Osgoode Hall Law School's

7th National Symposium on Class Actions

Top 10 Canadian Class Actions Decisions of the Past Year

Case Comments:
Alves et al. v. Mytravel Canada Holidays Inc et al.
Ring et al. v. Minister of national Defence et al.
Smith v. Inco Limited
Martin v Lahey

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Alves et al v. Mytravel Canada Holidays Inc. et al

What is it about?

Class action on behalf of persons who claim their vacations were ruined due to water shortages at six resorts in the Holguin Region of Cuba between November 1, 2004 and February 1, 2005.

Connection between Representative Plaintiff and Defendants:

Defendant, Red Seal Vacations Inc. sought to dismiss the claim against them because, on the face of the pleadings, none of the representative plaintiffs personally had a cause of action against Red Seal. Court refused to dismiss the claim against Red Seal. It was not necessary for there to be any connection between the representative plaintiff and *all* defendants. It was sufficient that some members of the class had a claim against one or more of the defendants.

Class Members Who Didn't Stay at the Resorts:

Representative plaintiff sought to certify as part of the class, persons who bought vacation packages but did not stay at the resorts that were allegedly the subject of water shortages. No facts were pleaded in support of these purported class members. Claims on behalf of these putative class members struck out.

Deceit, Misrepresentation and Negligence:

Pleadings contained various allegations of unscrupulous conduct by the defendants. However, Notice of Claim did not contain any facts pleading detrimental reliance by class members on the alleged misrepresentations by the defendants. Counsel for the plaintiffs was aware that the defendants had raised this deficiency in the pleadings as an issue prior to certification. Plaintiffs did not seek to amend the pleadings to add sufficient facts to overcome this hurdle.

Keene J. adopted the reasoning of Justice Gerein in ***Frey v. BCE Inc.*** 2006 SKQB 328:

> "In order to obtain relief respecting any of the alleged conduct there must be detrimental reliance by the party making the claim. It is an essential requirement. In this instance, the statement of claim contains no such pleading. In its absence, a cause of action is not disclosed. A description of bad conduct, absent an assertion that the plaintiff acted on it, does not constitute a valid cause of action."

Having failed to plead all the constitute elements of the torts, the claims of negligence, deceit and misrepresentation were struck out.

Breaches of Legislation and Regulation:

The Notice of Claim contained allegations of unspecified breaches of various legislative and regulatory provisions. No facts were pleaded particularizing the nature of the breaches.

Keene J. referred again to the court's reasons in ***Frey*** (supra):

> "However, no facts are pleaded so as to specifically bring the defendants within any of the cited legislation. There are only vague allegations. Absent particularization it is impossible to ascertain the nature of the claim. It follows that the claims purporting to be based on legislation do not disclose a cause of action."

All claims for breach of legislation and regulations were struck out.

Breach of Contract:

On the face of the pleadings, Keene J. found sufficient facts had been pleaded to make out claims of breach of contact for persons *who had actually stayed* at the resorts in question.

Evidence in Support of Certification:

Although the defendants had not sought to strike the plaintiff's affidavit evidence, Keene J. stated that: "…the overall concern this court has with the "evidence" tendered in this application requires a review of the affidavit evidence filed…"

Court held that the representative plaintiff's personal knowledge was limited to one resort over a span of six days.

Class Definition

Time frame: The proposed class definition covered a time span of four months.

Affidavits submitted in support of the certification motion contained *admissible evidence* of water problems spanning the time period of eleven days at two of the eight resorts contained in the class definition.

The court refused to extrapolate the claim over the entire proposed time frame and the entire geographic region.

Identifiable Class: Keene J. indicated that the representative plaintiff could have amended the pleadings to narrow the class definition.

However, the court referred to the reasons of Madame Justice Dovell in ***Walton v. Mytravel Canada Holdings Inc.***, 2006 SKQB 231 (passengers confined to a plane for one and a half hours on a runway in Dominican Republic).

> "The individual circumstances of each passenger would have to be analyzed in depth both as to how they booked his or her vacation, their reaction to the unfortunate situation as well as what transpired after the flight…"

Justice Keene decided that the individual circumstances of each traveler in the proposed class were so different (both with respect to cause of action and damages) that there was no identifiable class.

Common Issues:

The pleadings contained a number of proposed common issues. However, the common issues pleaded related only to the tort claims which had been struck.

> "I have examined the above common issues only in the context of contract. I find that on the language of the above, the plaintiffs have not put forward any common issued dealing with any defendants' liability in connection to the putative class." Para 103

Keene J. determined that no common issues had been pleaded with respect to any common issues contract.

Preferable Procedure:

The court stated that, with no certifiable common issue, it was difficult to say that a class action was the preferable procedure:

> "In my view, where the resolution of the common issues would only begin to resolve the question of liability, the goal of judicial economy has not been met and a class proceeding would not be the preferable procedure." Para 113

At paragraph 114:

> "Accordingly, any determination of the common issues in this case would merely mark the commencement as opposed to the completion of the liability inquiry…"

Result:

Certification denied.

Ring et al. v. Minister of National Defence et al.

What is it about?

Appeal from a certification of a class action brought on behalf of all persons present at Canadian Forces Base Gagetown in New Brunswick between 1956 and June 2006 who were exposed to the spraying of herbicides which may cause, or contribute to the risk of causing, lymphoma.

Burden and Standard of Proof:

Court confirmed the burden of proof on certification was with the plaintiffs to establish all five criteria necessary for certification. However, there was a dispute as to the standard of proof required. Plaintiffs argued they need only show "some basis in fact" for each of the certification criteria: ***Hollick v. City of Toronto*** [2001] 3 S.C.R. 158.

Defendants argued plaintiffs must establish certification criteria on the balance of probabilities: ***Dumoulin v. Ontario*** (2005), 19 CPC (6^{th}) 234. The defendants' position was that if there is to be a weighing of the evidence to resolve a factual question to determine if a certification requirement is met, than the balance of probabilities standard must apply.

The Court of Appeal rejected the defendants' views stating:

> "When, in **Hollick**, the Supreme Court established "some basis in fact" as the evidentiary threshold it was signaling a lesser standard of proof then that required for the determination of the merits of the claim." Para 14

Evidence on Certification:

Plaintiffs relied upon the affidavit of Dr. Sears, an expert in chemical engineering, whose affidavit attached various articles and scientific literature relating to the association between chemicals and lymphoma. Defendants filed affidavits from an environmental toxicologist, a toxicologist, an epidemiologist, and an oncologist.

At trial, the defendants challenged the qualifications of Dr. Sears to give opinion evidence, arguing her expertise did not include toxicology, oncology or epidemiology. Therefore, her expertise did not allow her to provide opinion evidence on the relationship between chemicals and malignant lymphoma. The trial judge admitted Dr. Sears' affidavit indicating that she had sufficient qualifications to act as a bibliographer and identify literature dealing with the association between chemicals and malignant lymphoma.

The Court of Appeal confirmed that while the test for certification did require a lesser standard of proof:

> "The lesser standard of proof noted above does not, however, lessen the standards for admissibility of evidence." Para 21

The Court of Appeal found that the trial judge relied on Dr. Sears' judgment in fields of which she was not qualified to give opinion evidence.

> "At best, as a bibliographer, Dr. Sears could state that there are texts or published papers on the subject. All such papers and texts would remain, however, inadmissible hearsay in the absence of the author of the work or an expert in the proper field who is prepared to adopt the work as authoritative and in accord with his or her own opinion … it was a error in law to admit the affidavit of Dr. Sears for the purpose of proof of the content of published texts or papers discussed by her." Para 26

Common Causes of Action

Breach of Fiduciary Duty: Counsel for plaintiffs claimed that the pleadings included a claim for a common cause of action of breach of fiduciary duty. However, there was no specific reference to the existence of a fiduciary duty actually included in the pleadings and no submissions made to the trial division on that basis. The Court of Appeal confirmed the general rule of pleadings that a plaintiff *must plead the material facts* upon which he or she relies in respect to the each of the constituent elements of the cause of action.

The Court of Appeal held that the statement of claim did not plead any material facts upon which a court could find the existence of fiduciary duty.

Negligence and Occupiers Liability: The class claimed damages on behalf of anyone who had been exposed to the allegedly toxic chemicals sprayed at C.F.B. Gagetown. The Court of Appeal pointed out that the class definition contained at least two subclasses:

1) Persons who had, or claimed to have had developed lymphoma; and

2) The much larger subclass of people who had no known harm from any exposure to the herbicides.

It was not disputed that for class members who had been diagnosed with lymphoma, the pleadings disclosed a cause of action.
However, the court had to consider whether the asymptomatic class members had actually suffered damage or harm from the alleged breach of a duty of care, one of the constitute elements of a claim of negligence.

Counsel for the plaintiffs claimed that asymptomatic class members who could prove they had been in a "toxic area" had suffered harm, because they would be

entitled to compensation based on the cost of testing to determine whether there was evidence of the presence of certain toxic chemicals in their bodies.

The Court of Appeal pointed out a circular logic in the claim of the asymptomatic class.

> "Accepting, for the purpose of discussion, that the existence of "toxic" areas demonstrates a breach of a duty of care, the plaintiffs seek to proceed directly from breach of a duty of care to compensation without the necessity of proving either economic or physical injury." Para 57

The Court of Appeal confirmed that the risk of a future disease is not actionable in the absence of a present injury.

> "The Trial Division judge made a palpable error in finding that the members of the class who have not been diagnosed with lymphoma are claiming to have suffered an injury (absorption of toxic chemicals). What the members of the subclass are seeking is testing to determine the level of certain toxins in their bodies. Damage (injury) to a plaintiff is an essential element in a claim in negligence. That is the element that is absent from the pleadings vis-à-vis the asymptomatic subgroup." Para 58

Identifiable Class:

The Court of Appeal confirmed that the class definition must use objective criteria. The court commented on the fact that the potential size of the class was in excess of 400,000 people but: "As large as the numbers are in this case, that fact alone does not make the definition too broad …"Para 64

The Trail Division judge attempted to cure the problem of the merits based class definition initially proposed by the claimants:

> "The concern of the Third Parties that the first class definition may be too broad and may include individuals who have no concern about exposure may be met by adding to the first definition the words "**and who claim** they were exposed to dangerous levels of dioxin or HCB [hexachlorobenzene] while on the Base." Para 65 [Emphasis added]

The court discussed the controversy between "merits based" and "claims based" tests for an identifiable class. The Court of Appeal confirmed that a merits based class definition is unacceptable while a claims based class definition may be certifiable: ***Rumley v. British Columbia***, 2001 SCC 69.

The Court of Appeal also considered the recent decision of ***Merck Frosst Canada Ltd. v. Wuttunee***, 2009 SKCA 43 which contained a nuanced discussion of the distinction between merits based and a claims based class definitions.

The Court of Appeal confirmed that:

> "The mere insertion of the words "who claim to" does not necessarily turn an unacceptable descriptor into an acceptable one." Para 71

The Court adopted the reasoning of Justice McNally in ***Bryson and Murrin v. Canada et al***, 2009 NBQB 2004 a similar Agent Orange class action filed in New Brunswick. Justice McNally stated:

> "The proposed class has virtually no meaningful restriction and would potentially include hundreds of thousands of claimants including many who have no actual exposure to the chemicals … the potential class would be limitless with many potential members, in many respects, having no real interest in the determination of the proposed common issues. In short, the proposed definition of class members is overly broad and more importantly, the criteria of membership does not "bear a rational relationship to the common issues asserted by all the class members". Para 75

Common Issues:

The Court acknowledged that there may be numerous individual issues to be determined in addition to the common issues. That fact does not undermine possible common issue conclusion.

However, the Court confirmed that when considering proposed common issues: "…success for one class member must mean success for all." Para 81

Proposed Common Issue: Did the toxic areas at CFB Gagetown create an unusual danger of causing lymphoma? Again, the Court of Appeal quoted liberally from Justice McNally's decision in ***Bryson***. The proposed common issue implied that answering the question was a single inquiry with a single answer for all class members. At Paragraph 90 of their decision the Court of Appeal quoted Justice McNally:

> "The plaintiffs have undertaken an ambitious claim to address all of the potential claims that might arise out of the affects of the spray program conducted at Base Gagetown over the past 53 years. In doing so, they have over reached and framed an overly broad action defining the causation issues in very general terms and for which they have not demonstrated that the proposed common issues could be resolved in a practical or manageable fashion or would advance the resolution of the claims in a fair, efficient and manageable way."

Proposed Common Issue: Foreseeability of harm. The Court of Appeal pointed out that the answer to this question would depend on facts that would change in the 50 plus years covered by the class definition.

The Court of Appeal's views with respect to the proposed common issues can best be summarized by the following quote from paragraph 94 of their decision:

> "Once again, what is framed as one question seeking one answer for all members of the class is in fact several questions requiring several answers which are dependent upon time of exposure of the individual members of the class."

Preferred Procedure:

The Court of Appeal stated that: "It is an error to examine the question of preferability solely from the perspective of the common issues which, one would expect, would always benefit from a common proceeding.: ***Hollick***, para 29"

The Court of Appeal held that even if any of the proposed common issues were acceptable, the resolution of the issues would be very complex. The court concluded that the resulting judicial economy, if any, would be minimal.

Statutory Bars:

The Court of Appeal considered whether the provisions of the **Pension Act** or **Crown Liability and Proceedings Act** might constitute a bar to the claims of the representative plaintiff and some of the class members. The court recognized that the provisions in question might bar the claims of ¾ of the potential class members.

Result:

The order certifying the class action was set aside.

Smith v. Inco Limited

Motion before Justice J. R. Henderson for directions regarding a motion by the defendant Inco to decertify the class proceeding.

What is it about?

Class action for compensation for decrease in property value resulting from alleged environmental contamination of class members properties resulting from discharge from defendant's nickel smelter. After the close of the plaintiffs' case at the common issues trial, Inco brought a motion for decertification.

The question to be determined on the motion was if Inco was unsuccessful in whole or in part in the motion would Inco be barred from tendering further evidence in its defence at the common issues trial.

Inco's Position:

Inco's position was that the evidence produced by the plaintiffs at trial did not support the continued certification of the proceeding. Inco claimed that it was entitled to a decision on the motion before making an election as to whether it would call evidence at the trial. Inco claimed that the motion to decertify was procedural only and not akin to a motion for non-suit.

Smith's Position:

The plaintiffs' position was that if Inco brought a motion to decertify, the trial judge must fully scrutinize the plaintiffs' evidence. Therefore, the motion was more than procedural. It was, effectively, a motion on the merits of the claim.

The plaintiffs argued that if Inco were to obtain a decision on the decertification motion before calling its case, Inco would have an unfair advantage and would be able to tailor its evidence at the trial in response to any perceived short comings by the trial judge.

Henderson J. identified a number of principles with respect to case law relating to certification of class actions:

1. The Class Proceedings Act is procedural;
2. The motion for certification carries a low evidentiary burden;
3. Any party can bring a motion to decertify or amend certification at any point;
4. There are no restrictions on the number of motions to decertify;
5. On a motion to decertify the presiding judge must carefully scrutinize the evidence;
6. On a motion to decertify the judge has the authority to continue to proceeding, decertify the proceeding, amend the certification or create new class or subclasses.

Judicial Discretion:

The court reiterated the broad discretion granted to the trial judge under the Class Proceedings Act.

On a motion to decertify the court must review all the evidence revealed to that point in the proceeding.

The court pointed out that in the present case the evidence in relation to certification had been examined by the court only 8 months prior to the start of the common issues trial.

The court considered a decertification motion at trial to be "very similar" to a non-suit motion brought by a defendant in a civil case.

The court pointed out that a non-suit motion adds to the time and expense of a trial.

The court agreed that there would be an unfair tactical advantage to Inco if the court were to hear and decide the decertification motion before Inco was called upon to present its case.

The court stated at paragraph 38:

> "…I must keep in mind the factors relating to judicial economy as aforementioned. It would be wasteful to fully scrutinize all of this evidence twice."

Justice Henderson did appear to be limiting the reach of his decision stating, at paragraph 51:

> "I would like to note that the exercise of judicial discretion must be done on a case by case basis. It might be that in some other case a distinct procedural or technical issue may exist that should be dealt with by way of a decertification motion prior to the defendant being put to a election to call evidence. However, in my view that is not the case before me."

Result:

Motion denied

MARTIN:

Ronald Martin is the representative plaintiff for a class defined as all individuals who were sexually assaulted by priests who were members of the Roman Catholic Diocese of Antigonish between 1950 and September 10, 2009.

In 2002 Ronald Martin received a telephone call that his brother David Martin had been missing in the woods of British Columbia for two weeks. Ron flew to British Columbia to join the search for his brother. Sixteen days later David's body was found, along with a suicide note indicating that he had taken his life because he could no longer endure the pain caused by the sexual abuse he had suffered as a child at the hands of Father Hugh Vincent MacDonald, a priest of the Roman Catholic Diocese of Antigonish.

Ron Martin had also been sexually abused by Hugh Vincent MacDonald but neither brother was aware of the abuse that the other brother had suffered. On the day that he was forced to identify his brother's body on behalf of the family, Ron Martin made a promise to David that his death would not be in vain and that someone would be held accountable for the abuse that they had both suffered.

A criminal investigation was launched after David's death which eventually resulted in Hugh Vincent MacDonald being charged with rape, buggery and assault against more than 16 former members of various parishes from the Antigonish Diocese.

Three priests from the Antigonish Diocese had already been convicted of sexually abusing more than 22 former parishioners from the Antigonish Diocese.

Unfortunately, Hugh Vincent MacDonald died before his trial.

In 2004 Ron Martin hired our firm to pursue an individual claim for compensation against the Diocese of Antigonish. Over time, more than two dozen individuals who alleged they had been sexually abused by Hugh Vincent MacDonald filed similar claims. Mr. Martin agreed to act as a spokesperson for all the Hugh Vincent MacDonald claimants and participated in settlement discussions with the Diocese aimed in resolving the claims of the Hugh Vincent MacDonald victims.

The investigation, litigation and negotiations pertaining to the Hugh Vincent MacDonald claims extended over several years. As a result of information gathered during the investigation of the Hugh Vincent MacDonald claims, it became apparent that there were many more claimants who had been sexually abused by other priests of the Antigonish Diocese.

The Hugh Vincent MacDonald Negotiations:

In January 2008 Ron Martin retained our firm to file a class action against the Catholic Episcopal Corporation of Antigonish (commonly known as the Diocese of Antigonish) and Bishop Raymond Lahey, in his capacity as corporate sole of the Diocese. The claim was the first lawsuit filed under Nova Scotia's newly proclaimed ***Class Proceedings Act***.

In December 2008 Ron Martin filed his application for Certification.

Shortly after delivery of the defendants' responding materials opposing certification, the parties entered into parallel negotiations to try to resolve the claims.

On August 4, 2009 the parties signed an agreement settling the class action.

On September 10, 2009, Justice David MacAdam certified the class action and approved the settlement agreement.

Terms of the Settlement:

A copy of the settlement agreement is attached as schedule “A” to this paper.

Certification of the action is conditional:

- If there are any opt outs the defendants have the right within 70 business days of the conditional certification order to elect not to proceed with the settlement; and

- If more than 70 class members identify themselves to class counsel, who class counsel believes are bona-fide class members, class counsel has the right within 70 business days of conditional certification to elect not to proceed with the settlement;

- If the conditions are not met or are waived the certification and settlement become final and binding.

The settlement agreement requires the defendants to:

- Pay up to 12 million dollars into a Damages Fund;

- Pay into a Costs Fund to reimburse individual claimants who are successful in the settlement process;

- Pay up to $400,000.00 for future psychological counseling for successful claimants;

- Pay all expenses associated with the claims process established under the settlement agreement;

- As security to ensure the performance of their financial obligations under the agreement, the defendants are required to provide a floating charge debenture against the real property of the Diocese.

Claims Process:

The settlement agreement establishes a claims process by which members of the class can have their entitlement to compensation and the amount of compensation payable determined on an expedited and confidential basis.

It may be stating the obvious to say that confidentiality is especially important to victims of sexual abuse.

The claims process can be summarized as follows:

- **Submit a claim:** A claimant must complete a claim form which must be delivered to defence counsel within 6 months of settlement approval. The claims period can be extended up to a further 6 months with leave of the court.

- **Document Disclosure:** The defendants can request the claimant to provide copies of relevant documentation. The defendants are required to pay for the production of all documents.

- **Discovery Examinations:** The claimant may be examined under oath by defence counsel for up to 2 hours. The settlement agreement specifically states that the examinations must be conducted in a respectful manner.

- **Psychological Examination:** The parties have retained a joint psychological expert. The expert's report forms his evidence in chief. The expert may be subject to cross examination.

- **Economic Expert:** The parties have retained a joint economic expert to quantify a claimant's economic losses. The settlement agreement acknowledges that

economic losses of up to $100,000.00 can be awarded without the necessity of an economic expert report.

- **Settlement Negotiations:** The settlement agreement calls for mandatory settlement negotiations. If the claim can not be settled by agreement a validation hearing will be conducted by a retired judge of the Nova Scotia Supreme Court, Justice Walter Goodfellow.

- **Validation Hearings:** Hearings will be conducted in an inquisitorial fashion. The claimant will only be questioned by the judge. There is no cross examination. Each side may call two witnesses without leave, provided that a written statement is provided in advance of the hearing. After the validation hearing Justice Goodfellow will render a written decision which may be appealed by either party to the Nova Scotia Supreme Court.

Benefits:

Under the settlement agreement the defendants waive a number of defences which they would normally be expected to plead in an individual or group action including, among others, limitation periods, latches, and denial of vicarious liability.

The standard proof is relaxed for claimants where there is a criminal conviction and for cases where charges were laid but did not proceed because of the intervening death of the abuser.

The process, including the validation hearing, is private and confidential.

The process is far less adversarial than traditional litigation as evidenced by the expedited discovery process, the use of joint experts, and the inquisitorial nature of the validation hearing.

Non Catholic Class Members:

Under the settlement agreement, non-catholic victims receive 75% of their compensation awards. The rational for the reduction is that based on the Supreme Court of Canada's decision in ***Doe v. Bennett***, [2004] 1 S.C.R. 436 the defendants had a legitimate defence to the claims for vicarious liability of non catholic class members.

In ***Bennett,*** the Supreme Court of Canada held that the Roman Catholic Episcopal Corporation of St. Georges was vicariously liable for sexual abuse by a former priest of the St. Georges Diocese, Father Bennett.

McLachlin C.J. in writing the courts unanimous decision stated that:

> "The relationship between the bishop and a priest in a Diocese is not only spiritual, but temporal. … The bishop exercised extensive control over the priest, including the power of assignment, the power to remove the priest from his post and the power to discipline.
>
> First, the bishop provided Bennett with the opportunity to abuse his power. …
>
> Second, Bennett's wrongful acts were strongly related to the psychological intimacy inherent in his role as priest …
>
> Third, the bishop conferred an enormous degree of power on Bennett relative to his victims."

Certification:

Justice MacAdam was satisfied that the proposed claim met the test for certification.

a) The pleadings disclosed a cause of action;
b) There was an identifiable class;
c) The claims of the class members raised a common issue;
d) The validation and compensation process outlined in the settlement agreement was the preferable procedure for the resolution of the dispute;
e) Ronald Martin as representative plaintiff would fairly and adequately represent the interest of the class and had no conflict with the interest of other class members.

The Martin motion was brought by the consent of the parties for certification and approval of a settlement agreement.

Lessons Learned:

The ***Bryson*** and ***Martin*** claims involved could not have been more different. So can any common lessons be taken from examination of the two decisions?

Cause of Action:

In ***Bryson***, McNally had concerns about the novel nature of the plaintiff's claim for medical monitoring expenses. However, he ruled that it was not the plain and obvious that the plaintiff's claim could not succeed.

In ***Martin***, the court had questions about the plaintiff's claim for breach of a non-delegable duty. However, the court was satisfied that the pleadings disclosed a cause of action including breach of fiduciary duty as enumerated by the Supreme Court of Canada in ***Doe v. Bennett***.

Identifiable Class:

In ***Bryson***, the court found that the proposed class definition was too broad, was not capable of objective determination, and would be limitless with potential members that had no interest in the determination of the common issues.

In ***Martin***, the definition of the class members was objectively defined (victims of sexual assault by priests) and temporally defined (January 1, 1950 to September 10, 2009). The court had questions about the temporal restrictions but was satisfied that if there were class members that we left out of the class as a result of the proposed time frame the court had the jurisdiction to deal with the issue upon application by the parties.

Preferable Procedure:

In ***Bryson***, the court felt that resolution of the common issues would not significantly advance the litigation because resolution of the individual issues was going to be a herculean task.

In ***Martin*** the settlement agreement avoided a contested certification hearing, a contested common issues trials and resulting appeals. Furthermore, the confidentiality of the validation process was found to be the preferred means of resolving the claims of victims of sexual abuse.

Lessons Learned:

Class actions, given their inherent complexity, may not be the appropriate vehicle for novel causes of action.

When defining the class, keep it simple. Do not try to be all things to all people.

Just because you may be able to resolve the common issues by way of a class proceeding does not mean you will be successful unless you have a workable plan for managing the remaining individual issues.