Class Actions in Ontario: Fresh Prospects for Securities Litigation?

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Modern class actions have finally become a real part of Ontario's legal landscape. Their arrival has been marked by numerous challenges to traditional assumptions regarding party prosecution and the role of counsel and the courts in protecting the rights of absent class members: a category of litigants previously unknown in the law of Ontario. Class proceedings are so new that counsel and the courts have really only dealt with the early stages of this form of litigation and only recently has an action progressed to the stage where the parties have sought court approval for a settlement. Accordingly, judicial interpretation of the legislation thins substantially as one considers successive stages in the process. Nevertheless, cases dealing with the early stages offer some insights into how the courts will approach the later stages.

This chapter provides an introduction to the Ontario class proceeding process and explores the important role it promises to play in the field of securities litigation. Part 1 contains an overview of the operation of class proceedings in Ontario as contemplated by the legislation and as considered by the courts in the early decisions interpreting it. Comparisons are made between the Ontario regime, the United States Federal Rule 23, on which it was modelled, and the legislative schemes in place in the provinces of Québec and British Columbia. Part 2 addresses the particular challenge posed by class proceedings involving plaintiff classes spanning more than one jurisdiction. It considers both the

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constitutional constraints on the certification of such proceedings in Ontario and the likelihood of an Ontario court recognizing a judgment emanating from the court of another jurisdiction in which a class purports to include persons in Ontario. Part 3 examines the special issues and opportunities arising in the field of securities litigation and the effect of the advent of class proceedings on both the rights of investors and the remedies available to them.

1. The New Ontario Class Actions Legislation

(a) Class Actions Come to Ontario

In 1992, Ontario joined the ranks of jurisdictions with legislation providing for litigation through the medium of class actions. An initiative that was more than a decade in the making,[2] the *Class Proceedings Act* 1992,[3] was proclaimed in force 1 January 1993. Ontario was the second Canadian jurisdiction to pass legislation in this area. Quebec has had such a procedure since 1978[4] and British Columbia passed legislation that came into force 1 August 1995.[5]

The advent of class proceedings marks a dramatic change in the options for "group" litigation in Ontario. Although it was possible under the previous rules of civil procedure[6] to commence representative actions, in practice, for many purposes, the right was largely illusory. The Supreme Court of Canada had ruled in a leading case of product liability involving a car manufacturer[7] that the claim could not proceed as a representative action because the cars were purchased under individual contracts and the damages required individual assessment. This narrow interpretation of the rule was one of a series of similar rulings.[8] Subsequent litigation relating to two major disasters – the derailment of a train carrying toxic substances in a residential area[9] and the crash of a plane as the apparent result of the explosion of a terrorist bomb[10] – confirmed that the

[2] Important milestones in its development included a three-volume report by the Ontario Law Reform Commission, "Report on Class Actions" (1982), a conference hosted by the then Attorney General, Ian Scott, "Access to Justice" (1988); an approval of class action legislative reform by the Uniform Law Conference, Proceedings (1988); and the "Report of the Attorney General's Advisory Committee on Class Action Reform" (1990).

[3] S.O. 1992, c.6. The term "proceeding" in the name of the Act was intended to reflect its application to the two methods of proceeding under the Ontario Rules of Civil Procedure: by action and by application. However, it is anticipated that the majority of proceedings commenced under the *Class Proceedings Act* will, in fact, be class actions.

[4] Act respecting the Class Action, R.S.Q. 1977, c. R–2.1.

[5] S.B.C. 1995, c.21.

[6] Former rule 12.01, previously Rule 75, permitted a person to bring or defend a proceeding on behalf of numerous persons with the same interest. This method of proceeding had remained relatively constant since its introduction in 1881.

[7] *General Motors of Canada Ltd. v. Naken* [1983] 1 S.C.R. 72.

[8] *York Condominium Corp. No. 148 v. Singular Investments Ltd.* (1977), 16 O.R. (2d) 31; *Butler v. Regional Assessment Commissioner*, Region No. 9 (1982), 39 O.R. (2d) 365

[9] *Abromovic v. Canadian Pacific Ltd.* (1989), 69 O.R. (2d), rev'd (1991), 6 O.R. (3d) 1, leave to appeal to the Supreme Court of Canada denied [1992] 1 S.C.R. vi.

[10] *Air India Flight 182 Disaster Claimants v. Air India* (1987), 62 O.R. (2d) 130 (H.C.). In its report, The Ontario Law Reform Commission reviewed several examples of claims or potential claims that

adjudication of mass tort claims under existing procedures was cumbersome and that there was a need for a legislative initiative in the area of representative proceedings.[11] In response to this need, the drafters of the legislation sought to draw heavily on the model of U.S. Federal Rule 23 and to benefit from the years of experience in United States courts with class actions to establish a regime appropriate for Ontario. As one author observed,[12] it was hoped that the introduction of class actions legislation would enable actions in which:

(a) each claim is based on a different contract;
(b) class members seek resolution of both common and individual issues;
(c) not all members of the class can be identified;
(d) each class member's damages require individual assessment;
(e) there is no predefined fund for the payment of a judgment;
(f) class members seek different remedies; and
(g) classes include sub-classes with separate common issues.

It was said that class actions could offer significant potential benefits to defendants as well, especially those who might otherwise face a multiplicity of claims against them in respect of a single instance or kind of wrongdoing.[13] Responding to a well-defined class of plaintiffs in a single action could serve both to contain the expense of resolving the dispute through litigation or negotiated settlement and to determine the scope and extent of potential liability. In recognition of this, section 3 of the *Class Proceedings Act* provides for defendants' class proceedings[14] in which defendants may seek consolidation of similar actions against them to benefit from the enhanced efficiency of a class proceeding. Although this option was not included in the Québec scheme,[15] its practical significance to defendants in the United States has been demonstrated in attempts by U.S. manufacturers in product liability claims to certify class proceedings. In one dramatic example, a defendant manufacturer of intrauterine devices resorted to bankruptcy proceedings when its efforts to certify a plaintiff class were unsuccessful.[16]

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illustrated the inadequacy of the existing procedures for prosecuting them, See O.L.R.C. Report, *supra*, note at 90–100.

[11] Nevertheless, the development was not without controversy. Outspoken detractors expressed concern that class actions involved unwarranted expansion of the judicial function into the legislative sphere: T. Cromwell, "An Examination of the Ontario Law Reform Commission Report on Class Actions" (1983), 15 Ottawa L. Rev. 587; H.P. Glenn, "Class Actions in Ontario and Quebec" (1984), 62 Can. Bar Rev. 247; H.P. Glenn, "Class Actions and the Theory of Tort and Delict" (1985), 35 U.T.L.J. 287; H.P. Glenn, "The Dilemma of Class Action Reform" (1986), 6 Oxford J. Leg. Studies 262; and see W.A. Bogart, "Ambiguity" in A. Prujiner and J. Roy (eds.), *Class Actions in Ontario and Quebec* (1991).

[12] S.J. Simpson (now Madam Justice Simpson of the Federal Court), "Class Action Reform: A New Accountability" (1991), 10 Advocates' Society J. 19.

[13] It remains to be seen whether class actions will represent a net benefit to defendants in view of the fact that defendants will face claims that might not otherwise be brought.

[14] S.3 provides, "A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff."

[15] Defendants' class actions are permitted, however, pursuant to s.3 of the British Columbia Act.

[16] See *In re Northern Distr. of California Dalkon Shield IUD Prods. Liability Litigation*, 693 F. 2d 847 (9th Circ., 1982).

In addition to the opportunities for plaintiffs and defendants to certify plaintiff classes, the Ontario scheme contemplates the certification of defendant classes. The first such application for certification of a defendant class was made in a claim by an Indian Band to rights in relation to land that was alleged not to have been surrendered.[17] Since all competing title claims and interests could be traced to a single issuance of Letters Patent in 1853, the validity of the Letters Patent was a common issue suitable for determination by a class action.

Similarly, in an action brought against a trade union, it was held to be inappropriate to name only the president as defendant and the plaintiff was granted leave to reconstitute the action as a class action brought against the trade union as defendant class.[18]

It has been regularly held that the *Class Proceedings Act* creates no new causes of action. It is solely procedural.[19] Accordingly, as will be discussed, a claim that is not otherwise viable will not become so by virtue of its certification as a class proceeding.

(b) Certification

The certification process provides a means for threshold judicial scrutiny of a proposed action to ensure that proceeding as a class furthers the objects for which it was established. In one of the first class proceedings to be certified in Ontario, a personal injury action arising from the manufacture and supply of silicone breast implants, these objects were described as follows:

(a) more efficient handling of potentially complex cases of mass wrong;
(b) improved access to justice for those whose actions might not otherwise be asserted; and
(c) to inhibit misconduct by those who might be tempted to ignore their obligations to the public.[20]

Judicial involvement at the certification stage also ensures that matters of notice, class definition and common questions are handled appropriately to avoid prejudice to absent class members who will be bound by the result.[21]

[17] *Chippewas of Sarnia Band v. Canada (Attorney General)* (1996), 29 O.R. (3d) 549 (hereinafter, *Chippewas*).

[18] *Darcy v. Wheeler* (1995), 25 O.R. (3d) 412.

[19] *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 739 106 D.L.R. (4th) 339 ("*Bendall*"); *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 at 45 (Gen. Div.), affd (1995), 21 O.R. (3d) 453 121 D.L.R. (4th) 49b (Div. Ct.) ("*Abdool*").

[20] *Bendall, ibid.* at 740, quoting from the Report of the Attorney General's Committee, *supra.*

[21] I.T. Dantzer and S.L. Coleman, "Certification: Controlling the Floodgates" in *New Class Proceedings Legislation; New Horizons of Civil Liability* (1991). Although there has been widespread acceptance of the value of the certification process in North America, the Australian Law Reform Commission proposed a method of proceeding that did not include certification. One Canadian commentator argued that it was superior because, in practice, the certification hearing "can often be more complex than the trial of the substantive issues" in its attempt to protect the absent class members' often valueless right to bring an individual action (J. Roman, "Class Actions in Canada: The Path to Reform?" (1988), 7(4) Advocates' Society J. 28).This, he said at 32, could create an "enormous deterrent" by shifting "the entire focus of the litigation away from the substantive issues of liability and injury to an investigation of the attributes of the hapless would-

Section 5 of the *Class Proceedings Act* establishes the following prerequisites for certification of a class:

> **5** (1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,
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> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
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> (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 for the class, an interest in conflict with the interests of other class members.

Given the prominence of the certification procedure in the prosecution or defence of a class proceeding it is worth considering each of these requirements briefly in turn.

(1) The Pleadings or the Notice of Application Discloses a Cause of Action

Since the *Class Proceedings Act* is purely procedural in nature and does not create any new causes of action, a motion to certify a class in a proceeding does not enhance the legal viability of a claim that would otherwise be dismissed as disclosing no reasonable cause of action. However, facilitation through class actions of claims that might not otherwise have been practicable has encouraged the commencement of novel claims and, thus, increased the likelihood of challenges to the fundamental viability of the claims commenced.

The *Class Proceedings Act* does not itself establish a test for determining whether the pleadings disclose a cause of action. Accordingly, it was decided in *Peppiatt v. Nichol*[22] that the considerations generally applicable to civil claims would apply. As Chilcott J. observed, in applying the usual Ontario Rules of Civil Procedure standard for motions to strike, a motion may be brought to strike out a statement of claim or notice of application as disclosing no reasonable cause of action where the factual allegations are patently ridiculous or incapable of proof or it is plain and obvious the claim could not succeed even if the facts pleaded were proved. In this regard, no evidence should be considered for the purposes of this determination.[23] However, in claims involving multiple parties on both sides, it is not necessary for each plaintiff to have a claim against each defendant as long

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be class representative." To this it may be responded that, at least at the outset of the new regime, it is anticipated that the Act will tend to facilitate claims that, but for the procedural barriers that had existed, would readily succeed and that there will be greater deterrents in other aspects, such as costs, for claims that are less clearly viable.

[22] *Peppiatt v. Nichol* (1993), 16 O.R. (3d) 133 at 140 ("*Peppiatt*").

[23] *Abdool, supra*, at 47.

as some plaintiffs have claims against each defendant. Thus, in the certification of the breast implant litigation in *Bendall v. McGhan*, the fact that the class action involved more than one manufacturer and, therefore, the defendants did not each face claims by all the members of the class, did not affect the court's obligation to certify the class.[24]

Challenges to the viability of defamation claims made by way of class actions illustrate the procedural nature of class action. In *Elliott v. CBC*,[25] one of the surviving Canadian aircrew who served with Bomber Command in World War II brought a defamation action against those responsible for producing and publishing a film and a book about Bomber Command. The defendants succeeded in having the action struck out as disclosing no reasonable cause of action because criticism in the film and the book were aimed at the British High Command and Bomber Command's Commander-in-Chief and not at the plaintiffs. As Montgomery J. noted in his decision on the costs of the action,[26]

> A class or representative action is simply a procedural mechanism. It allows, within the framework of one action the determination of the claims of many people who seek the same, or similar relief, from a defendant. It does not provide any of the people with new substantive rights. It does not place any member of the class in a different position from the point of view of proving his or her case. In this respect each member of the class is in the same position as if he or she brought an action on their own.

The viability of defamation actions in the form of class proceedings was also considered in two other recent cases. The first was a claim against a lawyer retained to commence a wrongful death action on behalf of the family of an aboriginal male who died while in the custody of the Kenora Police.[27] It was alleged that the lawyer had made statements to reporters that the Police Services Board condoned racist practices toward aboriginal persons. Taking judicial notice of the small size of the community, the Court found that the make-up of the Police Services Board and the identity of the Chief of Police were well known to the community and the statements concerning the routine practices reflecting racism were capable of defaming the members of the class. The motion to strike the claim was dismissed. However, in a claim[28] arising from derogatory statements printed in the newspaper concerning the conduct of fans from one city at a hockey game, the Court found that the group defined as "the citizens of the city of Pembroke" was not so small as to constitute an exception to the rule that an action for defamation must be based on injury to one's individual reputation.

[24] *Bendall, supra* at 744.

[25] *Elliott v. CBC*, (1993), 16 O.R. (3d) 677, 108 D.L.R. (4th) 385. aff'd (1995), 25 O.R. (3d) 302 (C.A.) but the Court of Appeal for Ontario explicitly refrained from finding that a class action for libel could not succeed.

[26] *Elliott v. CBC* unreported, Ont. Ct. (Gen. Div.) 11 February 1994 (available through QL systems as: [1994] O.J. No. 308) quoting from *Cobbold v. Time Canada Inc.* (1980), 28 O.R. (3d) 326 at 348–349.

[27] *Kenora (Town) Police Service v. Savino* (1995) 36 C.P.C. (3d) 46.

[28] *McCann v. Ottawa Sun* (1993), 16 O.R. (3d) 672, 24 C.P.C. (3d) 170.

(2) There is an Identifiable Class of Two or More Persons that would be Represented by the Representative Plaintiff or Defendant

This is the Ontario equivalent of the "numerosity" requirement" – the first of the four prerequisites for certification under U.S. Federal Rule 23(a)(1). The Ontario provision is arguably more liberal than the U.S. requirement. Rule 23(a)(1) permits class actions only when "the class is so numerous that joinder of all members is impracticable" but the Ontario rule requires only that the class be identifiable and comprised of two or more persons. Accordingly, in *Bendall*,[29] a class action for injury caused by breast implants was certified on the basis of evidence of only two actual claims supplemented by statistical evidence of the number of women who had received the implants. It should be noted, however, that the representative plaintiff or plaintiffs must be individuals and cannot themselves be represented by corporations. In *Algoma Action Committee Inc. v. Ontario (Minister of Natural Resources)*[30] the plaintiff company, incorporated to represent recreational landowners, was found to lack standing to challenge the settlement of a land claim made by an Indian Band. A more dramatic rseult was obtained in a similar attempt to shield members of a class action from potential adverse costs awards. Following a dismissal of the action by summary judgment in *Smith v. Canadian Tire Acceptance Ltd.*,[31] an award of solicitor and client costs was made against a non-party.[32] The Court found that the non-party and a society he had formed to seek restitution of interest charged in excess of that permitted under the *Interest Act* had mounted a campaign to recruit class members from among credit card holders. The campaign solicited contributions and promised substantial returns over and above the damages awarded in the form of a share in the contingency fee allegedly available under the Act. Montgomery J. noted in *Bendall* the option to determine subclasses as appropriate and that "certification is a fluid, flexible procedural process. It is conditional, always subject to decertification."[33]

As was clarified by Chilcott J. in *Peppiatt*, it is not necessary for certification that the precise number or identity of individual class members be known as long as there is an identifiable class of two or more members.[34] Still, the Act requires the parties to the certification motion to file affidavits providing their best information on the number of members in the class.[35] In this way, the "fluidity" referred to by Montgomery J. may extend to the nature of the class, suggesting it too could be refined if necessary.

The ability to vary the parties to the action as it progressed was discussed in a certification application in a British Columbia action for damages from fires

[29] *Bendall, supra.*
[30] In *Algoma Action Committee Inc. v. Ontario* (Minister of Natural Resources) unreported, Ont. Ct. (Gen. Div.) (15 March 1995), (available through QL systems as: [1995] O.J. No. 751) and see *Toronto Fire Department Pensioners' Assn v. Fitzsimmons* (1995) 40 C.P.C. (3d) 298.
[31] *Smith v. Canadian Tire Acceptance Ltd.* (1994), 19 O.R. (3d) 610.
[32] *Smith v. Canadian Tire Acceptance Ltd.* (1995), 22 O.R. (3d) 433.
[33] *Ibid.* at 747.
[34] *Peppiatt, supra.*
[35] S.5(3).

occurring in connection with the use of radiant ceiling heating panels.[36] The Court held that certain defendants would properly be brought into the action only after preliminary common issues involving other defendants had been resolved and the necessity of their participation had been determined.

However, the limits of flexibility were canvassed in a claim alleging misrepresentations in an offering circular when the newly certified class sought to amend the pleadings to add various causes of action. It was held inappropriate to permit the addition of causes of action that fundamentally changed the nature of the action.[37]

(3) The Claims or Defences of the Class Members Raise Common Issues

The requirement that the class members' claims or defences raise common issues is similar to the "commonality" requirement in Rule 23(a)(2). Like Rule 23(a)(2), it is intended to be given a liberal interpretation in that the claims need not be identical. However, unlike the U.S. Rule, there is no additional reference in the Ontario legislation to the question of whether the common issues must predominate to render the class action maintainable. Instead, the question of the proportionate extent of common and individual issues is considered in an Ontario certification hearing in the context of the more general analysis under section 5(d) of whether a class action is a preferable means of resolving the dispute. While the Act provides for flexibility in proceeding, it is anticipated that many actions will involve a determination of the common issues, often those related to liability, followed by individual determinations, generally related to damages.

(4) A Class Proceeding would be the Preferable Procedure for the Resolution of the Common Issues

As noted above, in contrast with the provision of U.S. Rule 23(b)(3) concerning the predominance of common issues over individual issues, the *Class Proceedings Act* provides for this more liberal determination of the merits of a motion to certify a class. Where alternative methods of proceeding such as individual proceedings, joinder, trial together, a test case, intervention or administrative hearings may be preferable methods of resolving the common issues, certification may be denied.

The approach taken by the British Columbia legislation with respect to the predominance of common issues is a compromise between the Ontario and U.S. approaches. Section 4(1) of the Act mandates certification based on five specified conditions similar to the conditions contained in the Ontario Act. The fourth of these conditions is that a class action would be the preferable procedure for the fair and efficient resolution of the common issues. However, in determining whether it is a preferable procedure, section 4(2) of the British Columbia Act requires a court to consider all relevant matters and, in particular, give issues including whether questions of fact or law common to the members of the class

[36] *Campbell v. Flexwatt Corp.* unreported, B.C.S.C. 13 June 1996 [1996] B.C.J. No. 1487 (Q.L.) (hereinafter, *Campbell*).

[37] *Maxwell v. MLG Ventures Ltd.* (1995), 40 C.P.C. (3d) 304.

predominante over any questions affecting only individual members.[38] Accordingly, in British Columbia the predominance of common issues must be considered in a certification application but it is not necessarily determinative of the outcome.

Certification was denied in one of the first applications made under the British Columbia Act on the basis that a class action would not be the preferable procedure.[39] The plaintiff class was to include those who had been denied personal injury claims by the Insurance Corporation of British Columbia (ICBC) as a result of its policy of giving consideration to the minimal nature of the impact forces (as evidenced by the damage to the vehicle) in deciding whether to pay a claim. The Court acknowledged that even if the plaintiff prevailed on the common issue with respect to the appropriateness of the ICBC policy, there would remain the myriad of individual issues normally associated with the litigation of individual claims. Thus, the predominance of individual issues was a factor in determining that a class action was not preferable in that case.

The requirement to consider the issues of section 4(2) of the British Columbia Act has encouraged a more sophisticated analysis of whether a class action is a preferable means of proceeding. For example, in a motion to certify a class action in a claim against the manufacturers of breast implants,[40] the British Columbia Court took careful note of recent U.S. decisions that expressed concern about the limits to the merits of class actions. The Court approved of critical comments about the progress of the U.S. breast implant litigation made in a decision by the U.S. Court of Appeals for the Sixth Circuit to decertify a class.[41] The Court of Appeals in that case had said that

> A single litigation addressing every complication in every model of prosthesis, including changes in design, manufacturing, and representation over the course of twenty-two years, as well as the unique problems of each plaintiff, would present a nearly insurmountable burden on the district court.

The British Columbia Court found such comments apt in the case before it. Observing that class actions were not a panacea for mass tort claims, the Court concluded that "[t]here is no simple, elegant solution". The Court observed that the three issues that had been certified for common determination in the Ontario and U.S. class actions relating to breast implants[42] would inevitably dissolve into more specific individual questions. However, the British Columbia plaintiff had

[38] The other four issues are: (b) whether a significant number of the members of the class 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, and (e) whether the administration of the class proceeding would create greater difficulties if relief were sought by other means.

[39] *Tiemstra v. Insurance Corp. of British Columbia* (1996), 22 B.C.L.R. (3d) 49 (B.C.S.C.).

[40] *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L. (3d) 97 (B.C.S.C.).

[41] *Re American Medical Systems Inc.*, 6th Cir. No. 95-3303, 15 February 1996.

[42] The three common issues certified in the Ontario and U.S. actions were: What information did the Defendants have regarding adverse effects of silicone gel breast implants and when was that knowledge available to them? Are silicone gel breast implants likely to cause specific medical conditions? Were adequate notices of either of the foregoing given by the Defendants?

also proposed as a common issue the more traditional consumer question of the fitness of the implants for their intended purpose and the Court certified a class action to make that determination.

In another successful certification application on behalf of a class of plaintiffs who had suffered water damage when their Crane toilets[43] cracked, the defendant argued that the dispute resolution procedures arising from claims handling agreements were faster, cheaper and more efficient than a class action. The Court agreed that it should not discourage alternative dispute resolution methods nor should it scrutinize such arrangements too critically. However, these arrangements excluded uninsured claimants and the uninsured losses of insured claimants. Accordingly, they were not preferable procedures. The alternative of a test case was also found not to be preferable. There had been at least two successful actions which the defendant had not accepted as having any general application. Further, the defendant's settlement posture included a denial of negligence which was likely to make the determination of negligence too expensive an issue for most individual claimants to pursue in litigation.

(5) There is a Representative Plaintiff or Defendant who would Fairly and Adequately Represent the Interests of the Class

Even in the absence of Canadian equivalents to the due process guarantees of property rights contained in the United States Constitution, it is well recognized that the fair and adequate representation by the representative party of the interest of the members of the class not participating in the proceedings – the "absent" class members – is critical to the propriety of a class proceeding. This places significant responsibility on the proposed representative. In view of this, the legislation provides that there must be a representative plaintiff or defendant who would fairly and adequately represent the interests of the class.

In addition, there are two further specific requirements, discussed below, regarding the qualifications of the individual concerned. It should be noted that the Canadian legislation contains no independent requirement equivalent to that found in the U.S. Federal Rule 23(a)(3) that "the claims or defenses of the representative parties are typical of the claims or defences of the class". As with the requirement in Rule 23(a)(3), it is not necessary for the representative party to have an identical claim or defence or to share all the characteristics of the class. Rather, it is important that the party share enough of the interests with the absent class members that those who do not opt out will not be prejudiced by certification of the class. Further flexibility in the representation of the class is contemplated by section 14 of the Act which provides for the court's permission for the participation of one or more class members in the proceeding "in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate."

[43] *Chace v. Crane*, unreported, B.C.S.C. 16 July 1996 [1996] B.C.J. No. 1606 (Q.L.).

(6) The Representative Plaintiff has Produced a Plan for the Proceedings that Sets Out a Workable Method of Advancing the Proceeding on Behalf of the Class and of Notifying Class Members of the Proceeding

The challenges posed by class proceedings can make significant demands on the skill of counsel and, thus, the adequacy of legal representation can also be critical to the effective prosecution or defence of a proceeding on behalf of a class. Representing a class either as a representative party or as counsel requires the assumption of a substantial responsibility involving large risks and expenditures of time. Accordingly, it is likely that most lawyers who undertake to do so will be adequate to the task and it will be unnecessary for counsel representing the party opposing certification to address the sensitive issue of the qualifications of counsel representing a party seeking certification. Nevertheless, certifying a class has the potential to impair the rights of individuals who do not opt out to prosecute or defend claims on their own behalf and it thereby warrants ensuring that they will be represented adequately both by the representative party and by the counsel retained.

The Act does not require scrutiny in the course of the certification hearing of the quality of legal representation that a class will receive in the proposed proceeding. Nevertheless, the determination of the adequacy of the plan for advancing the proceeding and notifying class members required by section 5(e)(ii) implicitly addresses this question. It is important for those seeking to act on behalf of a class to be prepared to persuade a court that there is a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding. Unlike the prosecution or defence of an individual matter, in which significant portions of the work may be undertaken in later stages, the substantial administrative effort involved in launching a class action such as the drafting of notices and logistical arrangements for delivering or publishing them must be completed before the certification hearing. This arrangement has the practical effect of screening claims in that the extent of the task involved, cautions counsel against commencing frivolous actions.

In addition, it should be noted that the contingency fee arrangement, which is available in Ontario only in class proceedings, so contrasts with the normal financial operation of litigation in Ontario that, in substantial litigation of this sort, it will likely prove a major challenge to the stamina of counsel. Indeed, one of the tacit concerns in determining whether the class will generally receive fair and adequate representation may be whether the firm retained will likely continue to be in a position throughout the litigation or settlement process to be able to operate on a contingency basis.

While the courts have not addressed directly the skill and stamina of those responsible for the legal representation of the interests of the class, they have considered whether the representative plaintiff need be legally sophisticated. In the recent decision in *Maxwell v. MLG Ventures Ltd.*,[44] counsel for the defendants argued that the representative plaintiff could not fairly and adequately represent the interests of the class because she had a less than complete understanding of

[44] *Maxwell v. MLG Ventures Ltd.*, unreported, (Ont. Ct. (Gen. Div.) 27 April 1995 available through QL systems as: [1995] O.J. No. 1136) (hereinafter *Maxwell*).

the legal process and of the issues involved in this action. The Court rejected this argument[45] finding that the plaintiff "has a more than adequate understanding of the issues in the litigation, that her concerns are typical of the concerns of minority shareholders who tendered their shares pursuant to the Offering Circular, and that she clearly is able to instruct counsel in this action."

In addition, it has been held that the fairly high standard set for representatives of classes should not provide a barrier to the certification of a defendant class action. Drawing on the experience with defendant class actions in the U.S., one Ontario court[46] acknowledged that the significant personal interest of a defendant who was ably represented by competent counsel could be sufficient to qualify the defendant who was ably represented by competent counsel could be sufficient to qualify the defendant as a representative of the class. The Court ruled that the unwillingness of a defendant to assume the responsibility of representing a class could be overcome by court orders issued pursuant to its authority under section 14 of the Act regarding the participation and the obligations of the various defendants.

(7) The Representative Plaintiff does not have, on the Common Issues for the Class, an Interest in Conflict with the Interests of Other Class Members

The question of a conflict of interest between members of a class may be dealt with in various ways depending on its nature and extent. Clearly, in rare cases, the conflict may be fatal to the certification of the class rendering it impossible for the party seeking certification to meet the requirement of fair and adequate representation. In others, a conflict may be resolved by excluding an identifiable group from the class whose interests may be prejudiced by the proposed certification. Finally, it may be necessary to identify an appropriate subclass and nominate a representative who would meet the same requirements and fulfil the same responsibilities *vis-à-vis* the special interests of the subclass as those of the representative party to the class as a whole. Where this is so, it becomes a pre-condition to certification and it should therefore be anticipated by representative parties and their counsel.

To provide further guidance to courts hearing certification motions, the *Class Proceedings Act* sets out in section 6 the following matters that should not bar certification:

> **6.** The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> 2. The relief claimed relates to separate contracts involving different class members.
> 3. Different remedies are sought for different class members.
> 4. The number of class members or the identity of each class member is not known.
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[45] In para 10 of the judgment.
[46] *Chippewas, supra.*

This list is designed to provide courts with further guidance to ensure that the kinds of objections that once prevented effective representative proceedings do not resurface in the jurisprudence interpreting the new legislation.[47] In this regard, it should be noted that the text of the *Class Proceedings Act* arguably does not contemplate the exercise of judicial discretion in the certification process, instead providing that the court *shall* certify a class proceeding if the requirements discussed above are met. One appellate court has held that the determination is as simple as the apparently mandatory provision would suggest.[48] Earlier trial court decisions have suggested that if all five criteria were met, certification would be mandatory.[49] In a similarly mandatory fashion, there seems to be no opportunity to amend the pleadings regarding the naming of defendants in order to prevent a denial of certification. It appears to have been conceded by counsel in an early appellate decision and accepted by the Court that the certification issue must be determined with respect to all defendants. The failure to certify the proceeding against any one defendant should "probably" result in the denial of the application with respect to all defendants.[50]

Section 4 of the British Columbia legislation similarly stipulates that the court *must* certify the class if certain conditions are met. It also states that, in determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court *must* consider all relevant matters including a series of specified points. However, the British Columbia legislation does not appear to require the denial of certification against all defendants if the application to certify against one defendant fails in that section 5(6) authorizes the court to adjourn the application to permit the parties to amend their materials or pleadings or to permit further evidence.

(c) Notice and Determining the Class

Having provided for the key determination of the certification of a class proceeding, the *Class Proceedings Act* also deals with questions that arise once an order certifying a class is issued: those associated with giving notice to other class members and determining the ultimate composition of the class. Generally,

[47] However, Moldaver J. sitting as a judge of the Divisional Court held in *Abdool*, *supra*, at 473 that "Section 6 of the Act directs that the court, in coming to its decision to certify or not, shall not refuse certification *solely* if any one of the five delineated grounds is found to exist. Implicit in this, however, is the recognition that a court is entitled to consider the grounds referred to in s. 6 and where two or more of them are found to exist, the cumulative effect of these may legitimately be factored into the s. 5(1)(d) equation." Another reading of the section might permit consideration of all relevant factors provided only that certification was not denied solely on one or more of the bases enumerated in s.6. Indeed, in a subsequent decision, one judge of the Ontario Court recorded his doubt that the quoted passage from *Abdool* "was essential to the result". He stated "I say this because I am not at all sure that this interpretation of the section is correct." and he recommended a statutory amendment to remove the ambiguity; Brockenshire J. in *Nantais v. Telectronics Proprietary (Canada) Ltd.*, (1996), 40 C.P.C. (3d) 245 leave to appeal to Div. Ct. at 263,127 D.L.R. (4th) 552 (hereinafter *Nantais*) refused.

[48] *Abdool* at 461, per O'Brien J.

[49] See for example, *Sutherland v. Canadian Red Cross Society* (1994), 17 O.R. (3d) 645 at 648, 112 D.L.R. (4th) 504, 25 C.P.C. (3d) 118.

[50] *Abdool* (Div. Ct.), *supra*, at 466.

the court certifying the class will issue an order requiring the representative party to give notice to the members of the class. However, since certification depends in part on the representative party producing a plan that sets out a workable method of notifying class members, this will have been considered in detail by the proposed representative prior to the hearing and it may be an issue in the hearing.

In determining the appropriate method of notice, the court will consider the cost of giving notice, the nature of the relief sought, the size of the individual claims, the number of class members, the places of their residence and other relevant factors. The court may order notice to be given personally, by mail, by posting, advertising, publishing or leafleting, by individual notice to a sample group or by any means or combination of means appropriate. The court may order different means to be used for different class members and it may even, having regard to the factors relating to the method of notice, dispense with notice where appropriate unless members will be required to participate in individual assessments. The contents of the notice to class members is provided for by section 17(6) of the Act as follows:

> **17. (6)** Notice under this section shall, unless the court orders otherwise,
>
> (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
> (b) state the manner by which and time within which the class members may opt out of the proceeding;
> (c) describe the possible financial consequences of the proceeding to class members;
> (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;
> (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
> (f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
> (g) describe the right of any class member to participate in the proceeding;
> (h) give an address to which class members may direct inquiries about the proceeding; and
> (i) give any other information the court considers appropriate.

In addition, a representative party may seek leave to include in the notice a solicitation of a contribution for fees and disbursements.[51] Although the Act requires court approval for all notices to class members, it provides for this point separately to indicate the particular concerns it raises with regard to discouraging potential members.[52] Moreover, the court is permitted by section 22(1) to make any order it considers appropriate with regard to the costs of giving notice, including apportioning those costs. As a result, defendants to class proceedings may be required to assist in giving notice or in funding the cost of giving notice.[53]

[51] *Class Proceedings Act*, s.17(7).

[52] In the pending *Budd v. Gentra Inc.* proceeding, the proposed class includes only members of a certain "Litigation Committee." A membership fee would obviate the need for further solicitations. Certification has not yet been sought in this case and it is not known whether a court would certify a class defined in this way.

[53] In *Nantais, supra*, the judge said, at 262: "The plaintiffs asked for an advance from the defendants

There are two other forms of notice in addition to the notice given upon certification that may be required in the course of the proceeding. First, notice of the need for individual proceedings following a determination of the common issues will be necessary in cases such as those in which liability is a common issue but the extent of damages varies from one member of the class to another. The notice informing class members of the determination of common issues and the need for individual determinations must, *inter alia*, describe the steps that must be taken to establish an individual claim and warn that the failure to do so will preclude the assertion of an individual claim without leave. In approving such a notice, the court has broad powers to make an appropriate order for its manner of delivery. Second, the Act contemplates an order at any time in the proceedings for notice to be given to the class members necessary to protect their interests or to ensure the fair conduct of the proceeding. Settlement offers, motions to decertify, proposals to change the representative party or counsel could all provide occasion for giving notice of this sort and in each of these situations, the court has broad powers to ensure that it is delivered effectively.

In establishing a mechanism for determining the class, Ontario legislators chose to follow the United States "opt-out" model to ensure that the process would maximize participation. Pursuant to section 9, "any member of a class . . . may opt out of the proceeding in the manner in which and within the time specified in the certification order." This approach has been found generally appropriate to the kinds of claims anticipated to be pursued as a class action. To the extent that the legislation is intended to facilitate the effective resolution of claims that are otherwise too small to be pursued individually, it is appropriate that inclusion in the class does not require positive steps to be taken. Conversely, since inclusion in the class carries with it the burden of being bound by a decision or settlement, it is not regarded an undue burden on those eager to preserve their rights to prosecute a matter individually and require them to take the initiative to opt-out in a timely fashion.

The binding nature of determinations made in class proceedings is established in section 27(3) of the Act which provides that "[a] judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding . . .". Therefore, it is particularly important to ensure the class is described with sufficient precision to permit persons who might be unsure of their status to know whether they need to act to opt out if this is their intention. A precise definition of the class is also necessary to permit defendants in plaintiff class actions to be aware both of the number of individual actions they may face and of the scope of the damages for which they may be liable.

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to cover the costs of preparing and sending notices [about the time for opting out]. It seems to me to be novel indeed, to suggest that the defendant should pay in advance for the privilege of being sued. I deny that request." However, in *Campbell, supra*, the defendant Province was ordered to pay for the cost of notification to a plaintiff class consisting of persons who the Province had ordered to disconnect radiant ceiling heating panels.

(d) Discovery and Trial or Settlement

One of the more distinctive features of the litigation of a class proceeding is the streamlined discovery process. Although section 15(1) provides for parties to have the same rights of discovery in class proceedings against one another as they would in individual proceedings,[54] discovery of class members other than a representative party may occur only after discovery of a representative party and with leave of the court. Section 15(3) of the Act specifies the factors for consideration in determining whether to grant discovery of class members as follows:

> **15. (3)** In deciding whether to grant leave to discover other class members, the court shall consider,
>
> (a) the state of the class proceeding and the issues to be determined at that stage;
> (b) the presence of subclasses;
> (c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;
> (d) the approximate monetary value of individual claims, if any;
> (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and
> (f) any other matter the court considers relevant.

In considering these factors, the court must balance the risk of deterring participation in a class proceeding by those whose potential award would be overshadowed by being subject to the burden of discovery against the risk of prejudicing the opposing party by denying access to discovery appropriate to the prosecution or defence of the kind of claim involved. Some courts have commented in certification decisions on the possibility of individual discovery of members of the class in appropriate cases.[55] In one case, the Court required those seeking to join a plaintiff class to file an affidavit as to whether they had prior knowledge of certain information, a fact that could give rise to a limitation defence. The Court also ordered that the notice to plaintiffs advise that individual discovery might be ordered and that those plaintiffs might have to pay their own individual legal costs.[56]

The general concern that the combined effect of class actions and an expansive approach to pre-trial discovery might foster what have been termed prejoratively as "strike suits",[57] was addressed in a recent determination of the enforceability of letters rogatory emanating from the Southern District of New York. Letters rogatory will generally be enforced in Ontario where a similar request might emanate from an Ontario court to a foreign jurisdiction. However, the request for examination of non-party Canadian auditors to a U.S. company whose securities were traded on the New York Stock Exchange was refused. The request, which was made for discovery purposes, was excessively broad in scope and the record

[54] Generally speaking, the Ontario rules provide for extensive production of documents but limit oral discovery to parties. Discovery of witnesses is rare.

[55] See *Ewing v. Francisco Petroleum Enterprises Inc.* (1994), 29 C.P.C. (3d) 212 at 215.

[56] *Maxwell, supra*, at para. 12.

[57] See discussion below at part 1(f)(1).

did not indicate that the evidence and information could not be obtained elsewhere. That an Ontario court declined to assist in what the defendants had termed a foreign "fishing expedition" suggests that Ontario courts would be similarly circumspect about expanding the scope of discovery for the purposes of local class actions.

Having addressed in detail the preliminary procedural aspects of conducting litigation by class proceeding, the legislation again distinguishes itself from legislation governing individual proceedings by making scant provision for the trial itself. Should the matter proceed to trial the Act specifies only that the common issues of the class and any subclasses be tried together. This includes the "common but not necessarily identical issues of fact" and the "common but not necessarily identical issues of law arising out of the common but not necessarily identical facts". The court may give separate judgments with respect to the common issues and the individual issues. It will often be the case that there will be a common determination of liability followed by individual determinations of damages but there may be occasions in which the nature of the claim will call for some different method of combining the trials of common and individual issues. Accordingly, the court is given the following authority:

> 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

In addition to the broad powers of the court regarding the conduct of the class proceeding itself, the court may, on its own motion or at the behest of a party or class member, stay related proceedings on such terms as it considers just. In this way, individual claims commenced prior to certification may be rationalized with the newly-certified class proceeding.

(e) Assessing Damages, Approving Settlements and Distributing Awards

It is likely that many class actions will involve common determinations of liability and individual assessments of damages. However, there may be occasions in which it is unnecessary or unduly burdensome to conduct individual assessments of liability. On such occasions, the Act provides for aggregate assessments of damages. For example, this might be appropriate in a case in which the damages can be determined by reference to the records of a company of its dealings with the public. Where, such means are not available, and it is, nevertheless, appropriate to make an aggregate assessment, the court is empowered by section 23(1) to admit in evidence statistical data including information derived from sampling.

In the majority of cases, where individual assessment of damages is appropriate, the court will determine the procedure for making individual claims. Section 24(6) instructs the court to minimize the burden on class members and empowers it to authorize various methods towards this end, including: the use of standardized proof of claim forms, the receipt of affidavit or documentary evidence and the auditing of claims on a sampling or other similar basis. In

addition, the court is required to set reasonable deadlines for the submission of claims. Where individual claims require individual determinations, the court is again required to establish the procedure for making such determinations that is the most expeditious and least expensive. The court is empowered to undertake the individual determinations itself or to appoint persons to conduct a reference under the rules of court and report back to it, or to direct any other method of determination consented to by the parties.

The potential prejudice to class members bound by a final determination in the action gives rise to a concern that representative plaintiffs could be persuaded to compromise their claims in a way that is not in the best interests of the other class members. Accordingly, section 29 of the Act requires court approval for discontinuing, abandoning or settling any claim that has been certified as a class proceeding. In authorizing any of these steps, the court is required to consider whether notice need be given to class members and, if so, what information it should contain.

The special nature of class actions gives rise to the possibility that judgments will be issued in claims in which it is impossible or impractical to identify with precision those individuals entitled to claim an award. For example, this may be true in cases in which it was found that a major supplier to the public of goods or services had overcharged for them, either by charging more than was permitted under regulations governing the goods or services, or by price fixing. In such cases, the court is authorized to order *cy-près* distribution of the award,[58] for example, through an order that the supplier reduce the price charged for the goods or services until the amount of the award had been distributed to the supplier's current customers. This is a dramatic departure from traditional damages principles in Ontario and its application will be monitored with considerable interest.

(f) Costs and Funding

(1) Fees

Among the most striking of the changes brought about by the advent of class actions in Ontario are the innovative measures for addressing the concerns of costs and funding, in particular the exception that has been introduced to the traditional rule in Ontario against contingency fees.[59] Although the scheme constitutes a limited foray into the realm of contingency fees, it is a significant step for Ontario as the last Canadian jurisdiction to retain laws prohibiting such arrangements. The spectre of reproducing the "American experience" with contingency fees has troubled some commentators. As one speculated[60]

> If the American experience serves as a guide, the [Class Proceedings] Act will foster a new breed of entrepreneurial advocate. He or she will, for example, review offering

[58] S.26(4) and (6).

[59] See generally, ss.32 and 33. S.33(1) of the *Class Proceedings Act* provides, "Despite the *Solicitors Act* and *An Act Respecting Champerty*, . . . a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding".

[60] Simpson, *supra*, note 12.

documents in pending transactions, searching for a misrepresentation or a promise that has not or cannot be kept. The advocate will then commence a class proceeding in the hope of achieving a swift settlement. In the American model, such advocates may cease to perform a service function. They become aggressive participants in the process: they take the initiative, develop causes of action, fund the disbursements on a speculative basis, and seek out and identify the necessary plaintiffs.

The risk of encountering the phenomenon of entrepreneurial advocacy in Ontario is greatly reduced by the legislators' decision to opt for what has variously been termed in American litigation as the lodestar or multiplier method, or the "Lindy model."[61] Under this model, the lawyer is entitled to charge fees on the basis of his or her hourly rate supplemented by a "multiplier", generally of between 1.3 and three times, reflective of the risk of pursing the claim on a contingency fee basis. Both the general formula and the strict guidelines for its operation ensure that contingency fee arrangements will continue to be carefully controlled in Ontario. Indeed, in the context of the existing system of cost-shifting with no contingency fees, the arrangement will likely have a cautionary effect on counsel regarding the merits of a potential claim, acting as a disincentive to accepting retainers for dubious causes. Unlike the system in place in Québec, in which a court makes a costs award based on a percentage of the total award, it remains to be seen how Ontario courts will make awards that recognize the risk undertaken in the past and the efficiency of a resolution so as to encourage firms to continue to accept retainers on a contingency fee basis in class actions.

Under the regime established by the *Class Proceedings Act*, agreements regarding fees and disbursements must be in writing and they must state the terms under which they will be paid, give an estimate of the expected fee, whether contingent or not and state the method of payment, whether by lump sum, salary or otherwise. Such agreements require (apparently prior) court approval to be enforceable. Court approval also renders any amount owing a first charge on any settlement or award in the matter. Failure to seek court approval does not disentitle a lawyer to recover fees, but it does place the determination of fees in the hands of the court. An agreement to act on a contingency fee basis which also involved augmenting a lawyer's "base fee" by a "multiplier", becomes effective on a motion to the judge who has given judgment in favour of some or all of the class members or who has approved a settlement.[62] The court on such a motion will determine fair and reasonable compensation for fees and disbursements having regard to the base fee, the amount of the disbursements and the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success. Moreover, the court is directed to review the amount of the base fee and the manner in which the solicitor conducted the action and may award only a reasonable base fee. The degree of scrutiny required

[61] So named after the decision in *Lindy Brothers Builder Inc. v. American Radiator and Sanitary Corp.*, 540 F. 2d 102 (3rd Circ., 1976). For a detailed review of the contingency fee options considered in selecting the appropriate model for Ontario, see T. J. O'Sullivan, "The Future of Financing Class Actions in Ontario: Considerations Arising From a Review of Bills 28 and 29" in A. Prujiner and J. Roy (eds.), *supra*.

[62] Or, pursuant to s.33(6) where that judge is not available, a judge assigned for that purpose.

under the Act should contribute greatly to public confidence in the integrity of the system for compensating counsel acting on behalf of a class.

Apart from the special provision for contingency fees, the Act contemplates solicitors being paid by lump sum, salary, or other arrangement.[63] In addition, it specifies that only the representative member or members of a class may be liable for fees incurred in the course of determining the common issues. In view of the nature of the procedural barriers to litigation sought to be overcome by the introduction of class proceedings, it is worth noting that, in cases in which a contingency arrangement cannot be reached, assistance may be available to representative plaintiffs for the payment of fees in a class action from the Ontario Legal Aid Plan. At present, persons who qualify under the "Guidelines to be Considered on Applications for Group Certificates or in Test Cases", approved in 1985 by the Law Society of Upper Canada, may receive funding to help defray what might otherwise be a prohibitive expense.

(2) Disbursements

Certain aspects of class actions, such as the need to give notice, can both increase the fees involved in the administration of the file and produce disproportionately high disbursement costs. Moreover, the opportunities created by class actions to prosecute claims that involve expensive statistical and scientific research to determine issues of liability and damages renders it more likely that disbursements will be substantial. To ease the burden of disbursements, the *Law Society Amendment Act* (Class Proceedings Funding), 1992[64] was passed. It provides for advances to plaintiffs to defray the cost of disbursements from a fund with an initial balance of $500,000 upon the approval of a Class Proceedings Committee.[65] In contrast with the Québec legislation,[66] the Ontario Act specifies that funds will not be provided for fees.

The criteria for approval listed in section 59.3(4) include:

(a) the merits of the plaintiff's case;
(b) whether the plaintiff has made reasonable efforts to raise funds from other sources;
(c) whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded;
(d) whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; and
(e) any other matter that the Committee considers relevant.

Additional criteria specified in section 5 of O. Reg. 771/92 include:

[63] The option to devise some other arrangement for fees under s.32 does not extend to establishing a different basis for determining a contingency fee such as a percentage of the award. Contingency fees, permitted under s.33 are specifically limited to the Lindy-lodestar model and require court approval to be enforceable and court approval for their payment.

[64] S.O. 1992, c. 7.

[65] The Act provides for contributions by the Board of the Law Foundation of Ontario of $300,000 and $200,000 respectively (s.59.1(3)).

[66] *Loi sure le recours collectif/Act Respecting the Class Action*, L.Q./S.Q. 1978, c. 8.

1. The extent to which the issues in the proceeding affect the public interest.
2. If the application for financial support is made before the proceeding is certified as a class proceeding, the likelihood that it will be certified.
3. The amount of money in the Fund that has been allocated to provide financial support in respect of other applications or that may be required to make payments to defendants under section 59.4 of the Act.

An early interpretation by the Committee of these criteria articulates a profound philosophical debate on the role of funding and, indeed, the institution of class proceedings itself. In the Committee's only published decision to date in *Edwards v. Law Society of Upper Canada*,[67] the Committee Chair, Ms. Molloy,[68] and Vice Chair, Mr. McGowan, wrote concurring decisions in which they differed on the relationship between the first requirement in each of the statutory and regulatory lists – those of the merits of the case and the public interest of the issues involved. According to Mr. McGowan there was little difference between them. As he explained:

> Parliament and the Legislative Assembly determine the public interest by passing laws. If the Law provides rights to a class of persons, it is in the public interest that they be permitted to enforce those rights. . . if the Committee concludes that a class action has a probability of success of 50% or more, then it is in the public interest that the class action be funded. . . However, I can envision cases which may appear to be unlikely to succeed but which I would wish to fund precisely because they appeal to my subjective concept of what is in the public interest. Legal history is replete with cases overturning what was previously thought to be the law.

However, in Ms. Molloy's view, the considerations of merit and public interest were intended to be distinct and counterbalancing. She reasoned that the additional factor of public interest in the regulations could not have been intended merely to duplicate the statutory criterion relating to the merits. Moreover, in her view, a purposive reading of the legislation suggested that:

> . . . generally speaking, the Committee would lean more favourably towards funding a case which raises issues of broad public importance or which is directed towards improving the situation of persons or groups who are historically disadvantaged in our society. One of the central purposes of the Class Proceedings Fund is to provide access to justice for those who otherwise would not be able to enforce their rights.

There is little doubt that the criterion of "public interest" will continue to be an issue of some controversy as the Committee's interpretation of its mandate develops.

Regulations promulgated under the Act provide for separate applications for funding at various stages in the proceeding although the extensive information required on the first application need not be resubmitted on each subsequent occasion.[69] In addition to numerous additional criteria and conditions, the regulations provide for a levy in favour of the fund from any settlement in a

[67] *Edwards v. Law Society of Upper Canada* (1995), 36 C.P.C. (3d) 116.
[68] Now Madam Justice Molloy of the Ontario Court (Gen. Div.).
[69] O. Reg 771/92.

plaintiff's favour fixed at 10% of the value of the amount of the award to which the members of the class are entitled. It is thereby hoped that the fund will be self-financing. What effect the anticipated fees or the levy can have on the acceptability of offers to settle remains to be seen. The experience with mass tort litigation in the United States such as the Breast Implant litigation teaches that the maximization of the proportion of the defendant's contribution to the fund to be distributed among claimants can be critical to the success of a settlement.[70] On this basis, plaintiffs that seek to certify a class and negotiate a settlement without funding may be in a better position to reach agreement.

(3) Costs awards

In accordance with the general practice of cost-shifting in Ontario in individual actions, unsuccessful representative plaintiffs in class actions are liable for a portion of the defendants' costs.[71] This is in contrast with the absence of costs awards against unsuccessful parties in the United States which, when coupled with contingency fees, effectively shields representative plaintiffs from financial risks in commencing class actions. Some United States jurisdictions are studying cost-shifting models as a means of regulating costly litigation. Ontario legislators chose to retain the basic cost framework for civil actions but to ameliorate the substantial financial risk of litigation on behalf of unnamed plaintiffs that could otherwise operate as a disincentive to class actions by providing statutory guidance on costs awards and indemnification through the Class Proceedings Fund.

Pursuant to section 31(1) of the Act, the court may consider whether the matter was a test case, raised a novel point of law or involved a matter of public interest. Pursuant to section 59.1(2) cost awards against unsuccessful plaintiffs receiving financial support from the Class Proceedings Fund are to be paid out of the fund. This provides representative plaintiffs with a significant added incentive to seek assistance from the Fund. It also places a heavy responsibility on the Committee making determinations regarding funding because a denial of funding exposes a representative plaintiff to potentially substantial costs liability and this will discourage some from pursuing a claim. As was clear in the debate in the Committee decision to fund in *Edwards*, discussed in the previous section, the possibility that a major adverse costs award could deplete the fund is a significant concern for the Committee in making the decision to fund an action. In Québec, where the "Fonds" was once fully responsible for adverse costs awards in litigation that it funded, a 1982 award in favour of Canadian Honda Motors Limited of $675,650 prompted an amendment to the legislation reducing costs awards available to successful defendants to those applicable to the small claims court where actions for damages under $3000 are heard.[72]

[70] This can be particularly critical in a case such as the Breast Implant litigation when the combined effects of contributing to a settlement fund and defending claims made by those who opt out can threaten a defendant's solvency. See S. Gale Dick, "Can Implant Settlement be Saved?" (1995), 13 *Alternatives to the High Costs of Litigation* 1.

[71] This was described as an economic barrier to class proceedings by M.G. Cochrane in his article, "Conditions for Instituting Class Actions" in A. Prujiner and J. Roy (eds.), *supra*.

[72] See L. Fox, "Liability for costs: A comparison of Bill 28 and Bill 29 and the Quebec legislation" in Prujiner and Roy, *supra* at 123; and G.D. Watson, "Ontario's New Class Proceedings Legislation

In *Garland v. Consumer's Gas Co.*,[73] the Law Foundation of Ontario intervened at a hearing to determine costs upon summary judgment[74] in favour of the defendant. Counsel for the Foundation submitted that an award "could seriously deplete the resources of the Class Proceedings Fund and thereby impair the ability of the Fund to provide full financial assistance in the future." Winkler J. was not persuaded and found[75] that:

> the impact of a costs award on the Class Proceedings Fund is not an appropriate consideration for the Court in determining whether to award costs to a worthy party in an appropriate case. Rather, the impact of such an award should be taken into consideration by the Class Proceedings Committee in deciding whether to grant funding to a particular plaintiff.

It remains to be seen whether this approach to costs awards will affect the Funding Committee's criteria for determining funding applications and whether it will cause the Committee to give greater priority to the likelihood of success on a certification application than to the "public interest" in the litigation.

With regard to the health of the fund itself, it may be suggested that fixing the rate of the levy at 10% might deter the participation of those who might otherwise make use of it and become potential contributors. Clearly, the operation of the fund is intended to rely on its use in successful claims. However, where the claim is very large and costly disbursements necessary for trial can be avoided by a settlement, the lack of involvement with the fund with its 10% levy may be a factor in the settlement negotiations. This, in turn, involves significant speculation on the part of representative plaintiffs and their counsel that could have untoward effects on the process such as raising the spectre that the firm could not afford to sustain its representation through a long settlement process. Accordingly, fine-tuning of the regulations may be necessary to provide for a flexibility in determining a levy rate appropriate to each case.

The British Columbia legislation takes the opposite approach to the matter of costs by prohibiting costs awards except when the court considers there has been vexatious, frivolous or abusive conduct; or an improper or unnecessary step has been taken for the purpose of delay or increasing costs or other improper purpose; or when exceptional circumstances make it unjust to deprive the successful party of costs.[76] However, given the room for discretion in making and declining to make costs awards contained in both the Ontario legislation and the British Columbia legislation, it remains to be seen whether there will be a substantial difference in the operation of these provisions.

– An Analysis" in G.D. Watson and M. McGowan, *Guide to Case Management and Class Proceedings* (1995).

[73] *Garland v. Consumer's Gas Co.* (1995), 22 O.R. (3d) 767.

[74] *Garland v. Consumer's Gas Co.* (1994), 17 B.L.R. (2d) 239.

[75] *Ibid.* at 772.

[76] *Class Proceedings Act*, s.37(1) and (2).

2. The Scope of Class Proceedings Under Ontario Law

(a) The Effect of Constitutional Constraints on Classes Certified in Ontario

One critical difference between the United States legislation and the Ontario legislation providing for class actions relates to their geographical scope. This difference is rooted in the constitutional underpinnings of the two regimes. The United States federal government has legislative competence in the field of class proceedings but in Canada, where "property and civil rights" and "the administration of justice" are among the classes of subjects exclusively allocated to the provinces by section 92 of the *Constitution Act*, 1867,[77] the provincial governments have generally been regarded as having exclusive legislative authority over class proceedings.

Provincial competence over a subject generally entails a restriction to a province on the scope of the legislation enacted on the subject. One province cannot pass legislation aimed at having substantial effects in another province. Thus, on the basis of current orthodoxy, provisions referring to members of a class found in the *Class Proceedings Act* should be read as "members of a class *in the province*" and persons outside the province who would otherwise come within the described class are not automatically rendered members of a class proceeding in Ontario. Although there has been no direct judicial consideration of this point, the first reported certification hearing described the facts relating to the existence of an identifiable class in terms of the proportion in relation to the Canadian statistics regarding breast implants of Ontario women who had received them.[78] Moreover, the first settlement sought to be approved in Ontario, that in a separate class proceeding related to breast implants, necessitated approval from the courts of both Ontario and Quebec because it related to a class comprised of plaintiffs from both provinces.

The fact that the definition of a class for a class proceeding would presumptively be limited to the province does not mean that a potential class member from another jurisdiction could not become a member of the class by taking steps to join the action or that, in so doing, they would not be bound by the determination of the court seized of the matter. Rather, plaintiffs from other provinces or countries who took steps to join the proceeding might be permitted to do so if they otherwise fitted the description of those eligible to claim in it and, in joining the proceeding, they would be bound by a judgment or court approved settlement reached in it. To the extent that such persons would otherwise be "wait-and-see" plaintiffs who would likely receive awards in separate proceedings, defendants may welcome the opportunity to reduce transaction costs by permitting them to join the class action.

These constraints appear to have been recognized implicitly in the British Columbia Act which makes express provision for non-residents to opt-in and

[77] *Canada Act* 1982 (U.K.) c. 11, s.92(13) and (14) respectively. It should be noted that "civil rights" is not used here in a civil liberties or due process sense but in the sense of matters that would properly be the subject, generally, of private law as opposed to public law.

[78] *Bendall*, *supra*, at 736.

tailors the ability to do so as not to render the proceeding beyond the jurisdiction of British Columbia courts.

Sections 2 and 16 of the British Columbia Act provide in part as follows:

> **2 (1)** One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.
>
> . . .
>
> **16 (2)** Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the proceeding.
> (3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.
> (4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6(1)(a),(b), and (c).[79]

These sections acknowledge that persons not resident in British Columbia are not precluded from access to the courts of the province but must attorn to its jurisdiction in participating in a class proceeding. Attornment occurs when a non-resident opts-in. Subsection (3) clarifies that persons who opt in will be bound by the determinations made in the course of the proceeding.

The restriction on non-resident opting-in to those whose interests are represented by a resident representative could be construed as intended to ensure that the proceedings do not become unduly cumbersome for the prosecution of the main claim by residents. In this way it would resemble traditional restrictions on third party claims. However, it could, additionally, be viewed as ensuring that the claim does not become one in which the court is called upon to adjudicate matters that are substantially related to "property and civil rights" within another province. Legislation purporting to authorize such proceedings arguably would be *ultra vires*. Following *Hunt v. T & N plc.*,[80] a party would be free to challenge the certification on constitutional grounds in the courts of British Columbia or the courts of the province or territory in which the claim of the non-residents would properly be heard.

Perhaps most telling, however, is the following provision in section 6(2) of the British Columbia Act:

> (2) A class that comprises persons resident in British Columbia and persons not resident in British Columbia must be divided into subclasses along those lines.

This provision would tend to ensure that differences in the court's jurisdiction that might arise from the fact that persons before it are not residents do not hinder the adjudication of the matter and the efficacy of any order it might issue.

These constitutional restrictions on class proceedings may be seen to present a significant drawback for the scheme as a whole. The kinds of claims that give rise

[79] S.6(1)(a), (b) and (c) provide for fair and adequate representation of a subclass.
[80] *Hunt v. T & N plc.* [1993] 4 S.C.R. 289.

to class actions often relate to classes that are not geographically confined to a single province. For example, as may be imagined, the natural definitions of classes in products liability cases often mirror the market in which the product is sold and this would generally extend throughout a region, the entire country or beyond. Although the natural make-up of the class may include persons resident in other provinces or countries, the fact that the constitutional reach of the legislation is limited to the province means that the key provision for determining the scope of the class – that which deems included all those who qualify and who do not opt – may be ineffective. Persons resident in other provinces who qualify and do not opt out might not be bound by a decision and might be free to pursue their own claims if they saw fit. While the geographical limitations would not prevent persons in other provinces from attorning to the jurisdiction and thereby participating, the uncertainty regarding the scope of the class impedes settlement and makes the assessment of global awards difficult. A defendant wishing to resolve a matter must know the size of the plaintiff class involved and the extent of the exposure to any further litigation of the matter. Moreover, a court approving such a settlement would not be empowered to approve a settlement binding non-resident absent plaintiffs. If potential plaintiffs from other provinces are free to claim a portion of the settlement or pursue their own claims at any time the process is impaired.

This analysis is predicated upon the traditional approach to inter-provincial litigation that regards Canada as comprised of discrete law districts. This approach has been challenged in a series of decisions following the approach taken by the Supreme Court in *Morguard Investments Ltd. v. De Savoye*.[81] In that case the Court hinted at liberalization of the old rules and the possible re-thinking of the degree of separateness of each province. The court went so far as to say that "the courts of one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by the courts in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action." This is the stuff of jurisprudential revolutions and its full impact has yet to be realized.

However, quoting extensively from *Morguard*, an Ontario court has held that inter-provincial comity requires an interpretation of the *Class Proceedings Act* that discourages multiple proceedings. In *Millgate Financial Corp. v. BF Realty Holdings Ltd.*[82] the plaintiffs to a British Columbia proceeding, which had been commenced before the Ontario *Class Proceedings Act* came into force and then later dismissed for want of prosecution, were told by the Ontario Court that the prior British Columbia action would be considered a "proceeding commenced before this [Class Proceedings] Act [came] into force" thereby precluding the plaintiff pursuant to section 37 of the Act from certifying an Ontario action as a class proceeding. Section 37 of the *Class Proceedings Act* provides that it does not apply to proceedings commenced before it came into force and the Court held that a broad interpretation of the Act was warranted to give effect to its purpose.[83]

[81] *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 (hereinafter *Morguard*).

[82] *Millgate Financial Corp. v. BF Realty Holdings Ltd.* (1994) 15 B.L.R. (2d) 212.

[83] In *Nantais, supra* at 260 ff., the court referred to the *Morguard* and *Hunt* decisions and mused that

(b) The Implications for Class Actions Commenced Elsewhere

Although the Canadian inter-provincial constitutional constraints present a dramatic limitation on the potential efficacy of class proceedings, similar limitations have plagued international class actions commenced in the United States for many years. In a securities-based class action precipitated by the winding up of a Canadian corporation, *Bersch v. Drexel Firestone Inc.*,[84] the United States Court of Appeals for the Second Circuit considered a challenge to a proposed class including persons from European countries. In ordering the exclusion from the class all persons who were not residents or citizens of the United States, the Court noted the problems associated with both the giving of notice and the conclusiveness of its judgment that were inherent in a multinational class proceeding:

> . . . one must have pause over sending notices only in English, as was directed in connection with the proposed settlement . . .[85]
>
> Here the record contains uncontradicted affidavits that England, the Federal Republic of Germany, Switzerland, Italy, and France would not recognize a United States judgment in favor of the defendant as a bar to an action by their own citizens, even assuming that the citizens had in fact received notice that they would be bound unless they affirmatively opted out of the plaintiff class . . .[86]

Another striking example of the exclusion of foreigners from a United States class action occurred in the resolution of the mass tort litigation concerning silicone breast implants. Canadian women from various provinces who were potential class members in a U.S. class action were presumptively excluded from the class. The Judicial Panel on Multidistrict Litigation had consolidated hundreds of actions including dozens of class actions[87] and assigned Pointer J. of the Northern District of Alabama to preside over the resolution of the matter. The settlement included the establishment of a fund against which claims could be made by women with breast implants supplied by the defendants. Taking into account both the difficulty of pursuing a claim outside the United States without the benefit of class proceedings and the generally lower awards in personal injury matters, the negotiators agreed to limit the amount of the fund available to foreign claimants to 3% of the total. However, foreign plaintiffs complained about the unfairness to them of the award which had been negotiated by representatives of the United States plaintiffs and the possibility of being bound by a proceeding of

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an opting-in provision for non-residents would solve the problem and "avoid any doubt as to jurisdiction". Counsel who argued the matter, however, have advised that the formal order provided for an "opting-out" procedure. The judge who heard the application for leave to appeal (which was refused) stated his view that *Morguard* provides "powerful support" for the concept of a national class. By refusing leave, the matter is now left with only a trial level decision. In the meantime, neither of these decisions addresses the very practical problem of what to do if a settlement seems possible. How could a defendant determine what is the appropriate settlement amount unless there is a definitive assurance of who composes the class?

[84] *Bersch v. Drexel Firestone Inc.*, 519 F. 2d 974 (2nd Circ., 1975).

[85] *Ibid.* 996n.

[86] *Ibid.* at 996–97.

[87] *In re Silicone Gel Breast Implant Products Liability Litigation*, 793 F. Supp 1098 (U.S. Dist., 1992).

which they had not received notice. On the question of whether persons outside the United States would be bound by the court's judgment, Pointer J. commented:[88]

> Domestic class members who do not learn of the settlement and consequently do not register or opt out by the 1994 deadlines face the loss of their rights to sue in courts in their own country and retain only the right, which may be of little value, to become late registrants under the settlement. On the other hand, foreign claimants who, not learning of the American settlement, fail to register by the December 1st deadline retain all rights to proceed in the courts of their own country. . .
>
> Those who had no interest either in the settlement or in pursuing the litigation in the United States did not have to do anything - for, by taking no action whatsoever in this settlement, they would still have the right to pursue claims in their own courts.

Whether the assumption that foreign claimants who took no action would retain all rights was the product of the submissions of counsel or reasoning from first principles of territorial sovereignty is not clear. Perhaps more significant to the determination that plaintiffs from Ontario, Québec and Australia should be presumed excluded from the class, however, were the following findings regarding the fairness of the settlement. According to Pointer J.:[89]

> There are substantial differences between the benefits afforded to foreign and to domestic class members under the settlement. . . [T]hese disparities have generated understandable protests from foreign claimants that they are being treated unfairly. These objections are not taken lightly by the court, particularly in view of the absence of direct participation by representatives of foreign claimants in the negotiation process.
>
> Those who negotiated the settlement have candidly acknowledged that this limitation was based not on any empirical study, but rather on pragmatic considerations. In short, recognizing that a total of $2,715,070,000 would be paid into the Program, how much of this should be set aside for foreign claimants to enable offers of settlement that would be acceptable to many of them, while not so depleting the funds available for domestic claimants as to make the settlement offer unacceptable to too many of them?

The rationale concerning the availability of tort remedies and the size of damage awards justifying the limitation on the resources directed to satisfy foreign claims did not apply to those from Australia, Ontario and Québec. Moreover, persons in those jurisdictions had commenced individual and class actions there or in the United States.[90] On this basis Pointer J. regarded it appropriate to reverse the procedure for certification by presumptively excluding claimants from these jurisdictions and permitting individuals there, instead, to opt in if they so desired.

In addition to these procedural concerns, there remains the possibility that the claims of persons from different jurisdictions, though superficially similar, differ in ways that affect questions of causation or proof and, therefore, are not

[88] *In re Silicone Gel Breast Implant Products Liability Litigation* (1 September 1994) U.S. Dist. Ct., Northern District of Alabama, per Pointer J. at 12–13, 45.

[89] *Ibid.* at 38–40.

[90] Pointer J. noted that "[t]he classes certified in Ontario are limited to persons who reside or are domiciled in Ontario or had an implant in Ontario, and the class definitions in Québec and Australia likewise have contained similar geographic limitations." *Ibid.* at 52. And see, *Bendall, supra*, note 16.

appropriately joined in a single class action. It was on this basis that persons whose cause of action had arisen in Canada were presumptively excluded from the class certified in *In Re Laidlaw Securities Litigation.*[91] In that case, it was found that the representative American investor's interests in the action were antagonistic to the interests of Toronto Stock Exchange and Montreal Stock Exchange investor claimants because the representative plaintiff was concerned only with the effect, if any, of the alleged misrepresentations on the price of Laidlaw shares on the New York Stock Exchange and not on the Canadian exchanges.

The difference between the exchanges was significant because the justification for certification depended on the "fraud-on-the-market" theory of liability which eliminated the need to show individual reliance on the representations in issue. Plaintiffs seeking to rely on the "fraud-on-the-market" theory must demonstrate an efficient market. The defendants in the case indicated the intention to argue that the Canadian exchanges were not efficient markets and, therefore, that individual reliance would have to be shown for investors who had purchased stock listed on them. Since the representative plaintiff had no interest in demonstrating the efficiency of the Canadian markets, he could not adequately represent the interest of Canadian investors. Persons who had purchased stock on the Canadian exchanges were, therefore, properly excluded from the class.

3. Special Applications to Securities Litigation

One area in which class actions are especially likely to promote access to justice, judicial economy and modification of behaviour is that of securities litigation. Before the advent of class actions, the remedies available to aggrieved investors and shareholders were inadequate both in personal and in derivative actions. As Baillie explained in a 1981 Special Lecture to the Law Society of Upper Canada,[92]

> . . . finding a remedy where the damages have been suffered by a large number of possible plaintiffs, is equally pervasive in [the] area [of shareholders' remedies]. Lawyers involved in this type of practice conclude with some frequency that there is no feasible technique to bring a questionable transaction before the courts. Those in a position to complain are too widely scattered and, as individuals, lack the financial motivation to proceed independently. Our [traditional] class action procedures are ill-adapted to meet this difficulty. Sometimes the gauntlet is picked up by a comparatively small, but well-financed, shareholder whose primary interest may be to obtain a healthy financial settlement for himself – a cure that may be worse than the disease.

An effective means of redress in this field will also help to ensure the reliability of information provided to shareholders and other investors by those who might otherwise act with impunity.

[91] *In Re Laidlaw Securities Litigation*, 91-CV-1829 (East. Dist. Penn., 1992)

[92] J.C. Baillie, (Partner, Tory Tory DesLauriers & Binnington) "Shareholders' Remedies" in *Special Lectures of the Law Society of Upper Canada: New Developments in Remedies* (1981) 21 at 23.

(a) Individual Issues of Reliance and Liability

At least one writer has commented that although Ontario has statutory and common law remedies for misrepresentations in prospectuses, there have scarcely been any actions based on such claims.[93] In an article written shortly after the passage of the *Class Proceedings Act*, the author considered whether its provisions would facilitate claims of this sort.

In the first class proceeding sought to be certified by investors who claimed their losses were caused by misrepresentations, certification was denied on the basis that individual issues of reliance and liability prevented a class proceeding from being the preferable method of resolving the dispute. The plaintiffs in *Abdool v. Anaheim Management Ltd.*[94] had purchased condominium units as tax-sheltered investments. They alleged that these investments had been represented as self-financing after an initial payment of $1000. When the revenues failed to meet the mortgage payments, their promissory notes and other instruments were called upon. They sued the owner/developer of the project, for fraud and misrepresentation but it had fallen on hard times and did not defend. The solicitors, the assignees of the original financing institution, the real estate brokers and the accountants who reviewed the financial statements were joined as defendants and the plaintiffs sought certification.[95]

The motion for certification was denied at first instance because each class member's claim exceeded $300,000 and the proposed certification, therefore, did not respond to the interest in promoting access to justice for small claims. The Court also found that a class action was not preferable for resolving the common issues in this case because "the court must look to individual circumstances when the investors are non-clients. The case here must be based on detrimental reliance and that is an individual thing." Going beyond the question of efficiency, Montgomery J. observed, "the individual issues regarding each plaintiff will be determinative of liability in each case and it would therefore be unjust to deprive these defendants of their normal procedural rights, including discovery of each investor."

The result was affirmed by the Divisional Court.[96] Both the majority and

[93] J. Chapman, "Class Proceedings for Prospectus Misrepresentations" (1994), 73 Can. Bar Rev. 492. This excellent article, written shortly after the *Class Proceedings Act* was passed, includes a thoroughgoing analysis of many of the issues touched on in this section. In his paper "Continuous Disclosure and Civil Liability: Part I" [1995] 2 *Corporate Financing Journal* 138, Jeffrey G. MacIntosh points out that the statutory remedy is available for prospectus and take-over bid circular misrepresentation, but not for misrepresentations in continuous disclosure documents including annual reports, materials change reports, proxy circulars, etc.

[94] *Abdool, supra.* The misrepresentations alleged in this case were not said to be made by way of a prospectus and, therefore, did not involve the statutory liability discussed below.

[95] In *Baranick v. Counsel Trust* (1994), 12 B.L.R. (2d) 39, a multiple party proceeding, the Court noted the similarity between the facts giving rise to the claims in *Baranick* and *Abdool* and the nature of the claims themselves. The Court granted Summary Judgment in favour of the defendant financial institutions in *Baranick* allowing a counter-claim for the amounts owing under the mortgages.

[96] A pre-trial motion, such as one for certification of a class proceeding, is brought before a judge of the Ontario Court (General Division) sitting as a motions judge. Since it is an interlocutory proceeding, an appeal is heard by the Divisional Court which is comprised of a panel of three

concurring judgments examined carefully the relationship between the plaintiffs and each of the defendants to determine whether the claim raised common issues for which a class proceeding was the preferable method of resolution. Reviewing the claim against each for breach of fiduciary duty, Moldaver J. considered whether, if the action were certified, the court would feel constrained to extend discovery beyond the representative plaintiffs and whether liability could effectively be determined as a common issue. In his view, the goal of judicial economy was not supported by a class proceeding in this case because liability depended upon the existence of a fiduciary relationship which, in turn, depended upon "the nature of the particular dealings and relationship which the individuals may have had with the respective defendants" and this would require "discovery of just about every single plaintiff." Moreover, "this would be the beginning, not the end of the liability inquiry" because the detrimental reliance of each investor would itself require a separate determination.[97]

The experience in *Abdool* made it clear that class proceedings will not be a panacea for securities litigation. Questions of the reliance of individual plaintiffs and the liability of individual defendants will have to be based on some common assertions in order to benefit from the provisions of the Act, such as deemed reliance under statutory liability applicable to prospectuses and take-over circulars as discussed below.

(b) Combining Class Proceedings and Derivative Actions

In a certification motion heard soon after that in *Abdool*, investors alleging their losses were caused by misrepresentations in an information package distributed to them sought to combine a class action for misrepresentation with a common law derivative claim. The defendant in *Peppiatt* said that he would develop a golf club as a not-for-profit corporation without share capital owned by 400 members. He published an information package containing representations that investors' money would be held in trust and returned if 260 members had not joined by a certain date. When the date approached and the requisite number of memberships had not been sold, he borrowed the money to purchase the necessary remaining shares.

The members commenced personal and derivative claims against the developer, his corporation, the management company and the bank for negligence, misrepresentation, breach of contract, breach of fiduciary duty and breach of trust. They sought certification of a class proceeding for their personal claims and the bank moved to strike the statement of claim on the basis that a class action and a derivative action should not be joined.

Reviewing the requirements for certification, the Court held that since the alleged misrepresentations were contained in an information package distributed

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members of the same court, the General Division. Appeals to the Court of Appeal (the final appellate Court in Ontario) require leave of that Court.

[97] The problem of individual issues with respect to causation also prevented the certification of a class in *Sutherland, supra*, a claim for damages based on allegations that HIV infection had been received through blood components or products handled by the defendant.

to prospective members there were numerous common issues of fact and law. Turning to the question of whether the proceeding could be combined with a derivative action, the Court held that, despite section 37 of the *Class Proceedings Act* which provides that the Act does not apply to a proceeding that may be brought in a representative capacity under another Act or is required by law to be brought in a representative capacity, these claims could be combined because the derivative action in this case was based on the common law. If the action had been a derivative claim under one of the legislative regimes, such as the Canadian and Ontario corporate statutes, it may not have qualified for certification but, as an action combining a common law derivative claim and a personal action, section 37 did not prevent certification.[98]

(c) The Relative Merits of Statutory Shareholders' Remedies and Class Proceedings

The rationale underlying the stipulation in section 37 of the Act that it does not apply to proceedings that may be brought in a representative capacity under another Act was evident in a subsequent determination of whether a class proceeding was a preferable method of proceeding in a case concerning the valuation of shares. Following the amalgamation of Canadian Home Shopping Network and a subsidiary of Rogers Communications Inc., Rogers applied to fix the fair value of the shares of dissenting shareholders pursuant to the Canadian *Business Corporations Act*.[99] One of the minority shareholders, in a counter-application, moved to certify a class proceeding for oppression.[100] The minority shareholder was unable to convince the court that oppression was a common issue or that a class proceeding was a preferable way to resolve the matter when a valuation under the Act was already underway. Most of the shareholders had accepted the management offer and the dissenters' objections seemed to relate to value rather that procedural or other fairness issues. It was apparent that where there was statutory provision for representative actions, they were likely to be viewed as the preferable method for resolving the kinds of disputes for which they were designed.

(d) Prospectus Misrepresentations/Securities Act Claims

Sections 130 and 131 of the *Ontario Securities Act* have been said to be among "the most feared and least used sections in all of Ontario statute law".[101] On the one hand, the fear stems from the civil liability that could be established for a range of individuals and enterprises responsible for the representations made in prospectuses, take over bid circulars and directors' circulars. On the other hand, the lack of use has been attributed to the lack of an adequate procedural mechanism for the prosecution of claims of misrepresentation. While the advent of class proceedings may, as one author has said, "breathe life" into the

[98] That a derivative action is not a proceeding required by (the common) law to be brought in a representative capacity may be subject to challenge in future cases.
[99] R.S.C. 1985, c. C-44, s. 190(15).
[100] *Rogers Broadcasting Inc. v. Alexander* (1994), 25 C.P.C. (3d) 159.
[101] J. Chapman, *supra*.

prosecution of such claims, other procedural mechanisms will likely prevent the phenomenon of "strike" litigation experienced in the United States. The relative rarity of juries in civil trials, the absence of treble damages awards, the potential for costs awards against unsuccessful plaintiffs and short limitation periods will combine to reduce the incentives and limit the opportunities for this sort of entrepreneurial advocacy.

Under the Ontario *Securities Act* a prospectus, when required, must contain "full, true and plain disclosure of all material facts,"[102] i.e. those that significantly affect or would reasonably be expected to significantly affect the market price or value of the securities.[103] A misrepresentation, giving rise to a cause of action under section 130, is an untrue statement of material fact or an omission to state a required material fact. A purchaser of securities is deemed to have relied upon a misrepresentation in a prospectus or like document. This is a distinct advantage to claimants like those in *Abdool*, who, under the common law, would have to prove reliance. In addition, the rebuttable presumption that damages amount to the difference between the price paid and the actual value relieves plaintiffs of the onerous task of proving their losses.

Section 130 permits plaintiffs to seek rescission or damages against the vendor of the shares and damages against issuers and their directors, CEOs and CFOs, lead underwriters, and third parties who have consented to the use of their reports or opinions in the prospectus. Issuers may avoid liability for misrepresentations only by showing that the plaintiff had knowledge of the misrepresentation. The other classes of defendants may assert a due diligence defence and directors and the officers mentioned above may rely on professional opinions provided to them by experts. The limitation periods in which a remedy may be sought under the Act are shorter than at common law. A claim for rescission must be commence within 180 days from the date of purchase and, for damages, within three years or 180 days from discovering the misrepresentation whichever comes first.

Despite the relative advantage of pursuing a claim for prospectus misrepresentation under the Ontario *Securities Act*, it has been hypothesized that institutional investors have hesitated to introduce such unpleasantness into their dealings in the market and to publicize the fact that they have suffered losses in this way, and retail investors have been hampered by inadequate resources to identify misrepresentations and pursue costly litigation against large defendants. Accordingly, the benefits of class actions may facilitate what was once a largely illusory remedy for losses causes by prospectus misrepresentations. Class actions may permit small investors to fund costly litigation by pooling their resources or taking advantage of contingency fee arrangements. They can seek funding for expert analysis of the nature of the misrepresentations and the values of shares necessary to proving damages and other costly disbursements. If granted funding, they can proceed without fear of devastating cost awards against them in the event their claim fails. In addition, institutional investors can participate as absent class members without committing themselves directly to particular allegations or admissions of losses. Collateral benefits include the enhanced respect enjoyed

[102] Ss.58–59.
[103] S.1(1).

by a claim on behalf of all investors. Although individual determinations of defences based on actual knowledge of a representation, the time of discovering the misrepresentation for limitation purposes and the quantum of damages may persist, they will often be relatively simple and, in some cases, limited to arithmetical calculations. Rarely will they overshadow the benefits of proceeding as a class.

The challenge of obtaining funding for disbursements and indemnity from adverse costs awards from the Class Proceedings Fund and the problems of alternative remedies render class proceedings an attractive option.

The first class proceeding using the deemed reliance provisions of the Ontario *Securities Act* was certified on 27 April 1995. The plaintiff class in *Maxwell*[104] is comprised of the former shareholders of Maple Leaf Gardens Limited who tendered their shares pursuant to an offering circular in which MLG Ventures Limited allegedly made misrepresentations. Certification was resisted on the basis that the defence of actual knowledge would be frustrated by a class proceeding but the Court held that

> any difficulties which might arise with respect to actual knowledge of a proposed plaintiff could be adequately dealt with by requiring each member of the class who wishes to join the action to file an appropriate affidavit with counsel for the plaintiffs, swearing as to whether he or she had any actual knowledge of the undisclosed facts and the date he or she acquired such knowledge.

4. Conclusions

The advent of class actions in Ontario represents a significant advance in the availability of remedies for mass wrongs. Judicial consideration of the legislation in the course of certification applications to date indicates the interest in ensuring that the disputes that are permitted to proceed by way of a class action promote the interests in access to justice, judicial economy and modification of behaviour. New provisions for contingency fees and funding for disbursements and adverse costs awards have the potential to enhance the efficacy of the process. While constitutional constraints represent significant barriers to the maintenance of regional or national classes, innovative solutions such as opt-in procedures and simultaneous approval of settlements attest to the determination of counsel and the courts to make the procedure function effectively.

Litigation on behalf of investors likely field of legal activity. While the prospect of strike litigation does not appear to be a genuine concern in the Ontario, the remedies available for prospectus and take-over bid circular misrepresentation under the *Securities Act* are likely to benefit significantly from the new opportunities for pursuing claims under them through class actions.

[104] *Maxwell, supra.*