

***CLASS PROCEEDINGS ACT:***  
**Recommendations to Augment the Inclusion  
and Protection of Persons with Disabilities**



March 29, 2019

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## A. INTRODUCTION

Since the coming into force of British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c. 50, the courts and the Public Guardian and Trustee (PGT) have considered how best to protect the legal interests and rights of persons under a legal disability<sup>1</sup> within the special context of class action proceedings.

The *Class Proceedings Act* was enacted to offer a remedy to persons whose claims may be too small, complex or expensive to warrant bringing an individual claim, but who can join with other similarly affected persons to bring a class action claim. Class action lawsuits can involve hundreds and thousands of litigants, and result in millions of dollars in compensation. They have a significant and far-reaching impact on corporate or government behaviour and reputation, and on the development of public policy. The issues addressed by class actions include consumer protection matters such as predatory loans and criminal interest rates, environmental damage, institutional abuse in prisons, residential facilities and schools, product liability including implanted medical devices, and mass personal injuries arising from corporate or government negligence, such as the class actions involving contaminated blood products.

Class actions serve a vital role in ensuring access to justice for individuals in claims brought against large, well-funded corporate and government defendants. As Justice Robert Sharpe of the Ontario Court of Appeal has written:

*The most significant modern development in civil justice in Canada has been the emergence of the class action. Class actions respond to the challenges that confront our regime of civil justice, in particular, the need to enhance access to justice to ensure the efficient and effective use of scarce judicial resources.*<sup>2</sup>

In almost every type of class action there will be class members who may be eligible to make a claim for compensation, but who are vulnerable or are under a legal disability, and therefore less able to participate and make informed decisions with respect to their rights and interests as class members.

In British Columbia, the Public Guardian and Trustee (PGT) is a corporation sole established under the *Public Guardian and Trustee Act* with a wide-ranging mandate, including statutory obligations to protect British Columbians who lack legal capacity to protect their own interests by:

- Protecting the legal and financial interests of children under the age of 19 years;

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<sup>1</sup> Persons under a legal disability are either minors under the age of 19, or adults who have been declared incapable of managing their legal and financial affairs pursuant to a court order made under the *Patients Property Act*, R.S.B.C. 1996, c. 349, or a certificate of incapability under the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6. Historically the rights of such persons were protected by the court under its *parens patriae* jurisdiction, in which the courts acted to protect the interests of those who were unable to act for themselves. Over time, the rights of persons under a legal disability have been codified in various statutes, and the PGT has assumed some of the jurisdiction formerly held by the courts. The PGT now has a role in over 20 statutes, including the *Infants Act*, R.S.B.C. 1996, c. 223, the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, the *Adult Guardianship Act*, the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, and the *Supreme Court Civil Rules*.

<sup>2</sup> Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic and Alison Warner, *The Law of Class Actions in Canada* (Toronto, 2014), Canada Law Book, at "Foreword", page ix.

- Protecting the legal, financial, personal and health care interests of adults who require assistance in decision making; and
- Administering the estates of deceased and missing persons.

Under this mandate, the PGT has developed active protocols to search for, and pursue, relevant class actions and compensation for eligible vulnerable clients and those under disability. Some of these protocols require the use of remedial sections in the *Class Proceedings Act* as there are no specific provisions directed at protecting the interests of persons under a legal disability or overt mechanisms to augment the role of the PGT in protecting persons under a legal disability.

## **B. ISSUES FOR PERSONS UNDER A LEGAL DISABILITY IN CLASS ACTIONS**

Many class actions are intended specifically to provide redress for vulnerable persons, such as the Indian Residential Schools<sup>3</sup>, Schedule 1 Institutions<sup>4</sup>, Woodlands<sup>5</sup>, and Jericho Hill<sup>6</sup> class actions. Nonetheless, class action proceedings are structured on the assumption that the eligible class members:

- will be mentally capable of understanding and advancing their own claims;
- have the ability to identify their interests and file claims on their own;
- are able to provide cogent evidence and obtain records to substantiate their claims;
- will independently retain counsel to advance their interests if necessary; and
- can attend court hearings and make submissions on the proposed settlement if invited to do so.

By contrast, persons under a legal disability:

- may not be in a position to know that a class action may affect their legal rights and interests;
- may not understand information relevant to the class action, such as the legal consequences of opting in or out;
- may not understand the notices they receive;
- may not be able to participate in, or raise objections at, a settlement hearing;
- may have difficulties making claims for compensation, including difficulties in providing evidence or swearing affidavits;
- may have barriers to communication;
- may lack family members or consistent support persons to provide collateral evidence;
- may not be able to retain and independently instruct counsel;
- may be in straitened financial circumstances such they cannot afford the costs of legal counsel or of obtaining medical and other records to substantiate a claim; and
- may not have an appropriate legal representative with authority to receive and administer compensation funds on their behalf.

<sup>3</sup> *Quatell v. Attorney General of Canada*, 2006 BCSC 1840 (certification decision)

<sup>4</sup> *Clegg v. HMTQ in right of Ontario*, Ontario Superior Court File No. CV-14-50642300CP

<sup>5</sup> *Richard v. British Columbia*, 2005 BCSC 372 (certification decision)

<sup>6</sup> *Rumley and others v. HMQ* (1998), British Columbia Supreme Court File No. C980463

### C. ROLE OF PGT IN CLASS ACTIONS FOR PERSONS WITH DISABILITIES

The PGT has a number of statutory obligations to protect British Columbians who lack legal capacity to protect their own interests including:

- the statutory authority to act as the legal representative of persons who have no one else to assist in decision-making;
- acting as the committee of estate for adults who have been declared mentally incapable; and
- acting as the property guardian for children in the continuing care of the province.

The PGT routinely provides the court with independent submissions in circumstances where the financial and legal interests of minors or adults under a legal disability are affected.<sup>7</sup>

The PGT investigates its clients' eligibility to make claims in class actions as part of its mandate to protect their legal interests. The PGT has been making claims on behalf of its clients in class actions since the late 1990s, including most significantly the Woodlands School, Indian Residential Schools and Hepatitis C<sup>8</sup> class action settlements.

The current process to identify relevant class actions sees the PGT continuously monitoring case law, media and other sources. When the PGT becomes aware of a class action that may potentially affect the interests of its clients, the PGT takes a number of steps to identify clients who may be eligible to claim. In some instances, data matches are conducted with external bodies such as the Ministry of Health. When a client is identified as a potential claimant, information relevant to making the claim is gathered, and a claim prepared and submitted on behalf of the incapable person. If the claim is successful, compensation is received in trust for the person and the funds administered for their benefit.

In some class actions, the PGT has provided comments to the court on behalf of persons under a legal disability. For example, in *Endean and others v. Canadian Red Cross Society and others* (1999), 68 B.C.L.R. (3<sup>rd</sup>) 350 (S.C.), the court required the PGT to be given notice of the proposed class action settlement so that the PGT could provide comments on the settlement from the perspective of persons under disability. The PGT provided input on the adequacy of the quantum of settlement, the reasonableness of the legal fees sought by class counsel, the timelines for persons under disability to make claims for compensation, the process for opting out, and the management of settlement funds payable to persons under disability.

The PGT's input, however, is not routinely sought by counsel or the court, and there is no statutory basis on which the PGT can request to be involved with a class proceeding unless the PGT is a party.

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<sup>7</sup> Among other examples, the PGT provides comments to the court on the appointment of a private trustee for a minor under s. 179 of the *Family Law Act*, S.B.C. 2011, c. 25, on the appointment of a private committee under s. 7 of the *Patients Property Act*, *supra*, and on personal injury settlements over \$50,000 for minors under s. 40 of the *Infants Act*, *supra*.

<sup>8</sup> *Killough and others v. Canadian Red Cross Society and others* (2001), S.B.C. Vancouver Registry No. C976108; *Endean and others v. Canadian Red Cross Society and others* (1999), 68 B.C.L.R. (3<sup>rd</sup>) 350 (S.C.).

#### **D. RECOMMENDATIONS FOR REFORM**

To further the rights of vulnerable persons and persons under a legal disability, the PGT proposes two procedural amendments to the *Class Proceedings Act*. The intention of these amendments is to improve access to justice for the most vulnerable persons in society, and thereby enhance the social justice purposes of the *Class Proceedings Act*.

These amendments would give the PGT standing to make submissions to the court advocating for enhanced protections for class members who are vulnerable or under a legal disability, and enhance the likelihood of vulnerable persons or persons under a legal disability becoming aware of relevant class actions through notice of certification and settlement to the PGT.

##### **Recommendation #1**

***The PGT recommends that the Class Proceedings Act be amended to allow the interests of persons under a legal disability to be heard through the provision of standing to the PGT to make submissions as a non-party at any relevant point in the proceedings and with the right for the PGT to obtain costs on a solicitor-client basis.***

Class action settlements can be highly complex, with many of their provisions having significant legal consequences, and the particular circumstances of persons under a legal disability may not always be fully considered during the drafting of the settlement agreement.

There is currently no provision in the *Class Proceedings Act* to allow the PGT to participate in a class action, or make submissions to the court on behalf of incapable persons whose interests may be affected by the class action.

The PGT is well-placed to provide independent submissions to the court on the issues facing persons under legal disability in the context of class actions, and advocate on their behalf for robust protections within the settlement agreement. The PGT can ensure certain issues are addressed and considered by the parties and the court to ensure the better protection of persons under legal disability. These issues include the following:

- sufficient efforts have been made by the parties to identify and notify incapable class members;
- notices of settlement are tailored to the needs of incapable persons, by being made easy to understand and advertised in a manner suited to the needs of persons under disability;
- the proposed deadlines allow adequate time for legal representatives to investigate and prepare claims on behalf of persons under a legal disability;
- the evidentiary requirements and standards of proof do not make it unduly difficult or complex for persons under legal disability to prove their claims;
- successful claimants will be awarded the costs of claims preparation, including the costs of obtaining medical and other records required to substantiate the claim and/or a contribution towards legal expenses;
- if a person is under a legal disability and has failed to claim compensation or opt out before the expiration of the applicable deadlines, the person will be deemed to have opted out, thereby

preserving the right of individual action against the defendant, subject to any applicable limitation periods;

- class counsel's proposed legal fee is reasonable;
- payments of settlement funds will be made only to persons who have the proper legal authority to represent the person under disability; and
- reversions to the defendant will occur only if the court is satisfied that all reasonable efforts have been made to identify vulnerable or incapable class members.

By amending the *Class Proceedings Act* to provide the PGT with standing to advocate on behalf of persons under legal disability, the Legislative Assembly would ensure that class members under a legal disability do not face barriers to asserting their legal rights within class action proceedings and obtaining just compensation.

### **Recommendation #2**

***The PGT recommends that the Class Proceedings Act be amended to require service of a copy of the notice of certification under s. 19, and a copy of the notice of settlement, abandonment or discontinuance under s. 35 on the PGT.***

In class proceedings, the court is asked to approve a form of notice to potential class members when the class is certified and when it is settled, abandoned, or discontinued. Notice of class actions may be provided by a number of means, such as newspaper advertisements and social media announcements. These may not be effective methods of providing information to vulnerable persons. For example, some class members may have significant barriers to communication, such as was the case with the Schools for the Deaf class action. There is currently no provision in the *Class Proceedings Act* to provide the PGT with notice that a class action has been certified, settled, abandoned or discontinued, even where the class action directly affects the legal interests of vulnerable persons. As a result, vulnerable persons and those under disability may be at a higher risk of losing compensation than more capable British Columbians.

Section 21 of the *Class Proceedings Act* provides as follows:

*21 (1) At any time in a class proceeding, the court may order any party to give notice to the persons that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.*

In theory, section 21 would permit notice to be given to the PGT when the interests of persons under disability are affected by a class proceeding. In practice, however, the PGT rarely receives notification under this section, and as a result notification to the PGT in most cases occurs through diligent monitoring, informally through media reporting on the class action, or as a courtesy by class counsel.

By amending the *Class Proceedings Act* to provide specifically that the PGT be notified of certification and settlement, the court can be sure that the PGT receives adequate notice of a matter potentially affecting the legal rights of its clients. In addition, notification would provide the PGT with an opportunity to consider whether it would be appropriate to advocate for additional protective measures to be incorporated into the settlement agreement, as detailed above.

## E. CONCLUSION

The PGT makes the following recommendations:

1. The *Class Proceedings Act* be amended to allow the interests of persons under a legal disability to be heard through the provision of standing to the PGT to make submissions as a non-party at any relevant point in the proceedings and with the right for the PGT to obtain costs on a solicitor-client basis.
2. The PGT recommends that the *Class Proceedings Act* be amended to require service of a copy of the notice of certification under s. 19, and a copy of the notice of settlement, abandonment or discontinuance under s. 35 on the PGT.

As detailed above, persons under a legal disability face significant obstacles in making class actions claims. The PGT recommends that the *Class Proceedings Act* be amended to enhance the notification provisions and expand the groups with standing. These proposed amendments would provide additional protection to persons under disability whose interests are affected by a class action proceeding. They would signal a legislative intention that attention must be paid to protecting those who experience barriers in advancing their own interests, and assist in ensuring that the class actions process truly respects the principle of access to justice for persons under a legal disability.