

# **SUBCLASS DESIGNATION IN CLASS ACTION PROCEEDINGS: COMMON THEMES**

**By William E. McNally and Barbara E. Cotton\***

## **INTRODUCTION**

There has been much judicial activity in the area of class action proceedings of late. One aspect of class action proceedings of interest is subclass designation - in what circumstances will the courts be amenable to designating subclasses within the broader defined class? The jurisprudence remains in a state of infancy on this point but it is the thesis of this article that common themes have emerged.

This article will postulate that there are four common themes indicative of when the courts will designate subclasses suggested by Canadian jurisprudence and secondary materials: (1) when there is a conflict of interest between the broad class and the proposed subclass(es); (2) when there are "common issues" in the proposed subclass(es); (3) as a subset of the "common issues" theme, when the proposed subclass has a unique theory of liability to advance or if there is a unique defence relative to the proposed subclass; and (4) on the basis of regional segregation, frequently because the laws of the provinces or outside of Canada are different, and in particular if limitation periods vary.

This article will commence by reviewing the overarching requirements for a class action that proceeds in the absence of a statutory framework-it seems logical to postulate that, in subclass designation, the subclasses so designated must meet the same overarching requirements. This postulation would seem to be reasonable for any overarching requirements imposed by a

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statutory mandate as well. A suggested American approach to subclass designation will then be briefly reviewed. The article will then turn to a discussion of each of the above set out themes for subclass designation and explore them in more detail.

## **THE OVERARCHING REQUIREMENTS**

It is clear that subclasses can be designated at any stage of the class action proceedings<sup>1</sup>. It seems reasonable to postulate that any subclass that is to be designated within the class action proceeding must also meet the overarching requirements of the class action proceeding.

The overarching requirements for a class action proceeding commenced in the absence of a statutory framework have recently been set out by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*<sup>2</sup>. This appeal came to the Supreme Court of Canada from the Alberta Court of Appeal. Alberta does not have a statute

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<sup>1</sup> The seminal authority for this principle is *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, wherein Montgomery stated the following oft-quoted passage at 747:

“ . . . The court maintains a supervisory role under the Act to ensure a fair and expeditious determination. Subclasses can be determined as the need arises.”

<sup>2</sup> (2000), 201 D.L.R. (4<sup>th</sup>) 385 per McLachlin C.J.

governing class action proceedings (as does Ontario and British Columbia, for example), and the court therefore considered the general common law requirements<sup>3</sup>.

In this case the representative plaintiffs Lin and Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in Western Canadian Shopping Centres Inc. ("WCSC"). WCSC was incorporated by Dutton, its sole shareholder, and solicited funds through two offerings to invest in land located in Saskatchewan for the purpose of developing commercial income producing properties. The Offering Memorandum provided that the subscription proceeds would be deposited with an escrow agent and would be released to WCSC upon conditions. The dispute arose from events after the investor's funds had been deposited with the escrow agent, Royal Trust.

WCSC purchased from Claude Resources Inc. the rights to a Crown surface lease for \$5,550,000 and also agreed to commit a further \$16.5 million for surface improvements. To finance WCSC's obligations to Claude Resources Inc., Dutton directed that Series A debentures be issued in an aggregate principle amount of \$22,050,000 to some of the investors. Dutton advanced more funds to Claude Resources Inc. and corresponding debentures were issued. Eventually the debentures were pooled. When Claude Resources Inc. announced that it could not pay the interest due on the debentures, Lin and Wu, the representative plaintiffs, commenced a class action

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In this case the class action proceeding was a representative action pursuant to Rule 42 of the *Alberta Rules of Court*.

complaining that Dutton and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds.

The defendants applied to the Court of Queen's Bench of Alberta for an order striking that portion of the statement of claim in which the individuals purported to represent a class of 231 investors pursuant to Rule 42 of the Alberta *Rules of Court*. The Chambers Judge denied the application. The majority of the Court of Appeal upheld the decision but granted the defendants the right to discovery from each of the 231 plaintiffs. On further appeal to the Supreme Court of Canada it was held that the representative action could proceed but the cross appeal with respect to individual discovery rights was allowed.

McLachlin C.J. made note of the fact that the proceeding was not governed by a statutory mandate and then set out the requirements for a class action proceeding which she suggested should govern in the absence of comprehensive codes of class action procedure. Relying on a previous Alberta Court of Appeal decision,<sup>4</sup> she stated that there were four overarching requirements: (1) the class must be capable of clear definition; (2) there must be issues of fact or law common to all class members; (3) success for one class member must mean success for all; and (4) the proposed representative must adequately represent the interests of the class. If these four conditions are met, the court must then be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed<sup>5</sup>.

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<sup>4</sup> *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337

<sup>5</sup> McLachlin C.J. stated at 401-404:

“While there are differences between the tests, four conditions emerge as necessary to a class action. First the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgement. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however,

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that any particular person's claim to membership in the class be determinable by stated, objective criteria: . . .

Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis a vis the opposing party. Nor is it necessary that common issues predominate over non-common issues so that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to the individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: . . .

To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact and law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed."

It seems reasonable to postulate that these overarching requirements would be equally applicable to subclass designation: (1) the subclass must be capable of clear definition; (2) there must be issues of fact or law common to all subclass members; (3) success for one subclass member must mean success for all; and (4) the proposed representative of the subclass must adequately represent the interests of the subclass.

Those jurisdictions with a statutory mandate governing class action proceedings may stipulate their own overarching requirements for a class action proceeding. Similarly, it seems reasonable to postulate that these overarching requirements are equally applicable to subclass designation. Thus, in the Ontario statute<sup>6</sup> there must be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant and the claims or defences must raise common issues; surely the subclass proposed to be designated must be of two or more persons that would be represented by the representative plaintiff or defendant and the claims or defences must raise common issues. The British Columbia statute is much to the same effect.<sup>7</sup>

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<sup>6</sup> *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5

<sup>7</sup> *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4

The Supreme Court of Canada has recently released two decisions dealing with class action proceedings within the context of the statutory mandates of Ontario and British Columbia. *Hollick v. Toronto (City)*<sup>8</sup> is of interest for its comments on the requirements of class definition. In this case McLachlin C.J., again for the court, stated that the representatives of the proposed class need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad, that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue.<sup>9</sup>

An earlier leading case of the Ontario Court of Justice(General Division), *Bywater v. Toronto Transit Commission*<sup>10</sup>, is of interest in that it set out the purposes of class definition. In this case Winkler J. stated that the purpose of class definition was threefold: (1) to identify those persons who have a potential claim for relief against the defendant; (2) to define the parameters of the lawsuit so as to identify those persons who are bound by its result; and (3) to describe who is entitled to notice in the class action proceeding. Thus, for the mutual benefit of the plaintiff and defendant the class definition ought not to be unduly narrow nor unduly broad.

### **AN AMERICAN VIEWPOINT**

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<sup>8</sup> [2001] S.C.J. No. 67

<sup>9</sup> See also *Rumley v. British Columbia*, [2001] S.C.J. No. 39

<sup>10</sup> (1998), 27 C.P.C. (4<sup>th</sup>) 172

Prior to looking at the Canadian jurisprudence and secondary materials on class designation, it is interesting to look at an American viewpoint expressed in the article of Susan Bisom-Rapp<sup>11</sup>. In this article, Ms. Bisom-Rapp posits that subclass designation will occur in American jurisprudence in three situations: (1) if there is a presence of divergent interests; (2) if there is a presence of conflicting interests; or (3) if there are management concerns of the court.

With respect to the situation in which a subclass is designated because of a potential conflict of interest with the broader class, Ms. Bisom-Rapp suggests that it is necessary to establish a separate subclass representative and that new counsel be appointed for the subclass. In the event of subclass designation because of divergent interests, however, she suggests that, although a new representative should be named who has suffered essentially the same injury as the subclass members, it is not necessary to appoint new counsel. There is a lack of antagonism between members of the main class and the divergent interest subclass, so counsel may continue to represent both groups. In the situation of subclass designation for management reasons, in order to facilitate the presentation of evidence, segregate various issues, or expedite the resolution of the case, for example, the author suggests that it may not even be necessary to designate a new subclass representative, and clearly would not be necessary to have new counsel appointed.

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<sup>11</sup> Susan Bisom-Rapp, "The Use of Subclasses in Class Action Suits Under Title VII" (1987), 9 *Industrial Relations Law Journal* 116

This thesis that new counsel need only be appointed if there is a conflict of interest between the broader class and the subclass has also been suggested in Canadian secondary materials<sup>12</sup>.

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This concept that if there is no conflict of interest, counsel should be able to represent all subclasses, was articulated by John J. Chapman in "Class Proceedings for Prospectus Misrepresentations" (1994), 73 *Canadian Bar Review* 492 at 506, wherein he stated: "However, the similarity and the substantive content of the provincial laws and the absence of any conflict of interest between the sub-classes should permit all sub-classes, if created, to be represented by the same counsel . . .".

Further, Eizenga, Peerless and Wright in *Class Actions Law in Practice* (Looseleaf Edition) (Markham, Ontario: Butterworths, 1999) state at paragraph 4.8: ". . . If the interest of subclasses are in conflict, a situation may arise in which separate counsel could be required to act for each of the subclasses. To date, no court has found this is necessary."

**COMMON THEMES FOR SUBCLASS DESIGNATION IN CANADIAN JURISPRUDENCE**

***(1) Conflict of Interest***

The most compelling reason for subclass designation in Canadian jurisprudence, and as commented on by secondary materials, would appear to be a conflict of interest between the proposed subclass and the broad defined class.

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See also James E. Hodgson and Bonnie A. Tough, "Practical Strategies in Class Actions", *Practical Strategies for Advocates VII: Back to Basics* (Ontario; The Advocate Society, 1999)

This theme is made note of by Michael A. Eizenga, Michael J. Peerless and Charles M. Wright in their authoritative textbook<sup>13</sup> wherein they state: “The necessity for subclasses would seem to exist only where there is a conflict which arises on the common issues themselves or the treatment of those common issues requires the protection of a subclass.”.

This concept that conflict of interest should give rise to subclass designation seems to have relatively early origins, as noted by a recent author<sup>14</sup>.

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<sup>13</sup> Michael A. Eizenga, Michael J. Peerless & Charles M. Wright, *Class Actions Law in Practice* (Looseleaf Edition) (Markham, Ontario, Butterworths, 1999) at paragraphs 4.6-4.9

<sup>14</sup> Vince Morabito, “Ideological Plaintiffs in Class Actions - An Australian Perspective” (2001), 34 *U.B.C.L. Rev.* 489, quoting from the *Report of the Attorney General’s Advisory Committee on Class Action Reform* (Toronto, 1990), at 33, wherein it was stated:

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“Sub-classing is a process by which the larger class is divided into more distinct and representative groups. A sub-class will have an issue of law or fact common to itself and therefore requires separate representation in order to protect interests that it has separate from the larger class. Inherent in sub-classing is a need to ensure that the sub-class is not prejudiced by being in conflict with the larger class’ interests.”

The case of *Anderson v. Wilson*<sup>15</sup> is of interest in that it incorporates two of the themes postulated in this article for subclass designation. The lower court referenced conflict of interest as a viable basis of subclass designation, although it declined to so designate; this was reversed on appeal with a subclass being created on the basis that the subclass had a unique theory of liability.

In this case the defendants operated five clinics for the administration of electroencephlogram (EEG) tests between July of 1989 and 1986. It was alleged that, as a result of the administration of the EEG tests, the plaintiff Anderson had become a carrier of Hepatitis B and the plaintiff Fischer had become severely ill with the disease and nearly died. The plaintiffs commenced a class action on behalf of the former patients of the clinic, alleging that the defendants were negligent in the administration of the EEG tests. Jenkins J. certified the class action, defining the class to consist of (1) infected patients; (2) cross-infected patients, that is, persons contracting Hepatitis B from infected patients; (3) uninfected patients who had been notified of their possible infection; and (4) *Family Law Act* claimants.

This order was appealed and one of the grounds of appeal was that Jenkins J. had failed to further define subclasses. The Ontario Court (General Division)[Divisional Court] per Campbell J. rejected the argument for further subclass designation. He contrasted the case with an American case<sup>16</sup> wherein there was a crystallized conflict of interest. The American case involved a proposed settlement of asbestos claims between sick claimants who needed generous immediate payments and exposure only claimants who might never get sick. He stated that, on the facts on hand, anyone who would get sick from Hepatitis was sick already and thus there was no conflict of interest between class members at that stage. Any suggestion of conflict of interest was hypothetical

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<sup>15</sup> (1998), 37 O.R. (3d) 235 (Ontario Court (General Division) [Divisional Court]); reversed on appeal at (1999), 44 O.R. (3d) 673; leave to appeal to the Supreme Court of Canada refused at (2000), 258 N.R. 194 (note)

<sup>16</sup> *Amchem Products v. Windsor* 521 U.S. 591 (1997)

at best and emerging conflicts could be dealt with later as they arose. Thus the representative plaintiffs, who were infected claimants, were not in conflict of interest with other members of the class and could properly represent the whole of the class.

This was overturned on appeal, with Carthy J.A. articulating the theme that there was a unique theory of liability relative to a subclass of those who were uninfected. He noted that the infected patients must establish that the clinics failed to meet an appropriate standard for infection control and that they were infected as a result. The factual basis for the uninfected patients was not to include the same causation factor and their theory of liability was that the conduct of the defendants occasioned the notices which foreseeably caused them nervous shock. Thus, there were different theories of liability unique to the subclass of those uninfected.

In *Hoy v. Medtronic, Inc.*<sup>17</sup> the British Columbia Supreme Court refused to designate a subclass on the basis there was no conflict between the class members. Such an approach was also recently taken by the Ontario Superior Court of Justice<sup>18</sup>.

## (2) *Common Issues*

Another theme seems to be that subclasses will be designated if they share common issues unique to the subclass.

“Commonality” is of course a larger theme that is essential to definition of the broad class as well. Both the statutory regimes of Ontario and British Columbia require that the claims of the class members raise common issues, and thus the issue of the composition of a class along lines of “commonality” has been discussed in the Ontario and British Columbia jurisprudence. As noted,

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<sup>17</sup> [2001] B.C.J. No. 1968

<sup>18</sup> *Kerr v. Danier Leather Inc.*, [2001] O.J. No. 4000 per Cumming J.

McLachlin C.J. has also emphasized in *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere* the need for common issues of fact or law as a condition of a class action proceeding in the absence of a statutory framework.

A recent helpful decision which gives insight into this requirement for “commonality” is *Koo v. Canadian Airlines International Ltd.*<sup>19</sup>, a decision of Allan J. of the British Columbia Supreme Court. This decision discusses the commonality requirement within the context of the British Columbia Act, which defines “common issues” to mean common but not necessarily identical issues of fact or common but not necessarily identical issues of law that arise from common but not necessarily identical facts.<sup>20</sup> The Act requires that: “the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members; . . .”<sup>21</sup>.

In *Koo* Allan J. reviewed the governing case law, and commenced by noting the statement of the British Columbia Court of Appeal in *Campbell v. Flexwatt Corp.* at 359<sup>22</sup>:

“This question of commonality of issues is at the heart of a class proceeding, for the intent of a class proceeding is to allow liability issues to be determined for the entire class based on a determination of liability of the defendants to the proposed representative plaintiffs.”

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<sup>19</sup> [2000] B.C.J. No. 329

<sup>20</sup> *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 1

<sup>21</sup> s. 4(1)(c)

<sup>22</sup> (1997), 44 B.C.L.R. (3d) 343, leave to appeal to the Supreme Court of Canada refused at [1998] S.C.C.A. No. 13

He then noted that Cumming J.A., in the *Campbell v. Flexwatt Corp.* decision, had further noted that common issues did not have to be determinative of liability; they need only be issues that move the litigation forward.

This principle was earlier expressed in *Endean v. Canadian Red Cross Society*<sup>23</sup>, wherein Smith J. stated at 167:

“ . . . a common issue need not be dispositive of the litigation. A common issue is sufficient if it is an issue of fact or law common to all claims, and that its resolution in favour of the plaintiffs will advance the interests of the class, leaving individual issues to be litigated later in separate trials, if necessary. . . ”

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<sup>23</sup> (1997), 148 D.L.R. (4<sup>th</sup>) 158, reversed in the result at (1998), 157 D.L.R. (4<sup>th</sup>) 465, leave to appeal to the Supreme Court of Canada granted at [1998] S.C.C.A. No. 260

Allan J. further referenced Winkler J. in *Carom v. Bre-X Minerals Ltd.*<sup>24</sup>, wherein he noted that a common issue must have sufficient significance in relation to the claim asserted that its resolution will advance the litigation in a meaningful way.<sup>25</sup>

Thus it can be seen that the breadth of a class or subclass will be dictated by its commonality of issue, within the meaning of commonality described above.

This theme of common issues has been recently discussed as a basis of subclass designation by the Alberta Law Reform Institute in its report on class actions<sup>26</sup>. The Institute at p. 72 defines a subclass as: “. . . a group within a class that has common issues against a defendant that are shared by some but not all of the class members”.

This theme of common issues is carried into their recommendation, in which the Institute states:

“RECOMMENDATION No. 3

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<sup>24</sup> (1998), 20 C.P.C. (4<sup>th</sup>) 163

<sup>25</sup> *Carom v. Bre-X Minerals Ltd.* dealt with the Ontario statute, which defines “common issues” similarly to the British Columbia statute and further requires in s. 5(1)(c) that the claims or defences of the class members raise common issues

<sup>26</sup> Alberta Law Reform Institute, *Class Actions*, Final Report No. 85 (Edmonton, Alberta, December 2000)

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(3) Subclasses having their own representative plaintiff should be created where the court is satisfied that this is necessary to protect the interests of the members of identifiable subclasses with common issues that are not common to the class as a whole or in fairness to defendants.”

This theme of common issues was also articulated in the early report of the Ontario Law Reform Commission which gave rise to the Ontario class action statute<sup>27</sup> and has been articulated in the American literature<sup>28</sup>.

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<sup>27</sup> Ontario Law Reform Commission, *Report on Class Actions*, (Toronto, Ontario; Ministry of the Attorney General; 1982). In this case the specific subsets of unique defences or theories of liabilities is included within the theme of common issues. The Ontario Law Reform Commission states at p. 453:

“In addition, subclassing can be useful in dealing with the commonality requirement found in the Rule 23 family of class actions: the existence of individual questions may pose less difficulty if those members of the class who are subject to special defences or who wish to assert particular themes

are placed in a subclass in order to protect their interests or to answer the special defences raised against them . . .”

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Federal Judicial Centre, *Manual for Complex Litigation* (3d) (St. Pauls, Minnesota: Wests Publishing Company, 1995), wherein the authors state at p. 220:

“During certification proceedings - or even after a class has been certified - the court may discover differences in the positions of class members, differences that may cause conflicts in the conduct of the litigation or in settlement. Although all members of the class may challenge the same conduct of the defendants, class members’ special interests and legal theories may be different, or the relief sought by some may be inconsistent with or competitive with that sought by others, even though they have a common position on liability.”

The British Columbia Court of Appeal case of *Campbell v. Flexwatt Corp.*<sup>29</sup> is interesting in that it further expands on the concept of common issues as a basis for subclass designation. In this case the plaintiffs were the owners of radiant ceiling heating panels, some of which had been certified by the Canadian Standards Association, and some of which had not. The panels were found to lead to fires and an order was issued requiring the plaintiffs to disconnect them. A class action proceeding was commenced under the British Columbia statute and a subclass of those persons who owned panels which were certified by the Canadian Standards Association was designated.

In discussing the concept of subclass designation on the basis of common issues, Cumming J.A. stated that the common issues could be issues of fact or law which did not have to be identical for each member of the class. Further, the common issues did not have to be issues which were determinative of liability; they need only be issues of fact or law that moved the litigation forward. The resolution of a common issue did not have to be, in and of itself, sufficient to support relief. He further suggested that, when a subclass was created because of particular common issues, it was not necessary to appoint a separate representative plaintiff unless the representative plaintiff for the general class could not adequately and fairly represent the interests of the subclass.

Subclass designation on the basis of common issues appears to be much in evidence in the case law<sup>30</sup>.

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<sup>29</sup> *Ibid*, note 22

<sup>30</sup> See *Millard v. North George Capital Management Ltd.* (2000), 47 C.P.C. (4<sup>th</sup>) 365 and *Cotter v. Levy*, [2000] O.J. No. 1086

(3) *Unique Theories of Liability/Unique Defences*

This theme appears to be a subcategory of the general theme of subclass designation on the basis of common issues, but it appears with sufficient articulation to mention it in its own right. The courts seem receptive to designating a subclass because of a unique theory of liability or because of a unique defence which will be advanced relative to the subclass.

This theme is illustrated by the case of *Peppiatt v. Nicol*<sup>31</sup> and the subsequent case of *Peppiatt v. Royal Bank of Canada*<sup>32</sup>. In this case a class action was commenced on behalf of the equity members of a golf club who were allegedly induced to purchase memberships in the golf club as a result of the misrepresentations made in the promotional material published by the defendant Nicol. The defendant Royal Bank financed the development of the golf club. The Royal Bank was aware of the promotional materials which contained representations that the construction of the golf club project would proceed only if 260 non-resident golf memberships were sold by a certain date. The Bank loaned Nicol and his companies funds to purchase 92 memberships to reach this required minimum number of memberships. The plaintiffs alleged gross mismanagement, negligence, breach of trust and breach of contract, which resulted in the cost of the golf course exceeding \$16,500,000. The plaintiffs applied for a certification as a class proceeding under the Ontario statute and the Royal Bank brought a cross-application to strike out the statement of claim. The certification application was granted in the first instance with the proposed class being the 169 people who had purchased equity memberships in the golf club for specified amounts at various times.

In the subsequent *Peppiatt v. Royal Bank of Canada* decision, an application was brought for decertification of the class action but in the result detailed subclasses were designated.

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<sup>31</sup> (1993), 16 O.R. (3d) 133

<sup>32</sup> (1996), 27 O.R. (3d) 462

The plaintiffs resisted the application on the basis that the defendants had proceeded on a common course towards all of the members and did not take any actions unique to any one subclass. It was argued that fragmentation into subclasses would just hamper the adjudication of the action. Chilcott J. stated, however, that factual distinctions among the class members would have significant consequences with respect to a number of legal issues and that the defendants might have very different defences for different groups of members. He carved out a detailed list of subclasses and ordered that a new representative plaintiff for each subclass be selected.

Similarly, in *Berry v. Pulley*<sup>33</sup> subclasses were designated on the basis of different defences. In this case Air Canada had taken over a regional airline, Air Ontario, by way of a merger. The 179 Air Ontario pilots who were members of the Canadian Air Line Pilots Association sued the 1,682 Air Canada pilots, also members of the Association, on the basis that torts were being committed in the designation of seniority of the pilots following the merger. The Air Ontario pilots sued for unlawful conspiracy, wrongful interference with economic relations and wrongful interference with contractual relations. The Air Canada pilots were designated into subclasses depending on their perceived unique defences.

#### (4) *Regional Segregation*

Finally, it should be noted that probably the most common basis of subclass designation in Canada to date appears to be on the basis of regional segregation, either within Canada<sup>34</sup> or on the basis of non-Canadian residence. A frequent reason for segregation on the basis of residence is that different statutes govern within the regions, and thus this is also probably a subset of the “common issues” theme. Frequently a variation in limitation statutes between the

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<sup>33</sup> (2001), 197 D.L.R. (4<sup>th</sup>) 317; appeal heard by the Ontario Court of Appeal and reserved October 30, 2001

<sup>34</sup> See *Pearson v. Boliden Ltd.*, [2001] Carswell B.C. 1855

regions is the impetus for subclass designation. Subclass designation on a regional basis is by no means guaranteed, however, and will be required to be justified<sup>35</sup>.

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<sup>35</sup> See *Wilson v. Servier Canada Inc. et al.* (2000), 50 O.R. (3d) 219, further reasons at [2001] O.J. No. 1615, wherein Cumming J. denied an application for subclass designation on a regional basis, stating:

“Mass torts and defective products do not respect provincial boundaries. Complex and costly litigation is not viable for individual claimants. The procedural latitude of the [*Class Proceeding Act*] recognizes the authority of all provinces and the rights of their individual residents. If a non-resident of Ontario wishes to commence an action in another province, that person can opt out of the Ontario action. If a class action is commenced and certified in either British Columbia or Quebec, that certified class proceeding will take precedence for the residents of that province.”

In the subsequent 2001 decision, a British Columbia subclass was designated.

## **CONCLUSION**

The jurisprudence with respect to subclass designation is in an early state of development, and no firm rules have as yet appeared. One can postulate that the overarching requirements for a class proceeding must also be met by the subclass which is sought to be designated, however. Common themes have appeared in the jurisprudence and in secondary materials with respect to subclass designation. Viable bases for subclass designation appear to be: (1) a conflict of interest between the subclass members and the general class; (2) “common issues” within the proposed subclass which require a separate designation; (3) unique theories of liability or unique defences; and (4) designation on the basis of regional concerns. As the case law in this area continues to develop these themes will likely be brought into sharper focus and perhaps new themes will emerge.