# Pension Class Actions

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## HOW CLASS ACTIONS WORK

Class actions increase exposure for defendants by making claims viable that were not previously. As a simple example, a single individual with a $500 claim could not afford to pay a lawyer on an hourly basis to advance such a claim. Nor would a lawyer agree to take such a claim on a contingency fee basis, because the hours spent would quickly exhaust any potential recover for the law firm. Therefore, without class actions, it is unlikely that such claim could be brought.

Class actions allow that one individual to bring his claim on behalf of many. If there were 1000 people with that same $500 claim, the claim would be worth $500,000 in the aggregate. While one individual with a $500 claim would still not be interested in paying a lawyer to take the claim on an hourly basis, the lawyer may now be prepared to take the case on a contingency fee basis. That is because the class action legislation allows his fee to be calculated as a percentage of the aggregate amount of $500,00 rather than as a percentage of his own direct client's claim of $500.

Pension disputes are fertile ground for class actions. Where one member of a plan may not think it economic to bring a claim relating to the terms of that plan, a class action allows one plaintiff and one class action lawyer to aggregate all of these members' claims into one proceeding. Given the monetary value of pension plans in Canada today, it can be expected that more and more pension disputes will be decided in the context of a class action.

Class actions do not make claims any more meritorious than they were before. They just remove a practical impediment to bringing claims that are meritorious – lawyer's fees. The class action structure encourages the lawyer to bring the claim without being paid by the hour by a client. It does so by holding out the promise that he or she will be paid handsomely at the end of the day by allowing him to retain a percentage of the recovery of the entire class.

## THE EXPANSION OF CLASS ACTIONS IN CANADA

Class actions were first made available in Quebec in 1978[1]. Since then, Ontario[2], B.C.[3], Saskatchewan[4], Newfoundland[5], Manitoba[6], and the Federal Court of Canada[7] have also adopted legislation.

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[1] Quebec *Code of Civil Procedure*, Art. 1003

[2] *Class Proceedings Act*(1992), S.O. 1992, c. 6

[3] *Class Proceedings Act*, RSBC 1996, c. 50

[4] *Class Actions Act*, S.S. 2001, c. 12.01

[5] *Class Actions Act,* S.N.L. 2001, c. C-18.1

[6] *Class Proceedings Act*, C.C.S.M. c. C130

The enhanced exposure created by class actions is no longer limited to jurisdictions with legislation however. The Supreme Court of Canada's judgment in *Western Canadian Shopping Centres v. Dutton,*[8] essentially "read in" the basic elements of class action legislation into the traditional representative proceeding rules in place in the remaining jurisdictions.

Therefore, class actions are now essentially available throughout Canada.

As the availability of class actions has expanded so to has the number of pension cases which are being launched as class actions. Numerous examples can be made as the types of pension claims which are being filed as class actions:

(a) Whether the Department of Veteran Affairs was a trustee of a pension plan and, if so, whether it breached its fiduciary duty[9]?

(b) Whether there was a shortfall in benefits paid to members and whether the plan's sponsor failed to make required contributions to the plan[10]?

(c) Whether contribution holidays were illegal, whether assets and liability transfers adversely affected certain plan members and whether plan amendments constituted a breach of fiduciary duty[11]?

(d) Whether a plan actuary was fiduciary to members of the plan[12]?

(e) Whether surplus was used improperly[13]?

(f) Whether a partial termination of a plan occurred[14]?

(g) Whether plan members are entitled to surplus, whether plan sponsor failed to properly insulate assets prior to plan termination, whether administrator expenses were properly paid, whether contribution holidays were illegal, and whether surplus payments from the fund were unlawful?

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[7] *Federal Court Rules, 1998,* SOR/98-106 as amended by *Rules Amending the Federal Court Rules, 1998,* SOR/2002-417, s. 17

[8] 2001 SCC 46

[9] *Authorson (Litigation guardian of) v. Canada (Attorney General),*[1999] O.J. No. 557, Court File No. 99-GD-45963

[10] *Sadler v. Watson-Wyatt* (20 November 1998), Vanc. Reg. No. C982281 (BCSC)

[11] *Hinds v. Colgate-Palmolive* (26 February 2002), O.J., Court File No. 98-CV-153808

[12] *McLaughlin v. Falconbridge,* [1999] O.J. No. 2403, Court File No. 96-CU-109781

[13] *Burleton v. Royal Trust Corp. of Canada* [2003] O.J. No. 2168, Court File No. 35346

[14] *Lacroix v. Canada Mortgage and Housing Corporation* [2003] O.J. No. 2610, Court File No. 99-CV-10694

A class action involves four major steps:

1. Filing: A person can file a proposed class action without obtaining court approval. Further, it is not necessary that this person seek out or obtain the approval of any other members of the class before filing the action. However, the case does not bind any other class members until it obtains court approval, which occurs at the second stage. This fact is often lost in press reports, which are often prevalent on the initial filing.

2. Certification or authorization: At this stage the court decides whether the case should be a class action. The test here is essentially whether the issues common across all class members are sufficiently important to justify a class action.

   There are a number of specific requirements that a plaintiff must satisfy at this stage of the case in order that it can be pursued as a class action. In British Columbia these requirements are:

   (a) the pleadings disclose a cause of action;

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

   (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

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

   (e) there is a representative plaintiff who

      (i) would 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, on the common issues, an interest that is in conflict with the interests of other class members.

   If the key issue in the case does not require any evidence from individual class members, then the case may well be a suitable class action. For example, in a products liability case, you do not need to hear the testimony of any individual class member to decide whether a product is defective when it leaves the plant. Given that defect is usually the key issue in such cases, these types of cases are usually certified in Canada.

   Conversely, if the heart of the case turns on the evidence of each class member, the case may not be approved as a class action. For example, if the allegation involves alleged oral misrepresentations made by thousands of agents of the defendant in different settings to different class members, then it may be necessary to hear from each class member in order

to determine exactly what was said in each case. These types of cases cannot be effectively managed within a class action structure, and are usually refused certification.

An important aspect of the certification or authorization procedure in a pension dispute is the definition of the class which is being represented in the class action and the potential to divide that class into various sub-classes. As will be explained more fully later in this paper, in certain types of pension disputes (i.e. where there has been a merger of plans or where there is a conflict between current members and historical members of the plan) it is important to ensure that the class is adequately defined at the outset to ensure that there are no conflicts between members within the class.

In *Gregg v. Freightliner*[15] a potential conflict within the plaintiff class concerning entitlement to an alleged surplus in a plan on termination between current members (i.e. members at the time of termination) versus historical members (i.e. members who had previously left the plan) led the court to divide the plaintiff's class into two separate sub-classes. This type of "sub-classing" has important implications for the ongoing conduct of the class action. Not the least of which is that if the court finds that there is an inherent conflict between the two groups, the court may appoint separate counsel to represent each of the plaintiff's sub-classes in the litigation or even refuse to certify the action as a class action.

3. Common Issues Trial: if the case is certified as a class action, the case will then proceed to a common issues trial. The court will determine whether the issues common to all class members should be resolved in favour of the class or the defendant on the merits.

4. Individual Issues Determination: If the class is successful on the merits, the court will set up a process to resolve any individual issues that remain. For example, in a products liability case, the common issues trial might determine whether the product was defective, while the individual issues stage will determine what damages each individual user suffered as a result of the defect.

   The individual issues trials can also be important where certain members of the class may be subject to limitation periods and other members arguably are not. Such an argument leads to the requirement that there be an individual determination of liability based upon individual circumstances giving rise to a limitation defence.

## CLASS ACTIONS INVOLVING PENSIONS AND EMPLOYEE BENEFITS

Class actions can be brought in many different areas including products liability, environmental cases, and consumer fraud. However, for the purposes of this paper, we are most interested in the scope for class actions involving pensions or employee benefits and will review the state of the law in these two areas.

Pension and benefit disputes have been certified as appropriate class actions in many cases, particularly in Quebec.

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[15] *Gregg v. Freightliner* (2003) Vanc Reg. No. S031838, BCSC 241

The reason these cases work so well as class actions is that they usually involve the interpretation of a standard form contract. This creates a clear common issue that can be assessed by the court in one trial – what does the contract mean?

Furthermore, the individual issues that remain after determining such the proper interpretation of the contract are often relatively straightforward. They will usually not require any cross – examination of the individual employee or any assessment of credibility. How much each individual should be entitled to if the case is successful may be a simple mathematical exercise.

In *Syndicat canadien de la fonctin publique, section locale 1236 v. Outrement (Ville)*[16] the defendant argued that a class action was unnecessary given that a challenge to the pension plan's activities by one member would apply to all in any event. The court disagreed. A class action was necessary because:

1. each member had his or her own contractual relationship with the plan;

2. a finding against one member would not bind the remainder, and

3. no member had sufficient interest to seek recovery of the global monetary amount sought.

In *Châteauneuf v. TSCO of Canada Ltd.*[17], employees were successful in obtaining an order that the employer transfer over $6 million to the pension plan.[5]

Most recently, on May 30, 2003 an Ontario court approved a settlement of a class action in which a class of pension beneficiaries alleged than an amendment to the plan purporting to reduce benefits was invalid[18]. The estimated value of the settlement was $51 million.

A list of other cases to certify pension cases is provided in the following footnote.[19]

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[16] (January 21, 1998), Montreal 500-06-000021-960 (Que. S.C.)

[17] [1993] R.J.Q. 2663, 1 C.C.P.B. 52 (S.C.), affd 124 D.L.R. (4th) 308, [1995] R.J.Q. 637, 68 Q.A.C. 1,6 C.c.P.B. 1 (C.A.), leave to appeal to S.C.C. refused 124 D.L.R. (4th) vi, 8 C.C.P.B. 107n, 192 N.R. 240n

[18] (May 30, 2003) Court File No. 35346 (Ont. S.C.). The judgment can be found on the web at: http://www.apert.net/judgment.htm

[19] *McLaughlin v. Falconbridge Ltd.* (1999), 21 C.C.P.B. 133, 36 C.PC. (4th) 40(Ont. S.C.J.); *Assoc. provinciale des retraités d'Hydro-Québec* (unreported, February 16, 1999, Montreal 500-06-000039-970, Que. S.C.); *Brochu v. Lac d'amiante du Québec Ltd.* (unreported, January 29, 1993, 235-06-000001-924, Que. S.C.); *Vachon v. Les Mines d'amiante Bell Ltee* (unreported, July 10, 1989, 235-06-00000-890, Que. S.C.); *Syndicat des fonctionnaires municipaux de Montreal (SCFP) v C.U.M.* (unreported, Montreal 500-06-0000010-914, Que. S.C.); *Bourque v. Labaratoires Abbott Ltée* (unreported, November 24, 1999, 99-CV-180055, Ont. S.C.J.); (2000), 23 C.C.P.B. 182, 43 C.P.C. (4th) 263 (S.C.J) (settlement approval); *Sadler v. Watson Wyatt & Co.* (unreported, November 28, 1998, B.C.S.C., Court File No. C982281 (certification); 103 a.C.w.S. (3d) 208, [2001] B.C.J. No. 246 (S.C.)[001/051/097 – 41 pp.]; *McMaster University v. Robb* (unreported, September 4, 2001, Ont. S.C.J., Court File No. 01-CV-216289)(granting certification); [2001] O.J. No. 5480-(S.C.J.) (approving settlement); *Hinds v. Colgate-Palmolive Canada Inc.* (unreported, February 26, 2002, Ont. S.C.J. Court File No. 98-CV-153808); *Bélisle v. Commission scolaire de Montréal,* [2001] J.Q. 4896 (S.C.); *CF Kingsway Inc. v. Goetz* (unreported, October 3, 2001, Ont. S.C., Court File No. 01-CV-220387)(certification); (unreported, January 21, 2002, Ont. S.C.J., Court File No. 01-CV 220387)(settlement approval)

Disputes with employees regarding salary, overtime, and severance pay have also been certified in several cases, as outlined in the following footnote.[20]

Another area which may be of interest is the use of class actions by employees of bankrupt corporations to pursue directors for unpaid wages. Several of these cases have been certified in Quebec.[21]

While a pension plan with a straightforward history (i.e. an ongoing, unamended plan with one category of members) does appear to be quite amenable to the class action procedure, the history of any given pension plan can lead to difficulties in melding that plan within a class action. While not a class action decision, the judgment of the Alberta Court of Appeal in *re National Trust Company and Sulpetro Ltd.*[22] is instructive in the difficulties which can arise in a pension class action dispute.

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[20] *Dinelle v. Université de Monréal* (1989), 30 C.C.E.L. 93 (Que. S.C.); *Desmeules v. Hydro-Quebec* [1987] R.J.Q. 428 (S.C.); Gagne v. Silcorp. Ltd. (unreported, April 17, 1997, 97-CU-120941, Ont. Ct. Gen. Div.)(certification and settlement approval); (1997), 14 C.P.C. (4th) 269, 35 O.R. (3d) 501 (Gen. Div.)(fee approval),revd 167 D.L.R. (4th) 325, 41 O.R. (3d) 417, 113 O.A.C. 299, 39 C.C.E L. (2d)253, 27 C.P.C. (4th) 114 (C.A.)(fee approval); (unreported, December 15, 1998, Ont. S.C.)(final counsel fee approval);S*impson v. Ontario* (unreported, September 24, 1993, 15639/93, Ont. Ct. (Gen. Div.))(certification decision); further proceedings (1997), 72 A.C.W.S. (3d) 990 (Ont. Ct. (Gen. Div.))[097/213/017-6pp.](decision on the merits), affd 118 O.A.C. 201 (C.A.)(decision on the merits); *Wicke v. Canadian Occidental Petroleum Ltd.* (1998), 40 O.R. (3d) 731 (Gen. Div.); (unreported, November 16, 1998, 98-GD-43927, Ont. S.C.) (scope of examinations); (1999), 45 O.R. (3d) 389, 45 C.C.E.L. (2d) 165, 99 C.L.L.C. ¶210-038 (Ont. S.C.J.) (certification decision and partial summary judgment); (unreported, June 20, 1999 98-GD-43927, S.C.)(approval of retainer agreement); (1999), 45 O.R. (3d) 425, 46 C.C.E.L. (2d) 293 (Ont. S.C.J.)(reference procedure), leave to appeal to Ont. S.C.J. refused 45 O.R. (3d) 638; *Dillon v. Novi Canadian Ltd.* (1999), 45 C.C.E.L. (2d) 23, 36 C.P.C. (4th) 28 (Ont. S.C.J.); *Joncas v. Spruce Falls Power and Paper Co.* (unreported, December 22, 1998, 97-CV-138924, Ont. Ct. (Gen.Div.))(application to strike); (1999), 45 C.P.C. (4th) 241 (Ont. Ct. (Gen. Div.))(certification)(2000), 48 O.R. 179, 6 B.L.R. (3d) 109 (S.C.J.)(merits);(unreported, July 14, 2000, s.C.)(costs); *McLaughlin v. FalconbridgeLtd.,* (1999), 21 C.C.P.B. 133 (Ont. s.C.J.); *Scott v. Ontario Business College (1977) Ltd.* (1999), 91 A.C.W.S. (3d) 527 (Ont. S.C.J.); *Atkinson v. Ault Foods Ltd.* (unreported, September 2, 1997, C17932/97 (Gen. Div.))(certification and injunction); (unreported, November 20, 19997, (Gen. Div.))(costs of certification application); leave to appeal denied, December 23, 1997 Ont. Ct. (Gen. Div.); (unreported, August 26, 1998 (Gen. Div.))(settlement approval); *Schweyer v. Laidlaw Carriers Inc.* (2000), 49 C.C.E.L. (2d) 308, 23 C.C.P.B. 200, 44 C.P.C. (4th) 236 (Ont. S.C.J.); *Kumar v. sharp Business Forms Inc.* (2001), 9 C.C.E. L. (3d) 75, 5 C.P.C. (5th)128, [2001] O.J. 1729 (S.C.J. ); *Orrod v. Etobicoke (Hdro-Electric Commission)*(2001), 53 O.R. (3d) 285, 8 C.C.E.L. (3d) 48, 3 C.P.C. (5th) 253 (S.C.J.)(certification); *Rathwell v. Hershey Canada Inc.* (unreported, August 18, 1999, Ont. s.C.J., Court File No. 99-CV-9415-CP)(certification order); *Isaacs v. Nortel NetworksCorp.* (2001), 110 A.C.W.S. (3d) 246, [2001] O.J. No. 4851 (S.C.J.); *Gagné v. Primerica Financial Services Ltd.,* [2001] J.Q. No. 5211 (S.C.) (fee approval).

[21] *Lafreniere v. Wise,* [1995] R.J.Q. 2121 (S.C.); *Plourde v. Helie,* [1984] C.S. 462 (Que.); *Masson v. Thompson* (unreported, January 29, 1992, Montreal 500-06-000005-914 (Que. S.C.)(certification decision), affd [1993]R.J.Q. 69 (C.A.); [1994] R.J.Q. 1032 (S.C.)(jurisdiction over non-resident class member) affd [1995] R.J.Q. 329, 67 Q.A.C. 75 (C.A.)(application to sever thid party proceedings); [1997] R.J.Q. 634 (S.C.) (decision on the merits in favour of the class) appeal allowed in part 101 A.C.W.S. (3d) 463 (C.a.); *Bellavance v. Klein* (1997), 67 A.C.W.S. (3d) 1072 (Que. C.A.); *Brunelle v. Cohen* (unreported, April 21, 1998, Montreal 500-06-000043-972, Que. S.C.)(certification order), (unreported May 31, 1999)(settlement approval), further proceedings (unreported, September 7, 1999)(S.C.): *Guthier v. Fortier* (unreported, December 18, 1991, 500-06-000007-902, Que. S.C.)(certification); (unreported, April 26, 2000, S.C.)(settlement approval). Note that the court may refuse to certify a class action if the employee group is small and geographically defined: *Castonguay v. Gauthier* (unreported, February 15, 1993, St. Francois 450-06-000001-911, Que. S.C.).

[22] *National Trust Company and Sulpetro Ltd.* [1990] 66 D.L.R. (4th) 271

In *Sulpetro*, one pension plan was amalgamated with a second pension plan to form a new pension plan in 1981. Later, the new pension plan was again merged with a second pension plan. The original pension plan documents for each plan were quite different. All but one of the pension plans allowed the sponsor to amend the plan to transfer surplus to itself. The other plan irrevocably granted any rights to surplus to the members of that plan. The Alberta Court of Appeal decided that the one original plan which did not allow the surplus to revert to the employer "continued" after the merger into the two later plans and formed a segregated "fund" within the amalgamated fund. In essence, the court held that the members of each of the four plans prior to amalgamation maintained whatever rights they had to surplus through the amalgamations regardless of the new plan wording. Therefore, during the litigation, although there was only one plan, and one fund, there was actually four groups of members each with specific sets of rights to certain portions of the trust fund.

In the context of a class action, this division means that there would arguably need to be four separate classes of plaintiffs if claims were being made to a surplus. It would not be possible to group all of the individual members into one "class" because of the different rights asserted by each of the members depending which plan they joined. Accordingly, a review of the history of the plan, of all the constating documents, and a tracing of the specific funds attributable to earlier plans is essential to gain an understanding of whether any proposed class is appropriate, and, as importantly, whether there are other potential claimants who need to be separately represented in the class proceeding.

It is interesting to note that while class actions have become the norm with respect to large pension claims in recent years, prior to class action legislation, each province traditionally permitted one party to bring a "representative action". A representative action allowed a plaintiff to assert that they represented a group and seek relief on behalf of a group of plaintiffs. In order to use this procedure a plaintiff did not have to seek a class certification order (although a defendant could challenge their right to proceed in this way). However, none of the other special simplifying procedures under the *Class Proceedings Act* are available in representative cases. Most importantly, from class counsel's perspective, there is no statutory mechanism allowing counsel to be paid from the recovery of the class as a whole. Traditionally, many of the most important pension decisions in Canada were decided by way of representative action. Certain counsel have continued to use the traditional procedure despite passage of the B.C. *Class Proceedings Act*). For example, in *Buschau v. Rogers Cable System Inc.*[23] a representative claim was made seeking an order terminating a pension plan and the payment out of surplus

It should also be noted that class actions do not give the court any additional jurisdiction. As such, if a dispute is properly the subject of arbitration under a collective agreement, the court will not hear the case, even if proposed as a class action.[24]

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[23] *Buschau v. Rogers Cable System Inc.* [2001] B.C.J. No. 50

[24] *Roy v. Fonds d'aide aux recous collectives* (unreported, October 3, 1997), Montreal 500-02-056186-971, Court of Quebec);*Syndicat canadien de Is function publique, section locale 2601 v. Mont-Royal (Ville)*(unreported, October 1, 1998, Montreal 500-06-000025-961, Que. S.C.); *Carrier v. Quebec* (unreported, December 15, 1998 Montreal, 500-06-000048-971, Que. S.C.), appeal dismissed 100 A.C.W.S. (3d) 5 (C.A.)

## THE COST OF DEFENDING CLASS ACTIONS

Class actions are always complex cases. The defence is additionally complex because there are so many issues that arise that are not present in traditional litigation, such as notice and communication with the class.

Taking the second stage issue (whether the case should be a class action) as an example, defendants will often expend hundreds of thousands of dollars defending this preliminary motion. This effort is normally justified because certification as a class action dramatically increases a company's exposure, while success in defeating certification may mean that no case will ever be brought.

Class actions in pension cases, however, may be somewhat different than other types of class actions and the cost of defending a pension class action while still weighty, may be more similar to the cost which has historically been involved in defending major pension litigation. This is because unlike, for example, some product liability litigation, pension claims normally involve large sums in any event Even if one single member brought an application claiming a right to a surplus, the declaration that would be granted in that litigation would always have had tremendous consequences for the plan, and, by definition, would have been applicable to all plan members whether or not they were involved in the proceeding. So while the cost of defending such claims will be great, it may not differ that greatly from the normal cost of defending some of the larger pension law disputes in Canada.

Another point to consider is that in many jurisdictions, the defendant will be unable to claim back any portion of its legal costs in defending certification or the common issues trial, even if successful. In Quebec, the scale of costs is dramatically reduced. In B.C., Saskatchewan, Manitoba, Newfoundland, and in Federal Court, costs are generally not payable. This is a significant factor that helps explain why class actions are resisted so strenuously.

## THE FUTURE

We do not see any reason to expect that the court's liberal approach to class actions involving pensions and employee benefits will change. While there is some substantial controversy about the appropriateness of class actions in sexual abuse and products liability cases, the controversy has not extended these other areas.

We expect the trend towards using class actions in these areas to continue. Indeed our view is that the class action tool has not been used as extensively as it could be for such disputes in jurisdictions outside Quebec. We expect that this will change. For example, a firm in Ontario with substantial pension experience Koskie Minsky, has recently hired a leading class action practitioner, and is pursuing pension class actions aggressively[25]. This firm has recently launched a class action in British Columbia in respect of one of the public sector pension plans in British Columbia, as is

[25] See this firm's website at http://www.koskieminsky.com/ClassAction.htm

partnered with a Vancouver firm that specializes in class actions. Certification has not yet been granted in that case.[26]

A leading labour law practitioner in B.C. has recently certified one of the first employment cases in B.C. and, the second aspect of that, case certification of the pension claim, is pending and will likely be granted this fall.[27]

One of the consequences of the rapid growth of class action litigation involving pensions is the changing position of fiduciary insurers. Fiduciary insurers in Canada are increasingly well-versed in the lore of pension class actions and have monitored the exponential growth in this area. This likely means that pension administrators will see further increases in fiduciary insurance premiums in the near future.

Pension administrators would therefore be well advised to keep the threat of class litigation constantly in view.

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[26] *Williams et al v. College Pension Board of Trustees et al* (23 September 2002) Vanc. Reg. No. L021149 (BCSC)

[27] See this firm's website at http://www.telvingleadle.com/files/classaction.html

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