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CLASS ACTIONS IN CANADA: ANOTHER WESTERN PROVINCE (ALBERTA) ENACTS LEGISLATION

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INTRODUCTION

Alberta class action proceedings are still in their nascent stages. Although representative actions have long been possible, it is only recently that the procedure was refined and facilitated. Alberta's *Class Proceedings Act* [FN1] (the "Act") was proclaimed in force on April 1, 2004, making Alberta the sixth province in Canada with comprehensive class action legislation. Since that time there have been relatively few decisions in class actions, and none have proceeded to trial. However, a number of cases have demonstrated how the Act will be interpreted in regards to the important certification stage of any action. Because the Act is fairly explicit in its requirements and as there are a limited number of judges assigned to hear class actions, there has been consistency in the judgments. While some important aspects of the Act, such as which action should proceed when there are competing class actions, have yet to be judicially considered, the Alberta Courts have taken guidance from other jurisdictions where the legislation is similar, and from the Alberta Law Reform Institute Final Report on Class Actions. [FN2] Although similarities to other Canadian jurisdictions are abundant, Alberta has distinguished itself by its purposive approach to the legislation, the specific considerations that a judge must have in mind when deciding whether a proceeding should be certified, and on the issue of costs. Certification and costs will each be discussed in turn.

CERTIFYING CLASS ACTIONS IN ALBERTA

The mandatory requirements for certification of a class action are set out in section 5(1), 5(2) and 5(3) of the Act:

Class certification

5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

(i) will fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

. . .

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(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

The other factors that the Court must consider in determining whether a class proceeding is the " preferable procedure" are set out in section 5(2) of the Act:

5(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

As the case law in Alberta is still in its developmental stages, so when the Courts have applied the statute, they have looked to case law from other Canadian jurisdictions for assistance. In *Windsor v. Canadian Pacific Railway,* Rooke J. commented that the similarity between Alberta's legislation and that of other provinces made the case authorities "persuasive even if not binding" on the Alberta Courts [FN3]. References to the trilogy of Supreme Court of Canada decisions on certification, namely *Western Canadian Shopping Centre v. Western Canadian Shopping Centres* [FN4], *Hollick v. Metropolitan Toronto (Municipality)* [FN5], and *Rumley v. British Columbia* [FN6], are abundant in Alberta class action case law.

Overall, it is clear that the Courts will use a liberal and flexible approach to interpreting Alberta's class action provisions in keeping with the three stated goals of proceeding by way of class action; namely, *judicial economy*, distributing fixed litigation costs among larger numbers, thereby improving *access to justice* and ensuring *modification of behaviour*. The Alberta Court of Appeal [FN7] summarized this approach recently in *Ayrton v. PRL Financial (Alta) Ltd.* [FN8]:

> The Supreme Court in *Western Canadian Shopping Centres* and *Hollick* has mandated a purposive approach to the commonality question in class actions. That approach may involve interpreting legislation liberally in order to facilitate, rather than stifle, the development and use of class actions as a procedural tool.

This approach is predominant despite the fact that the Act leaves no room for judicial discretion in a certification application upon the Court being satisfied of the mandatory requirements in section 5. [FN9]

One other general statement of note is that the Courts have been mindful that the objective of certification is not to test the merits of the action. [FN10] While the merits are relevant in terms of being able to identify common issues, define a class, and ascertain whether the class proceeding is the preferable procedure, the concern at this stage of litigation is rightly on the form and appropriateness of a class action. [FN11] However, affidavit evidence in support of the certification is required and must provide sufficient information, particulars and specificity with respect to the requirements outlined in the Act. Similarly, those who oppose certification must put forward their contradicting evidence. [FN12]

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Section 5(1)(a) - The pleadings must disclose a cause of action

The purpose of this requirement is to dispose of actions that are clearly frivolous or that do not disclose a cause of action. [FN13] That the pleadings must disclose a cause of action is a "low bar" to be met. [FN14]

There has been one case in Alberta in which this threshold was not met. The action was against a number of named defendants, however the pleadings disclosed a cause of action against only one. [FN15] The Court found that since the Act states expressly that the ordinary rules of Court should apply, by extension the case law that interprets those provisions should also apply. Therefore, in order for an action to proceed to certification, the pleadings must show that the representative plaintiff has a valid cause of action against all named defendants. For all the defendants to be liable, appropriate plaintiffs need to be named in the style of cause *prior to* a determination of who should be named as a representative plaintiff to represent the class.

Section 5(1)(b) The class must be identifiable

The Court in *Paron* [FN16] explained that a clear class definition at the outset of litigation is important because it identifies those:

(a) entitled to notice;

(b) entitled to relief; and

(c) bound by a final judgment.

Consequently the definition must be precise, objective and presently ascertainable.

Class definitions must avoid criteria that are subjective or that depend on the merits because they:

(a) frustrate efforts to identify class members;

(b) contravene the policy against considering the merits of a claim in deciding whether to certify a class; and

(c) create potential problems of manageability.

The criteria must bear a rational relationship to the common issues asserted by all class members.

The Supreme Court of Canada's requirement of an identifiable class, enunciated in *Western Canadian Shopping Centres,* has been adopted in Alberta: [FN17]

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

In *Hollick* [FN18], the Court found that defining a class by geographic and temporal boundaries was a sufficiently objective basis on which to create an identifiable class. However, the requirement of determination by objective criteria is only one requirement for a class to be identifiable. The other requirement is that there must be a rational connection between the class and a common issue or issues, and that such connection be supported by the evidence. [FN19] Whether a class is over-inclusive or under-inclusive is not ordinarily fatal at this stage, as the Act permits amendments to the class definition if it is found to be imprecise. [FN20]

An unidentifiable class was found by Justice Topolniski in *Paron* [FN21] because membership in the class was "claim based." To gain membership in the class, a person was required to "claim" that between certain dates, his or her interest had been adversely affected. Since membership was based on a "state of mind", it would be impossible for the defendants to know who was part of the class. The Court distinguished this type of claim from other cases in which claims-based identification of a class had been accepted because in those cases the class was not dependent on what a person claimed. That is to say, the class could have been reframed as "all those who took some action and suffered personal injury as a result."

Another recent Alberta case also dealt with the issue of "claims-based" classes. [FN22] Justice

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Slatter observed that "claims-based" class definitions are subjective and prima facie problematic. It was held that, generally, these types of definitions are unnecessary. Slatter J. noted that the source of these definitions appeared to be an attempt to avoid merit-based class definitions. To resolve this issue Justice Slatter explained:

> There is however a difference between " damage" and "damages". Damage is an injury to person or property. "Damages" is a legal remedy, consisting of a sum of money paid to someone who has suffered compensable damage. It is merit based to define the class as "all those who are entitled to damages" from the defendant, because the entitlement to those damages depends on a finding of liability. It is not merit based to define the class as all those who suffered " damage" or "personal injury". Damage is an essential element of tort . . .the suffering of damage does not always result in compensation (i.e. damages), or does not always result in compensation from the named defendant. In my view the resort to " claims-based" class definitions is an attempt to avoid an artificial problem, and there is nothing wrong with requiring the members of the class be only those who have suffered injury. [FN23]

Therefore, when possible, identifying a class based on whether its members claim damage should be avoided. Though it is not fatal to do so, it does raise suspicion that the class is not properly identifiable.

Section 5(1)(c) - The claim must raise a common issue

The Act defines a common issue as "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". [FN24]

To ensure that an issue is common, a purposive enquiry should be made. The Chief Justice of the Supreme Court of Canada indicated in *Hollick* that " an issue will be common only where its resolution is necessary to the resolution of each class member's claim." [FN25] However, the issue need not be central to resolving the litigation. The Supreme Court stated that the common issues need not be determinative of liability and do not need to dispose of an entire action or claim. However, an issue will only be common where its resolution is essential to each class member's claim. Again this is a "low bar" to certification; even if substantial issues remain to be decided at an individual level, this will not be fatal. [FN26]

Justice Topolniski denied an application for certification in *Paron* partly on this basis. Six lakeside residents brought an action claiming that thermal pollution had negatively impacted lake levels and caused loss of enjoyment of their properties. The facts, however, showed that if lake levels were to rise, many of those represented in the class would be adversely affected. Because of this fact, there were found to be no common issues. The Court opined:

> If one class member is successful on a common issue, either all class members are successful or some class members are indifferent to that issue. There is no common issue, if success for one member of the class means a loss for another. . .
>
> In some cases a conflict of interest can be dealt with by naming formal subclasses, and if necessary providing for separate representation for each of the subclasses. Alternatively the problem can be resolved by redefining the class to exclude those with conflicting interests. However, in other instances the conflict may be so fundamental that it prevents the action from proceeding as a class action, for example where all the issues are only sub-class common and there are no universally common issues. [FN27]

In the circumstances, the Court found that some members of subclasses could be found in the untenable position of being both a plaintiff and an intervener opposing subclass proceedings for injunctive relief. Furthermore, one lawyer could not properly represent all of the subclasses, as that defeated the "economy" purpose of class litigation. In short, too many liability variables came into play for the issues to be able to be determined in a class proceeding.

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Section 5(1)(d) - A class proceeding must be the preferable procedure

A class proceeding is the preferred method if it is a "fair, efficient and manageable" method of deciding the common issues and if it is preferable to other reasonably available means of resolving the claims of class members. [FN28]

The Act is unlike class action legislation in other Canadian jurisdictions, in that it provides statutory directives on what a Court must consider under this requirement. Other provinces leave the inquiry into whether a class action is a preferable procedure to be assessed through the lens of the fundamental advantages of class actions, namely: judicial economy, access to justice and behaviour modification. However, because the Act gives a wide discretion to the Courts to consider "any relevant matter", most of the decisions weigh the three advantages listed above in addition to the five mandated considerations. [FN29]

In considering whether the class proceeding promotes access to justice, the Court can take judicial notice of the fact that in some circumstances the cost of pursuing individual claims would be prohibitive relative to the potential recovery on an individual basis. [FN30] The Courts understand that pursuing a claim that would require expert witnesses, cross-examinations, and lengthy and involved discoveries would cause many individuals to avoid legal action where the damages recovered on an individual basis would not be not significant.

Behaviour modification is also an essential aspect at this stage of the inquiry. The reason for this was given in *Western Canadian Shopping Centres*: [FN31]

> Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery.

This modification of behaviour is not limited to the particular defendant before the Court in the immediate case. Even if a defendant is or has been diligently attempting to redress any shortcomings, this does not satisfy this concern. As one Court stated: "It is counterintuitive that the defendant could successfully avoid certification of the environmental liability claim simply because it took corrective action after the environmental contamination became known instead of preventing the contamination in the first place." [FN32] Individual modification of behaviour is not the only concern; the Court must also take into account deterrence for similarly situated defendants.

Another relevant factor in the consideration of whether a class proceeding is a preferable procedure is the impact on third parties. In one decision, an application for certification was denied because the necessary parties were not joined in the litigation. Despite the fact that the defendants would be severally liable, the Court felt that the risk of apportioning liability in the absence of other necessary parties "create[d] a real risk of inconsistent judicial decisions, and violates the principle of natural justice that the rights of persons should not be decided unless they are extended a right to be heard in the proceedings." [FN33]

Section 5(2)(a) - Whether common issues of fact and law predominate over individual issues

As previously noted, the Court cannot refuse certification solely because of the need for individual assessments. However, the inquiry at this stage is not based on a simple balancing act of the common and individual issues. As the Court noted in *Kristal*: "Any approach based solely on the number of issues would encourage the drawing up of ever-longer lists of subdivided issues with the hope of tipping the numeric scale. . . the essence of the inquiry is to assess and weigh the nature and significance of the common and individual issues on the trial process." [FN34]

The Courts have warned against over-emphasizing the importance of individual issues. The correct inquiry is based on the more fundamental issue of whether the class proceeding is preferable. It is acknowledged that individual assessment may always be an issue and that irrespective, the focus should be on what the proper forum is to decide the common issues. [FN35]

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Section 5(2)(b) - Whether a significant number of class members have a valid interest in controlling prosecution of separate actions

The concern with respect to this issue is whether there are proposed class members who have a legitimate interest in controlling separate prosecutions of the action. Even where this is the case, there remains the possibility for them to opt-out in accordance with the Act. [FN36]

Section 5(2)(c) - Whether the class proceeding would involve claims that are or have been subject to other proceedings

In *Windsor*, the Court considered whether multiple other actions were a bar to certification of the class action. The Court found that they were not. Even when the action was certain to become " complex and bulky", the Court found that this was to be expected. It was held that "the Court cannot deny access to justice for claimants with justifiable claims simply because they have the misfortune of being swept up in complex, voluminous and factual and legal issues. The purpose of judicial economy is to seek to relieve the complexity and volume by properly hiving off and determining common issues that advance the claims of all members of a class." [FN37]

Although the Act does not require evidence to support what the plaintiffs propose, it may be practical to present such evidence. In *Paron*, the Court was sceptical for precisely this reason. There was no evidence that anyone other than the representative plaintiffs had any interest in litigation against the defendant. While they need not have shown that all the class of plaintiffs supported pursuing the claim, the complete absence of any support was of significance. [FN38]

Section 5(2)(d) - Whether other means of resolving the claims are less practical or efficient

Alternate procedures available to a Court to resolve the claims might include multiple separate actions, multiple actions consolidated and tried together, or a test case which could lead to further actions. If a class proceeding is not certified, the Courts run the risk of having multiple claims on the same facts which in turn may lead to different results. [FN39]

The Courts have been cognizant of the fact that class proceedings are not meant to alleviate all of the problems in complex litigation. The Court in *Windsor* stated:

> What [class proceedings] can do is assist the parties and the Courts by shortening the process, even if only for hours or days over the course of a lawsuit. It is an obvious inference that if the common issues can be determined once, instead of many times, then judicial economy will be served. [FN40]

Section 5(2)(e) - Whether the administration of the class proceeding would create greater difficulty than if relief was sought by other means

Given that having multiple proceedings creates enormous difficulty, as might be expected, this item is generally not a significant hurdle for a plaintiff to clear. As was observed by the Court in *Investplan* [FN41]:

> . . .the only advantage of a multi-party action would appear to be that some plaintiffs might be discouraged and walk away, which is an advantage only to the defendants, and which is not a legitimate reason to refuse certification given the goal of 'access to justice.'

Section 5(1)(e) The representative plaintiff must be suitable

A plaintiff's suitability is not dependent on the question of whether his or her individual claim will ultimately be successful. The defendant in *L.T. v. Alberta* argued that the representative plaintiff's claim was statute barred and so she was not an appropriate representative. The Court held that this should not be a concern at the certification stage:

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> The requirement that the representative plaintiff be a member of the class is not the same thing as requiring that the representative plaintiff prove, at the certification stage, that he or she has a valid cause of action. In other words, being a member of the class is not the same thing as being able to succeed on an immediate summary judgment application on the entire cause of action. The defendant undoubtedly had an arguable defence against the specific claim on the named representative plaintiff, but that does not mean that she is not a member of the class. [FN42]

Special considerations arise when the representative plaintiff is not a class member. This circumstance is permissible pursuant to section 2(4) of the Act, which reads:

> **2(4)** Notwithstanding subsection (2), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.

In *Investplan,* supra, the Court allowed a corporation to be the representative plaintiff as it had demonstrated the ability to undertake the necessary studies and had the resources to pursue the matter. This is in line with the Alberta Law Reform Institute report, which comments that "the exception could be useful in cases where a particular individual or organization possesses special ability, experience or resources that would enable it to conduct the case on behalf of all class members." [FN43]

Section 5(1)(e)(i) The representative plaintiff must fairly and adequately represent the interests of the class

Whether a representative plaintiff is adequate depends on whether he or she understands his or her duties, is willing to serve and has no conflicting interest. [FN44] In considering this issue, the comments in *Western Canadian Shopping Centres* are useful:

> 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. [FN45]

Efforts by defence counsel to argue that representative plaintiffs are not adequate because their "zeal" for the case would prejudice the rest of the class have been rebuffed in Alberta. The Courts are more concerned to avoid a representative who is "a 'straw man' with no particular interest in prosecuting the litigation to the fullest." [FN46]

In *L.T. v. Alberta,* the representative plaintiff was representing a large group of people who alleged abuse during a period of wardship of the state. Counsel for the plaintiff argued that only a single representative was being put forward because it would make administration of the action easier. Although the Court was sympathetic, it found that " the convenience of counsel was not a primary consideration." [FN47]. The Court went on to recommend that where a proposed plaintiff is potentially vulnerable, it is appropriate to have multiple plaintiffs to ensure the action goes forward. While L.T. was found to be an appropriate representative, the Court would not certify the proceeding unless two or three other suitable representative plaintiffs were added. [FN48]

Section 5(1)(e)(ii) The representative must have a litigation plan that advances the proceedings

Litigation plans, at the certification stage, are not expected to be perfect. Section 5 of the Act only requires that the plan be "workable". The Court in *Windsor* remarked that for the plan to be "workable" it need only be "capable of implementation in the circumstances." [FN49]

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Until recently certification had never been refused in Alberta due to the inadequacy of a litigation plan. However, in *Paron*, this was found to be one of the determining factors in the refusal of certification. In making this finding, Justice Topilniski listed the essential elements a plan must contain, relying on *Bellaire v. Independent Order of Foresters*: [FN50]

(a) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;

(b) the collection of relevant documents from members of the class as well as others;

(c) the exchange and management of documents produced by all parties;

(d) ongoing reporting to the class;

(e) mechanisms for responding to inquiries from class members; and

(f) whether the discovery of individuals class members is likely and, if so, the intended process for conducting those discoveries.

The plan in *Paron* did not provide a means or process for collecting documents from members of the class, did not describe how class members would communicate with the plaintiff and did not address the complex and divergent needs of the proposed class members. As certification was denied on a number of different grounds, the Court did not comment on whether it might have been permissible to improve these aspects of the plan through later case management orders.

Section 5(1)(e)(iii) The representative must not have a conflicting interest in respect of the common issues

The Act does not define "conflict of interest" in the context of a representative plaintiff. The Alberta Law Reform Institute's Final Report suggests that this concern applies on with respect to the common issues, and that an interest that is somewhat different from that of other class members should not disqualify a representative. [FN51]

Defendants have argued that a representative was inappropriate because at a future date the representative plaintiff's personal interest could come into conflict with other class members. This argument did not succeed, particularly since section 13(2) of the Act allows the Court to substitute the representative plaintiff if he or she no longer "fairly and adequately" represents the class. [FN52]

A conflicting interest was found in *Paron,* where the representative plaintiff put forward as a common issue the need to return a lake level to its historical level. If certification were granted on the basis of this common issue, some of the members might have lost some of the enjoyment of their property, so there was in reality no common issue.

THE ISSUE OF COSTS IN ALBERTA CLASS ACTIONS

The Act provides no special considerations with respect to costs. Section 37 of the Act merely states that "with respect to any proceeding or other matter under this Act, the Court may award costs as provided for under the Rules of Court." In Alberta, while costs are always a matter of judicial discretion, the general rule in civil litigation is that the unsuccessful litigant pays all or a portion of the successful party's costs. Section 37 of the Act went explicitly against the Alberta Law Reform Institute's recommendation that Alberta should have a "no costs" regime with respect to class actions. This provision on costs was the most contentious part of the legislation when it was debated in the legislature. Mr. Rathgeber, the government sponsor of the bill, noted that the Act adopted the normal rules on costs. He summarized the government's position:

> Following the ordinary costs rule allows the Court to consider the specific circumstances of each case and make a decision based on those circumstances.
> This is consistent with the discretion given to the Court to make decisions . . .
> As I indicated in committee, the reason that [the bill] does not have a fund provided

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for plaintiffs, is that the general practice in Alberta is that costs follow the cause. Successful plaintiffs are able to recover their Court costs from the unsuccessful party. Similarly, successful defendants who fend off a lawsuit, be it a class action or otherwise, are able to recover their Court costs from the unsuccessful plaintiff. This is the normalcy in Alberta, and [the bill] does nothing to change the normal provisions for costs. Also existing in Alberta is the discretion of a judge to not award costs if it would be unduly hard on the plaintiff, so there is that discretion. [FN53]

The government seemed to be concerned that Alberta would turn into a "cottage industry for frivolous or unmeritorious lawsuits," so a no costs model was ultimately rejected.

Alberta is unique with respect to the issue of public funding for costs, when compared to the other Canadian provinces with class action legislation. In Ontario, for example, where a costs regime also applies, there is a fund to assist prospective class litigants. There is no such fund in Alberta. However, the Courts in Alberta have recognized that a no-costs regime may be more appropriate in certain cases. The Court in *Ayrton v. PRL Financial (Alta.) Ltd.* [FN54] held that in Alberta, class action litigants can only avoid the risks of costs to be paid by a representative plaintiff by applying for an order for no costs in the proceedings and relying upon established common law principles relating to costs for public interest litigation. There is nothing in the Act that expressly prohibits such an order. [FN55] The Court in *Ayrton* went on to discuss four criteria that ought to be considered when departing from the normal rule that costs follow the outcome: public interest, novel point of law, whether the case was a test case and access to justice.

A no costs order was sought in *Pauli v. ACE INA Insurance* [FN56], one of the "salvage" cases in which the plaintiffs were applying for determination of whether the Alberta Insurance Act permitted insurance companies to charge deductibles against actual cash values in total loss situations and also keep the salvage. The Court noted that in other judicial decisions there had been an exception made to the regular costs regime when a public interest was involved. When a person commences public interest litigation and seeks a no costs order, the relevant criteria were:

(a) the proceeding must involve issues the importance of which extents beyond the immediate interest of the parties involved;

(b) the person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically;

(c) the issues have not been previously determined by a Court in a proceeding against the same defendant;

(d) the defendant has a clearly superior capacity to bear the costs of the proceeding; and

(e) the plaintiff has not engaged in vexatious, frivolous or abusive conduct.

The Court found that these criteria were met in the circumstances of the case, and therefore no costs should be awarded in relation to the merits issue. The Court did, however, award costs for all other steps taken to pursue certification as well as for the case management orders, and ordered divided costs on the appeal.

From the few cases that have been decided in Alberta on the issue of costs, it appears that the Courts are more inclined to a no-cost regime similar to that which exists in some Canadian provinces, such as British Columbia. The decisions seem to place weight on the need for allowing many claimants to pool their resources to pursue claims that they could not pursue individually because of the small monetary amounts at stake. It is felt that if the regular costs rules are followed, this may curtail access to justice because lawyers and other third parties, who might be willing to underwrite the costs of a potentially meritorious representative action, would be unwilling to do so if they knew they would face crippling costs merely because they offer this financial assistance. [FN57]

CONCLUSIONS

Alberta's Act is relatively new, and the body of

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case law considering it is still in its infancy. Those commencing or defending class actions are assisted by explicit statutory provisions detailing what considerations the Court must take into account when deciding whether to certify a class action. Despite this, the Courts have considerable latitude and have adopted a purposive approach to the legislation. Many apparent shortcomings in a proposed class action will not be fatal if it can be demonstrated that amendments to the form of the claim in the future will respond adequately to concerns that might arise.

Alberta has a unique system of costs for class actions. Although, many other Canadian provinces also have a "loser pay" system, plaintiffs in those other provinces may be protected by funds that are set up to relieve representative plaintiffs from the potential costs burdens. This type of fund does not exist in Alberta. Despite this, the Courts have been willing to create a no costs regime in appropriate cases which are brought in the public interest.

[FN1]. S.A. 2003, c. C-16.5

[FN2]. Alberta Law Reform Institute, Class Actions, Final Report No. 85 (Edmonton: ALRI, 2000) [ALRI]

[FN3]. [2006] 8 W.W.R. 672 (Alta. Q.B.) at para. 33 [*Windsor]* and *Condominium Plan No. 0020701 v. Investplan Properties Inc.*, [2006] 25 C.P.C. (6th) 327 (Alta. Q.B.) at para. 28 [*Investplan*]

[FN4]. [2001] A.W.L.D. 432, 201 D.L.R. (4th) 385 (S.C.C) [*Western Canadian Shopping Centres*].

[FN5]. [2001] S.C.R. 158 (S.C.C.) [*Hollick*].

[FN6]. [2001] 3 S.C.R. 184.

[FN7]. The highest Court within the Province.

[FN8]. (2006) 265 D.L.R. (4th) 240 at para 9. See also *Kristal Inc. v. Nicholl & Akers*, [2006] 54 Alta. L.R. (4th) 275 at 82 [*Kristal*].

[FN9]. *Kristal*, supra, at para. 84; see also *Gillespie v. Gessert*, [2006] A.W.L.D. 2029 (Q.B.) at para. 23 [*Gillespie*].

[FN10]. *The* Act, s. 6.

[FN11]. *Paron v. Alberta (Minister of Environmental Protection*, [2006] A.W.L.D. 2331 (Q.B.) at para. 35 [*Paron*].

[FN12]. *Investplan*, supra, at para. 53. Also in *Hollick*, the Court says that the affidavit evidence need not be extensive or that a detailed merits assessment be done.

[FN13]. *Gillespie*, supra, at para. 25.

[FN14]. *Windsor*, supra, at para. 9.

[FN15]. *Gillespie*, supra.

[FN16]. *Paron*, supra, at 41.

[FN17]. *Windsor*, supra, at 71.

[FN18]. *Hollick*, supra, at para. 17.

[FN19]. *Ibid.*, at para. 76.

[FN20]. *Ibid.*, at para. 91; the Act, section 9(3).

[FN21]. *Paron*, supra, at paras. 47-54.

[FN22]. *L. (T.) v. Alberta (Director of Child Welfare)* [2006] Alta. L.R. (4th) 23 (Q.B.) [*L.T. v. Alberta*].

[FN23]. *Ibid.*, at 67.

[FN24]. The Act, s.1(e).

[FN25]. *Hollick*, supra, at para. 18.

[FN26]. *Windsor*, supra, at para. 103; the Act, section 5(1)(c).

[FN27]. *Paron*, at para. 66-67.

[FN28]. *Paron*, supra, at 90

[FN29]. *Windsor*, supra, at 110-112.

[FN30]. *Ibid.*, at 141.

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[FN31]. *Western Canadian Shopping Centres*, supra, at para. 29

[FN32]. *Ibid.*, at 148.

[FN33]. *L.T. v. Alberta*, supra, at para. 141.

[FN34]. *Kristal*, supra, at para. 115-116.

[FN35]. *Investplan*, supra, at para. 93.

[FN36]. *Windsor*, supra at para. 125; the Act, s. 17.

[FN37]. *Ibid.*, at para. 127-128; see also *L.T. v. Alberta*, supra, at para. 134-135.

[FN38]. *Peron*, supra at para. 106.

[FN39]. *Kristal*, supra, at para. 129.

[FN40]. *Windsor*, supra, at para. 131.

[FN41]. *Investplan*, supra, at para 99; see also *Metera v. Financial Planning Group*, [2003] 10 W.W.R. 367 (Alta. Q.B.).

[FN42]. *L.T. v. Alberta*, supra, at para. 117.

[FN43]. ALRI, supra, at para. 221.

[FN44]. *Windsor*, supra at para. 155.

[FN45]. *Western Canadian Shopping Centres*, supra at para. 41.

[FN46]. *Windsor*, supra at para 156-57.

[FN47]. *L.T v. Alberta*, supra at para. 123.

[FN48]. *Ibid.*, at para. 126.

[FN49]. *Windsor*, supra, at para. 162.

[FN50]. [2004] O.J. No. 2243; *Paron*, supra at para. 130.

[FN51]. ALRI, supra, at para. 218.

[FN52]. *Windsor*, supra, at para. 163-64.

[FN53]. *Alberta Hansard*, April 16, 2003, pp. 1081-84.

[FN54]. [2006] A.W.L.D. 2022 (C.A.).

[FN55]. *Ibid* at para. 31.

[FN56]. [2004] I.L.R. I-4328 (Alta. C.A.).

[FN57]. *Ayrton*, supra.

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