judge denied the application, which was upheld by the majority of the Alberta Court of Appeal. The defendants then appealed to the Supreme Court of Canada, which dismissed the appeal and took the opportunity to review class action procedure in Alberta in general.

The heart of the decision is that, notwithstanding the absence of class action legislation in Alberta, class action proceedings can be advanced by way of representative actions pursuant to Rule

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<sup>3</sup> [2001] 2 S.C.R. 534; (2001), 201 D.L.R. (4<sup>th</sup>) 385.

42 of the Alberta *Rules of Court*, with the courts exercising their inherent power to settle the rules of practice and procedure to govern class action proceedings as disputes are brought before them.

Principles previously established in the leading Alberta case of *Korte v. Deloitte, Haskins & Sells*<sup>4</sup> were adopted in modified form such that class actions were held to be allowed to proceed under Alberta Rule 42 where the following conditions were met:

- (1) The class was capable of clear definition;
- (2) There were issues of law or fact common to all class members;
- (3) Success for one class member meant success for all; and
- (4) The proposed representative adequately represented the interests of the class.

Further, the Supreme Court of Canada stated that if these conditions were met, the court must also be satisfied, in the exercise of its discretion, that there were no countervailing considerations that outweighed the benefits of allowing the class action to proceed.

Thus the Supreme Court of Canada laid the foundation for class action proceedings in Alberta and opened the door for further development of a class action blueprint to be developed by the Alberta courts on an ad hoc basis.

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<sup>4</sup> (1993), 8 Alta L.R. (3d) 337.

In a recent important decision Mister Justice John D. Rooke has responded to the Supreme Court of Canada's invitation to develop a class action blueprint for Alberta through judicial activism and has further established important leading principles. In the decision of *Pauli et al. v. Ace Ina Insurance et al.*<sup>5</sup> Rooke J. was called upon to settle certain procedural matters in the Alberta class action proceeding commenced in the wake of the *McNaughton*<sup>6</sup> decision issued by the Ontario Court of Appeal. In *McNaughton* it was proposed that a class action proceeding be commenced in Ontario to recover damages resultant from insurance companies' deduction of a deductible from the actual cash value paid for an automobile when the title to the salvage was taken by the insurer. The applicant had applied to the court for a declaration that pursuant to a statutory condition in the Ontario *Insurance Act* the insurer was not entitled to deduct the deductible, and the Ontario Court of Appeal had so declared. Leave to appeal to the Supreme Court of Canada was refused. Following the refusal of leave to appeal to the Supreme Court of Canada class action proceedings were commenced in various jurisdictions, including in Alberta by way of a representative action pursuant to Rule 42.

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<sup>5</sup> [2002] A.J. No. 926; 2002 A.B.Q.B. 690; further reasons released in a judgment dated July 31, 2002.

<sup>6</sup> *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2001), 54 O.R. (3d) 704 (C.A.), leave to appeal to the Supreme Court of Canada refused at [2001] S.C.C.A. No. 451.

Rooke J., as designated case management judge regarding the Alberta representative action, was called upon as a preliminary matter to settle points of procedure in the representative proceeding and in doing so established another cornerstone in the blueprint for class action proceedings in Alberta. Most significantly, he stated that there would be a presumption that the procedures for class action proceedings set out by the Alberta Law Reform Institute in its *Final Report No. 85* on class actions<sup>7</sup> by way of recommendations would be the proper procedure.

He had two significant caveats with respect to this presumption: (1) none of the substantive provisions in the Alberta Law Reform Institute report were to be applicable, absent proof that the court had jurisdiction to so order; and (2) costs would be presumed to follow in the ordinary course of litigation, (ie., neither of the alternatives presented by the Alberta Law Reform Institute with respect to costs would be presumed). In further reasons for judgment he clarified that the “substantive provisions” that he was referring to in his first caveat included the Institute’s recommendations regarding: the suspension of limitation periods, the adoption of evidence principles specific to class proceedings, the introduction of aggregate assessment of damages, and class member rights of appeal.

The significance of the presumption of applicability of the Alberta Law Reform Institute Class Actions Report procedure to this discussion is that the Institute dealt at some length with procedure regarding the constitution of a representative defendant and a defendant class in representative actions.

Rule 42 itself expressly contemplates court appointment of a representative defendant in that it states that where numerous persons have a common interest in the subject of an intended action one or more of those persons may be authorized by the court to defend on behalf of or for the benefit of all, *inter alia*.

The Institute expanded on the Rule, as follows:

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<sup>7</sup> Alberta Law Reform Institute, *Class Actions (Final Report No. 85)* (Edmonton: Alberta Law Reform

**“RECOMMENDATION No. 26**

Defendant class actions

- (1) The Alberta class actions regime should provide for defendant class proceedings, that is, proceedings in which one or more individual plaintiffs seek relief against a defendant class. Except as otherwise indicated in subsections (2) to (4), the provisions dealing with plaintiff class actions should apply, with any necessary modifications, to defendant class actions.
- (2) Where a plaintiff intends to apply for certification of a defendant class proceeding, the proposed representative defendant should not be required to file a statement of defence on behalf of the class until after the certification hearing.
- (3) The condition precedent to certification, that the proposed representative plaintiff has produced a plan for advancing the proceedings on behalf of the class and for notifying class members of the proceeding, should not apply to the proposed representative defendant in a defendant class action.
- (4) Members of the defendant class should not have the right to opt out of the defendant class proceeding. However, specific provision should be made giving any member of the defendant class the right to apply to be added as a named defendant for the purpose of conducting their own defence.
- (5) A plaintiff should have the right to discontinue a defendant class proceeding without the approval of the court.
- (6) The limitation period within which a plaintiff must bring action against a defendant should be suspended by the commencement of a proceeding in which that defendant is a potential member of a defendant class and resume running upon certification or, if the proceeding is discontinued before certification, upon discontinuance.”

Pursuant to Rooke J.'s decision, subsections 1 through 5 will be presumed to be the applicable procedure in Alberta.<sup>8</sup>

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Institute, December 2000).

<sup>8</sup> Recommendation No. 26 (6) will not be presumed to be applicable as it deals with limitation periods.

Thus it can be seen that there is scope for the constitution of a representative defendant and a defendant class within representative proceedings in Alberta. The question then becomes, when should the courts be agreeable to constituting a representative defendant and a defendant class? On this question we can turn to the case law for guidance.

### Early English Authority

A caveat must be stated at the outset. As noted by the Ontario Law Reform Commission in its report on class actions<sup>9</sup> defendant class actions can be divided essentially into two main categories, that is, suits against unincorporated associations such as trade unions or clubs and suits against a large number of individuals who have no pre-existing relationship and who are alleged to have committed in common some wrong. The case law dealing with the appointment of representative defendants of unincorporated associations such as trade unions is specialized and unique within its context, and will not be specifically examined in this article. This article will deal with the second category of defendant class actions, that is, suits against a large number of individuals who have no pre-existing relationship and who are alleged to have committed in common some wrong.

The courts have a long history of constituting defendant classes in the context of representative actions. These powers were long exercised by the Court of Chancery in England prior to what can be said to be the “modern” jurisprudence establishing these judicial powers.<sup>10</sup>

The seminal “modern” authority establishing the power of the courts to constitute representative defendants and a defendant class would seem to be *Duke of Bedford v. Ellis*.<sup>11</sup> In this

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<sup>9</sup> Ontario Law Reform Commission, *Report on Class Actions* (Ontario, Ministry of the Attorney General, 1982) Volume 1 at page 41.

<sup>10</sup> See *Wood v. McCarthy and Another*, [1891-4] All E.R. Rep. 224.

<sup>11</sup> [1901] A.C. 1.

case Lord Macnaghten stated the “classic statement”<sup>12</sup> of principle, as follows:<sup>13</sup>

“The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could “come at justice”, to use an expression in one of the older cases, if everyone interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.”

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<sup>12</sup> As characterized by Stevenson J. in *Heath Steele Mines Ltd. v. Kelly and Astle* (1977), 16 N.B.R. (2d) 517 (New Brunswick Supreme Court Queen’s Bench Division).

<sup>13</sup> At page 8.

And further:<sup>14</sup>

“I think the rule as to representative suits remains very much as it was a hundred years ago. From the time it was first established it has been recognized as a simple rule resting merely upon convenience. It is impossible, I think, to read such judgments as those delivered by Lord Eldon in *Adair v. New River Co.* (1805), 11 Ves. 429, in 1805, and *Cockburn v. Thompson* ((1808), 16 Ves. 321, 325, 329) in 1809, without seeing that Lord Eldon took as broad and liberal a view on this subject as anybody could desire. “The strict rule,” he said, “was that all persons materially interested in the subject of the suit, however numerous, ought to be parties . . . but that being a general rule established for the convenient administration of justice must not be adhered to in cases to which consistently with practical convenience it is incapable of application.” “It was better,” he added, “to go as far as possible towards justice than to deny it altogether.” He laid out of consideration the case of persons suing on behalf of themselves and all others, “for in a sense,” he said, “they are before the Court.” As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will fairly and honestly try the right.”

Another early leading case is *Walker v. Sur and Others*,<sup>15</sup> a decision of the English Court of Appeal, wherein a plaintiff’s application to amend his writ of summons to describe the defendants who were members of an unincorporated religious society as being sued on their own behalf and on behalf of all other members of the society was denied in the result, with articulation of the general governing principles.

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<sup>14</sup> At pages 10-11.

<sup>15</sup> [1914] 2 K.B. 930.

A further significant case of the Chancery Division in England emphasized that the purpose of the representative defendant and the defendant class action was the convenient administration of justice. In *John v. Rees and Others*<sup>16</sup> the annual meeting of the Pembrokeshire Divisional Labour Party (“P.D.L.P.”) was properly constituted and chaired by the plaintiff as president. Just prior to that the Member of Parliament for the constituency had been expelled from the National Labour Party and at the annual meeting a profound conflict of views arose between those supporting the expelled member and those who opposed him. The meeting broke down in general disorder and the president adjourned the meeting and walked out. After he had walked out the meeting purported to elect a second president in place of the plaintiff, as well as another treasurer and secretary. The plaintiff therefore issued a writ in which he claimed to be representing all of the members of the P.D.L.P. excepting the defendants, the newly elected slate, and in which he sought an injunction restraining the defendants from handling the property of the P.D.L.P. until trial of the action. The defendants applied to set aside the writ and one of the issues was whether the plaintiff could commence a representative action. In oft-applied passages Megarry J. held that the representative action was properly constituted and articulated that the rule regarding representative actions was that they were not to be treated as a rigid matter of principle but rather a flexible tool of convenience in the administration of justice.

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<sup>16</sup> [1970] Ch. 345.

A more recent leading English case is that of *Irish Shipping Ltd. v. Commercial Union Assurance Co. plc and another (The "Irish Rowan")*<sup>17</sup>, a decision of the English Court of Appeal (Civil Division). In this case the plaintiff shipowners had lent their vessel Irish Rowan to the charterers for a period of approximately one year. The vessel was destined for liner trading and the time charter provided that claims in respect of cargo were to be the liability of the charterers. The charterers took out insurance against such liability in the Belgian insurance market. In all there were 77 insurers including the two named defendants. Claims were made by the owners of the cargo carried on the Irish Rowan and were settled by the shipowners. The shipowners then sought to recover an indemnity from the charterers but the charterers were in liquidation. The shipowners nonetheless commenced arbitration proceedings and were granted awards. The shipowners then claimed against the insurers and sued two named insurers as representative defendants. The named defendants applied to strike out the words in the writ constituting them as representative defendants, *inter alia*, and were unsuccessful. They were further unsuccessful on appeal, with the English Court of Appeal holding that this was one claim upon one contract which the shipowners had an interest in pursuing and the insurers all had the same interest in defending. Thus the requirement that the defendant class have the same interest in the proceedings as the two named defendants was satisfied and the representative proceedings were properly constituted.

### Guiding Principles

Although the defendant class action has a significant history in the United States<sup>18</sup> the Canadian jurisprudence dealing with representative defendants and defendant class actions seems draw from the early English authority to establish the following guiding principles:

- (1) In assessing whether a representative defendant and a defendant class action should be constituted, the court should primarily ascertain whether the proposed class of defendants has any common interest.

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<sup>17</sup> [1989] 3 All. E.R. 853.

<sup>18</sup> See the seminal decision of *Hansberry v. Lee*, 61 S. Ct. 114 (1940) and the leading article of Barry M. Wolfson, "Defendant Class Actions", (1977), 38 *Ohio State Law Journal* 457.

- (2) Further, where there is a possibility of different defences, a class action binding prospective defendants is inappropriate.
- (3) A further guiding principle is whether the proposed representative defendant would likely defend the action in a vigorous manner. This is most frequently expressed as a requirement that the court ascertain whether the representative defendant could be said to “fairly and honestly try the right.”<sup>19</sup>
- (4) The guidance in *John v. Rees* that the constitution of a representative action is primarily for the benefit of the convenient administration of justice is overarching.
- (5) An objection of a named defendant to acting in a representative capacity is to be given only token weight if the court is satisfied that the defendant will vigorously defend.

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<sup>19</sup> See *Re Attorney-General of Canada and Cloutier et al.* (1982), 143 D.R. (3d) 321; *Interprovincial Steel and Pipe Corporation Ltd. v. Shaw and United Steelworkers of America, Local 5606*, [1975] 1 W.W.. 659

Canadian jurisprudence establishing these principles seems to start with the case of *Heath Steele Mines Ltd. v. Kelly*<sup>20</sup>, a decision of Limerick J.A. of the New Brunswick Supreme Court-Appeal Division. In this case the plaintiff Heath Steele Mines Ltd. had fired one of its employees for allegedly making false entries in a log kept in connection with the operation of the boilers at the mine. The other employees went out on a wild cat strike to protest the firing of their co-worker. The strike continued for three days and after the second day the plaintiff issued a writ of summons seeking a declaration that the strike was contrary to the collective agreement and asking for an order that two named employees be appointed to represent the other defendant employees of the mine. Counsel for the defendants applied to set aside the writ and the representation order which had been granted, but were unsuccessful in the result.

Limerick J.A. first noted, applying *John v. Rees*, that the rule permitting class actions was a rule established for the convenient administration of justice. On the facts the convenient administration of justice would be served by allowing the appointment of the representative defendants as otherwise there would be more than 215 named defendants and the proceedings would be “endless and exorbitantly extravagant.” He then stated: “Of more importance in this matter is the fundamental question - do all of the individuals in the class sought to be sued in a representative capacity have a common interest and a common defence, the condition precedent to proceeding with a representative action?”<sup>21</sup>

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<sup>20</sup> (1978), 7 C.P.C. 63.

<sup>21</sup> At page 68.

These guiding principles were also articulated in another leading case of the Federal Court of Canada - Trial Division, affirmed on appeal. In *Montres Rolex S.A. v. Balshin*<sup>22</sup> MacKay J. considered an action by the plaintiffs seeking to redress injury and prevent further injuries to their interests arising under their registered trademarks. The defendants to the action were named and unnamed individuals engaged in the sale of imitation Rolex watches and related products from street vending locations. Because the defendants' operations had little permanence the plaintiffs could not seek to enjoin the activities of established individuals. The statement of claim therefore sought to have included as defendants those defendants whose identities were unknown to the plaintiff who conducted their activities from street corners and frequently relocated.

Initial judgments restraining the infringing of the plaintiff's registered trademarks were granted against five named defendants and against "all others" engaged in selling imitation Rolex products. Because the five named individuals had not been appointed to be representative defendants, however, these judgments were held to bind only the five named defendants. The plaintiffs then brought an application to appoint two named defendants as representative defendants of all persons unidentified who are engaged in selling or otherwise dealing with imitation Rolex products. This motion was dismissed initially by Associate Chief Justice Jerome, primarily because the named respondents actively resisted it. It was held that it was not certain that the named defendants would satisfactorily prosecute their own defence, let alone that of others, and there was no indication that there would be identical defences put forward. A further order was granted by Justice Cullen adding John Doe and Jane Doe as unnamed defendants to the statement of claim.

As a result of other steps taken in advance of trial at the commencement of the trial itself there was only one named defendant and the defendants John Doe and Jane Doe and all others unknown to the plaintiffs. At trial MacKay J. considered the claim for an injunction as against John

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<sup>22</sup> [1990] F.C.J. No. 231; [1990] 3 F.C. 353 (abridged); affirmed at (1992), 45 C.P.R. (3d) 174.

Doe and Jane Doe and whether the one named defendant should be constituted as a representative defendant of all others unknown to the plaintiff. MacKay J. stated:<sup>23</sup>

“Here there is no persuasive argument that, viewed from any perspective other than that of the plaintiffs, the proposed class of defendants has any common or same interest. Where there is a possibility of different defences, a class action binding prospective defences is inappropriate . . . A key factor in recognizing representatives for a proposed class of defendants may well be reasonable confidence on the part of the Court that the representatives will defend the common or same interest of members of the class concerned. Without this there can be little confidence that the purpose of rules supporting class actions can be met, that is that a multiplicity of actions will be avoided and litigation will proceed in an orderly fashion that is acceptable to all persons who may be affected. Without that confidence it may be inferred that a member of a proposed class of defendants may not be bound by a judgment consented to by one of the class . . .”

In the result as the one named defendant did not appear at trial to defend his own interest, it was held that it was not appropriate that he be decreed representative of any class of others unknown. John Doe and Jane Doe and all others unknown to the plaintiffs were enjoined from trading in imitation Rolexes, however, provided that any person identified within six years after the date of trial as one to whom the clause applied had to be served, *inter alia*, with notice that they had the opportunity to apply for a determination that there were lawful reasons why the clause did not apply to him or her.

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At page 13 (Q.L.).

The plaintiffs appealed to enlarge the scope of the permanent injunction so that it would apply to unnamed defendants who infringed the trademarks after the trial date. MacKay J. was upheld on appeal with a minor variation of his order. Robertson J.A. stated that he found the reasoning of MacKay J. in not allowing the designation of the named defendant as a representative defendant persuasive.<sup>24</sup> He further applied the earlier passage of the Associate Chief Justice Jerome, which had denied appointments of the then two named defendants as representative defendants, as follows<sup>25</sup>:

“It is clear . . . that the respondents to this motion resist it, which alone is almost enough to cause the application to fail. In addition, however, it is far from certain that they intend to satisfactorily prosecute their own defence, much less that of their co-defendants. They do not have any office or title which casts them in a position of responsibility for the others. There is nothing to indicate that their defence will be identical to any put forward by the others.”

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<sup>24</sup> At page 183.

<sup>25</sup> At page 183.

The general principle that a representative defendant and a defendant class can only be constituted if the defendants have common interests and there are common defences is well represented in other Canadian jurisprudence.<sup>26</sup>

Canadian jurisprudence has also adopted the principle of Mister Justice Megarry in *John v. Rees* that the constitution of a representative defendant and a defendant class is a rule of convenience; “. . . a rule of which one ought to take a broad and liberal view and that if it were not possible to make everybody interested a party, the party must bring in enough claimants so the matter might be fairly and honestly tried . . .”<sup>27</sup>

A leading Canadian case applying these general principles in a class action context is that of *Chippewas of Sarnia Band v. Canada (Attorney General)*.<sup>28</sup> In this case the Chippewas of Sarnia Band applied for certification of a class action proceeding under the Ontario legislation and for appointment of one or more representative defendants to act on behalf of up to six classes of defendants. The band claimed an interest in certain lands which were then held by approximately 2,200 persons. The band claimed that the lands were never lawfully surrendered or conveyed. Because all competing interests to the band's claim could be traced to one Letter Patent in 1853, the band wished to assert its claim in one proceeding against all of the affected parties. In the result the band was successful and the representative defendants and defendant classes constituted.

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<sup>26</sup> See *Pawar v. Canada* (1997), 137 F.T.R. 231 and *National Supply Company Ltd. et al. v. Greenbank et al.*, [1941] 3 W.W.R. 711.

<sup>27</sup> *Pawar v. Canada* (1996), 123 F.T.R. 257 per Hargrave, Prothonotary at 263; *John v. Rees* is also applied in *Native Transfer Committee at Mountain Institution v. Canada (Solicitor General)* (1997), 125 F.T.R. 10; *Alberta Wilderness Association et al. v. Canada (Minister of Fisheries and Oceans) et al.* (1998), 146 F.T.R. 257 and *Bruno et al. v. Minister of National Revenue et al.* (1999), 168 F.T.R. 224, also decisions of Hargrave, Prothonotary.

Adams J. of the Ontario Court (General Division) took the opportunity to review the jurisprudence regarding defendant class actions and articulated the general principles noted herein. He commenced by noting the Ontario Law Reform Commission's description of defendant class actions as follows:

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<sup>28</sup> (1996), 137 D.L.R. (4<sup>th</sup>) 239; subsequent reasons at (1996) 138 D.L.R. (4<sup>th</sup>) 574.

“A defendant class action is a civil action brought against one or more persons defending on behalf of a group of persons similarly situated. It provides an efficient procedural mechanism for the determination of common issues in a complex proceeding involving multiple parties. It offers a means of binding all interested parties and, therefore, prevents re-litigation of the same issues in a multitude of lawsuits. The advantages of a defendant class action include the conservation of judicial resources and private litigation costs, both absolutely, by preventing re-litigation of the same issues, and relatively, by spreading expenses and resolving common issues over a large number of defendants. In this sense, greater access to the courts, by plaintiffs and defendants alike, is achieved.”<sup>29</sup>

Adams J. noted the “robust” and liberal approach to defendant class actions of Megarry J. in *John v. Rees* and characterized *Irish Shipping* as being a recent illustration of the liberal and flexible approach to defendant class actions. In the result, in his supplementary reasons, Adams J. held that multiple representative defendants were appropriate in that each representative should have both the financial capacity and the incentive to defend the action with diligence and vigor.

*Chippewas of Sarnia Band v. Canada (Attorney General)* is of further interest, however, in that it dismisses the argument of the proposed representative defendants that the application to constitute them as representatives should be denied because they vigorously objected. Adams J. reviewed the American jurisprudence regarding defendant class actions and noted that the willingness of the proposed defendant representative to serve was viewed in American jurisprudence as being only of “token weight.” *Newberg on Class Actions*<sup>30</sup> was quoted as authority that the unwillingness of a defendant to serve in a representative capacity was in reality a positive factor as it suggested there would be vigorous defence of the action by the defendant for itself and on behalf of the class. The court’s willingness to constitute a defendant as representative in the face of vigorous opposition was also demonstrated in *Guaranty Trust Co. v. International Plaza Ltd.*<sup>31</sup>

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<sup>29</sup> At pp. 247, 248, applying the Ontario Law Reform Commission, *Report on Class Actions*, (1982) at p. 41.

<sup>30</sup> Herbert B. Newberg, *Class Actions, A Manual for Group Litigation at Federal and State Levels*, (3d) (New York, McGraw-Hill, 1992).

<sup>31</sup> (1977), 4 B.C.L.R. 275.

The policy reasons behind the constitution of a defendant class action were also recently summarized in *Berry v. Pulley*.<sup>32</sup> In this case an action was brought under the Ontario *Class Proceedings Act* and the plaintiffs moved for certification which sought the constitution of a defendant class. The proposed plaintiff class was some 179 Air Ontario pilots who were members of the Canadian Airline Pilots Association at a certain date; the proposed defendant class was comprised of 1,682 Air Canada pilots who were also members of the Association at that specified date. Air Canada had gained control of the regional airlines, including Air Ontario, in the early 1990s and the president of the Association had declared a “merger” of the two employer airlines. A dispute arose between the Air Ontario and the Air Canada pilots as to an integrated seniority list and the Air Ontario pilots commenced the class action proceedings as a result. Cumming J. in the first instance constituted the Air Canada employees as the defendant class, rejecting the defendants’ submission that each Air Canada pilot would necessarily have a discreet individual position. He noted that certification of a defendant class would provide an efficient procedural mechanism for the determination of the common issues in the complex proceeding and further that a certified class proceeding would bind all interested parties and avoid a potential multitude of costly lawsuits which could lead to inconsistent results.

## Conclusion

The constitution of representative defendants and defendant classes has a long history dating back to the Court of Chancery. The Canadian courts, for the most part, have tended to turn to English jurisprudence, and not a consideration of the defendant class action within an American context, to guide their decision making. Several guiding principles have emerged as to whether a representative defendant and defendant class should be constituted. The court will ask at the outset whether there

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<sup>32</sup> *Berry v. Pulley*, [2001] O.J. No. 911 per Cumming J. of the Ontario Superior Court of Justice; affirmed at (2000), 48 O.R. (3d) 169 (O.C.A.); affirmed at [2002] S.C.J. No. 41.

are common issues and common defences with respect to the proposed defendant class. The court must also be satisfied that the proposed representative defendant will vigorously defend the claim. Further, the court will be predisposed to grant the constitution of a representative defendant and a defendant class action if it will lead to the convenient administration of justice on the facts. Resistance of the defendant to acting in a representative capacity will be given only token weight if the court is satisfied the defendant will vigorously defend the claim. There therefore seems to be much scope for the constitution of a representative defendant and a defendant class within the context of class action proceedings in Canada and, more specifically, within the context of a representative proceeding in Alberta.