THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE

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A Comparative Perspective

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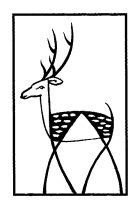

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To my parents

Preface

My interest in multi-party litigation developed some time ago when, as a young lawyer, I was involved in group litigation. I was immediately struck by the complexities and logistical difficulties which accompany such actions. The intricacies of framing the pleadings, seeking to identify the most appropriate cause/s of action to match the circumstances of so many putative class members, the breadth of relevant discovery, the complicated funding arrangements with both class representative and class members, the problems of communicating (or attempting to communicate) with absent class members, the tactical decisions that arise throughout interlocutory stages, the IT demands that must be met to facilitate method and order—these features all made an indelible impact. No doubt all practitioners who are involved in multi-party litigation can attest to being similarly impressed and, at times, frustrated.

The opportunity to undertake detailed academic study of the class action device arose from doctoral research at Oriel College, Oxford, from which this book has developed and expanded. In writing this book, my purpose is to compare and contrast the class action jurisprudence (legislation, case law and secondary literature) emanating from three jurisdictions—the United States, Australia, and Canada—so as to draw parallels and counterpoints that may assist those who study, conduct, legislate for, or adjudicate on class actions. While it is not possible to canvass the entire range of substantive issues associated with the class action device in this book, the main focus is upon key aspects of commencement and conduct, after some examination of the different framework which England has implemented to date for its multi-party litigation.

I am indebted to the Oxford Faculty of Law and to Oriel College for their financial generosity and support, which facilitated study periods in Ontario and New York so as to gather materials and assimilate jurisprudence that was not available in England. Grateful thanks are also due to my doctoral supervisor, Richard Tur, whose guidance and insights throughout this work have been extremely valuable. The support and encouragement provided by Professor Ross Cranston, Professor Oscar Chase, publisher Richard Hart, my friends, and my parents, are also gratefully appreciated. In addition I would like to convey my thanks to Richard, Jane Parker, Mel Hamill, Sarah Newton, the staff at Hope Services Ltd, and all the team at Hart Publishing, for providing valuable editorial and other assistance in order to bring this book to fruition.

Class action law at both judicial and legislative levels is under constant review, with reforms of Rule 23 of the United States Federal Rules of Civil Procedure becoming effective in late 2003, and reforms of Australia's Pt IVA

regime having been recommended but, as yet, not acted upon by the federal government. The law is stated as at 1 December 2003.

Rachael Mulheron
December 2003

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List of Abbreviations

GENERAL

[232]	paragraph 232
56	page 56
§ or s 10	section 10
ACCC	Australian Competition and Consumer Commission
ADR	Alternative dispute resolution
ALRC	Australian Law Reform Commission
AltaLRI	Alberta Law Reform Institute
Am	American
Ass	Assurance
Assn	Association
Aust or Aus	Australian
BC	British Columbia
Comm	Commission or Commissioner
CP	Consultation Paper
DP	Discussion Paper
GLO	Group litigation order
Ins	Insurance
Intl	International
LCD	Lord Chancellor's Department
Litig	Litigation
LJ	Law Journal
L Rev	Law Review
ManLRC	Manitoba Law Reform Commission
OLRC	Ontario Law Reform Commission
PD	Practice direction
Prod/s	Product/products
Q	Quarterly
SLC	Scottish Law Commission
Soc	Society
U	University
US	United States
Ybk	Yearbook

LEGISLATION

CPA (Ont)	Class Proceedings Act 1992, SO 1992, c 6
CPA (BC)	Class Proceedings Act, RSBC 1996, c 50
CPR	Civil Procedure Rules (Eng and Wales)
FCA (Aus)	Federal Court of Australia Act 1976 (Aus)
FRCP	Federal Rules of Civil Procedure (US)
CCP (Que)	Code of Civil Procedure RSQ, c C-25, Book IX
RSC	Rules of the Supreme Court (Eng and Wales)

COURTS

CA	Court of Appeal (of the jurisdiction referred to by the reporter series)
Ch	Chancery Division
Div Ct	Superior Court of Justice (Divisional Court of Ontario)
FCA	Federal Court of Australia
FamCA	Family Court of Australia
Full FCA	Full Bench of the Federal Court of Australia
Gen Div	Ontario Court of Justice (General Division)
HCA	High Court of Australia
HL	House of Lords
QB	Queen's Bench Division
SC	Supreme Court (of the relevant jurisdiction)
SCC	Supreme Court of Canada
SCJ	Superior Court of Justice (Ontario)
SD NY	United States District Court Southern District New York (sample jurisdiction only)
2d Cir	United States Court of Appeals Second Circuit

LAW REPORTS

AC	Law Reports, Appeal Cases (Third Series)
ACSR	Australian Corporations and Securities Reports
ACTR	Australian Capital Territory Reports
ACWS (3d)	All Canada Weekly Summaries, Third Series
AILR	Australian Industrial Law Reports
ALD	Administrative Law Decisions
All ER	All England Law Reports
ALR	Australian Law Reports

Alta LR (2d)	Alberta Law Reports, Second Series
Alta LR (3d)	Alberta Law Reports, Third Series
ASC	Australian Consumer Sales and Credit Cases
ATC	Australian Tax Cases
ATPR	Australian Trade Practices Reports
Aust Torts Reports	Australian Torts Reports
Bankr	Bankruptcy Court Decisions
BCLC	Butterworths Company Law Cases
BCLR (2d)	British Columbia Law Reports, Second Series
BCLR (3d)	British Columbia Law Reports, Third Series
BCLR (4th)	British Columbia Law Reports, Fourth Series
BLR (2d)	Business Law Reports, Second Series
BLR (3d)	Business Law Reports, Third Series
BMLR	Butterworths Medico-Legal Reports
BR	Bankruptcy Reporter
Cal 2d	California Reports, Second Series
CCEL (3d)	Canadian Cases on Employment Law, Second Series
CCLI (3d)	Canadian Cases on the Law of Insurance, Third Series
CCLS	Canadian Cases on the Law of Securities
CCLT (3d)	Canadian Cases on the Law of Torts, Third Series
CCPB	Canadian Cases on Pensions and Benefits
Ch	Law Reports, Chancery Division (Third Series)
Ch D	Law Reports, Chancery Division (Second Series)
CLR	Commonwealth Law Reports
CLR (2d)	Construction Law Reports, Second Series
CPC (3d)	Carswell's Practice Cases, Third Series
CPC (4th)	Carswell's Practice Cases, Fourth Series
CPC (5th)	Carswell's Practice Cases, Fifth Series
DLR (2d)	Dominion Law Reports, Second Series
DLR (3d)	Dominion Law Reports, Third Series
DLR (4th)	Dominion Law Reports, Fourth Series
Env LR	Environmental Law Reports
ER	English Reports
F 2d	Federal Reporter, Second Series
F 3d	Federal Reporter, Third Series
Fair Empl Prac Cas	Fair Employment Practice Cases
FCR	Federal Court Reports
Fed Sec L Rep	Federal Securities Law Reports
FLR	Family Law Reports
FRD	Federal Rules Decisions
FSR	Fleet Street Reports
F Supp	Federal Supplement
F Supp (2d)	Federal Supplement, Second Series

ICR	Industrial Cases Reports
IPR	Intellectual Property Reports
IR	Industrial Reports
KB	Law Reports, King's Bench
LGERA	Local Government and Environmental Reports of Australia
LJ Ch	Law Journal Reports, Chancery New Series
L Jo	Law Journal Newspaper
Lloyd's Rep	Lloyd's Law Reports
Lloyd's Rep IR	Lloyd's Law Reports Insurance and Reinsurance
Med LR	Medical Law Reports
MPLR (3d)	Municipal and Planning Law Reports, Third Series
My & Cr	Mylne and Craig's Chancery Reports
NSWLR	New South Wales Law Reports
NW 2d	North Western Reporter, Second Series
NZLR	New Zealand Law Reports
OAC	Ontario Appeal Cases
OR (2d)	Ontario Reports, Second Series
OR (3d)	Ontario Reports, Third Series
P 2d	Pacific Reporter, Second Series
QB	Law Reports, Queen's Bench
Qd R	Queensland Reports
RPC	Reports of Patent, Design and Trade Mark Cases
SC	Session Cases, Scotland
SCR	Supreme Court Reports, Canada
S Ct	Supreme Court Reporter, United States
SLT	Scots Law Times
Sol Jo	Solicitors' Journal
SW 2d	South Western Reporter, Second Series
SW 3d	South Western Reporter, Third Series
Trade Cas	Trade Cases (CCH)
US	United States Supreme Court Reports
Ves Jun	Vesey Junior's Chancery Reports
VR	Victorian Reports
WL	Westlaw
WLR	Weekly Law Reports
WN	Weekly Notes of Cases, England and Wales
WWR	Western Weekly Reports

Works Frequently Cited

AltaLRI Memorandum	Alberta Law Reform Institute, *Class Actions* (Memorandum No 9, 2000)
AltaLRI Report	Alberta Law Reform Institute, *Class Actions* (Report No 85, 2000)
ALRC Report	Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988)
FCCRC Paper	Federal Court of Canada, The Rules Committee, *Class Proceedings in the Federal Court of Canada*, Discussion Paper (2000)
ManLRC Report	Manitoba Law Reform Commission, *Class Proceedings* (Report No 100, 1999)
Newberg (3rd)	HB Newberg and A Conte, *Newberg on Class Actions* (3rd edn, Colorado Springs, McGraw-Hill Inc, 1992) [looseleaf]
Newberg (4th)	HB Newberg and A Conte, *Newberg on Class Actions* (4th edn, Colorado Springs, McGraw-Hill Inc, 2001)
OLRC Report	Ontario Law Reform Commission, *Report on Class Actions* (1982)
Rand Executive Summary	DR Hensler, NM Pace, B Dombey-Moore, E Giddens, J Gross, EK Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain, Executive Summary* (Santa Monica, RAND Institute for Civil Justice, 24 Mar 1999)
Rand Institute Report	DR Hensler, NM Pace, B Dombey-Moore, E Giddens, J Gross, EK Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, RAND Institute for Civil Justice, 2000)
SALC Paper	South African Law Commission, *The Recognition of a Class Action in South African Law* (Working Paper No 57, 1995)

SALC Report	South African Law Commission, *The Recognition of Class Actions and Public Interest Actions in South African Law* (Project No 88, 1998)
SLC Paper	Scottish Law Commission, *Multi-Party Actions: Court Proceedings and Funding* (Discussion Paper No 98, 1994).
SLC Report	Scottish Law Commission, *Multi-Party Actions* (1996)
VLRAC Report	Victorian Attorney-General's Law Reform Advisory Council (by V Morabito and J Epstein), *Class Actions in Victoria—Time for a New Approach* (1997)
Final Woolf Report	Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996)

List of Tables and Figures

Notes on Mode of Citation

Throughout this book, the following protocols will be adopted:

1. Throughout footnotes, the order of preference of case law citations will be as follows:

   (a) where the case has been reported in an authorised series of reports, the authorised citation will be used only;
   (b) in the absence of (a), where the case has been reported in an unauthorised series of reports, the unauthorised citation will be used;
   (c) in the absence of (a) and (b), where the case has been designated a neutral citation by the adjudicating court, the neutral citation will be used;
   (d) in the absence of (a)–(c), the case shall be cited in the following manner: (court, date).

2. The only exception to 1(a) above is that, in respect of decisions of the Canadian provinces, the DLR reporting series shall be used wherever available in addition to the provincial or Supreme Court reporting series.

3. When available in a primary or secondary source, paragraph numbers will be used as pinpoints in preference to page numbers.

4. In each jurisdiction, the court is referred to in parentheses in all instances where it is not obvious from the report series or mode of citation which court made the decision.

5. In the Table of Cases, and for cross-referencing assistance, the neutral citation will be shown in addition to other citation/s, where available.

6. The scholarship and opinion of many entities and persons are referenced throughout this book, and have been cited and pinpointed in accordance with British citation conventions. All reasonable efforts have been made to pinpoint as accurately and fulsomely as possible.

7. It should be noted that wherever quotations appear, and in the interests of brevity, footnotes within those quotations have not been reproduced, and the conventional usage of 'footnotes omitted' should be assumed throughout.

Part I
The Class Action Introduced

1

Introduction

A THE CLASS ACTION DEFINED

THE FOLLOWING IS one definition of a class action:[1]

> A class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ('representative plaintiff') may sue on his or her own behalf and on behalf of a number of other persons ('the class') who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ('common issues'). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.

Notwithstanding the simplicity of the above definition, class actions *are* complicated, sometimes controversial, and a concomitant of a complex society. This has manifested in two particular respects: by strongly-held opinion for and against their introduction, and by frequent appellate review.

As a procedural device, class actions excite an inordinately passionate public debate, and correspondingly, evoke quite disparate views as to their efficacy, utility and desirability. At one end of the spectrum, the class action has been variously described as a "Frankenstein monster"[2] and a "rather loony proposal";[3]

[1] This definition is drawn and composed from a number of sources, especially: ALRC, *Access to the Courts—Class Actions* (DP No 11, 1979); *SALC Report*, [2.3.1], [5.3.1]; *AltaLRI Report*, [57]; *ALRC Report*, [2], [5]; *OLRC Report*, 2. Incidentally, *OLRC Report*, 3 made the first point inside flap back in 1982. Throughout this book, the terms "plaintiff" and "defendant" will be used for the sake of consistency, given their common usage and understanding.

[2] *Eisen v Carlisle and Jacquelin*, 391 F 2d 555, 572 (2nd Cir 1968) (Lumbard CJ, dissenting) ("The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action"). Also: *Tiemstra v Insurance Corp of BC* (1996), 22 BCLR (3d) 49 (SC) [20]: "class actions have the potential for becoming monsters of complexity and cost": Esson CJSC, and cited on appeal: (1998), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA) [13]. The "monster" analogy is often used when a court does not believe the class action to be manageable: eg, *Lacroix v Canada Mortgage & Housing Corp* (2003), 36 CPC (5th) 150 (SCJ) [64]; *Bittner v Louisiana-Pacific Corp* (1997), 43 BCLR (3d) 324 (SC [in Chambers]) [44].

[3] The term used by Senator Durack to describe the ALRC's proposals for grouped proceedings, when tabled in Parliament in 1991: Australia, *Parliamentary Debates*, Senate, 13 Nov 1991, 3019. This political backdrop is noted, eg, in: V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U of British Columbia L Rev* 459, [6].

at the other end, it has been endorsed on the basis that it is "one of the most significant procedural developments of the century"[4] and "can any jurisdiction do without this?"[5] Whatever the rhetoric and however steeped in uncertainty, the device is now a prominent and permanent feature of civil litigation in many common law jurisdictions.

From the perspective of case law jurisprudence, the controversy is also striking. Following the implementation of a structured and sophisticated regime for multi-party litigation where previously there was none, judicial observations about the procedure as being "novel", "controversial", even "radical", have been made.[6] Not unexpectedly, as class action litigation becomes more prevalent thoughout, leading illustrations of appellate review and overrule of the application and interpretation of the statutory provisions emerge.[7] As noted elsewhere, the fine balancing of criteria by the court which is entailed in class action jurisprudence may mean that both plaintiffs and defendants can draw upon the *one* decision for support;[8] and particular cases[9] have been "held up repeatedly as exemplars of the great value or worst excesses" of class actions[10]—all of this at a time when, as Bone notes, there is a "great upheaval in civil procedure and keen interest in procedural reform".[11]

[4] Of the US class action: JP Fullam, "Federal Rule 23—An Exercise in Utility" (1972) 38 *J of Air Law and Commerce* 369, 388. Similarly: AJ Pomerantz, "New Developments in Class Actions: Has Their Death Knell Been Sounded?" (1970) 25 *Business Lawyer* 1259, 1259–60 (the class action is "one of the most socially useful remedies in history").

[5] AJ Roman, "Is It Time to Change the Law on Class Actions in Manitoba?" Isaac Pitblado Lectures (1986) VIII- 7, cited in *ManLRC Report*, 1.

[6] Eg: *McMullin v ICI Aust Operations Ltd* (1998) 84 FCR 1, 4 (Wilcox J) ("an entirely novel procedure"); Justice Ryan, "Development of Representative Proceedings" (1993) 11 *Aust Bar Rev* 131, 135 ("a controversial step"); M Frankel, "Some Preliminary Observations Concerning Civil Rule 23" (1967) 43 FRD 39, 44–45 ("it is a rather heady and disturbing idea to be told that people in far-away places who receive a letter or are 'described' in a newspaper 'notice' which does not come to their attention are exposed to a binding judgment unless they take some affirmative action to exclude themselves. One thoughtful judge has described this as an 'unprecedented' and 'radical extension' of federal jurisdiction . . .: *School District of Philadelphia v Harper & Row Publishers Inc*, 267 F Supp 1001, 1005"), cited in *Newberg* (4th) § 1.10 p 35.

[7] For some notable appellate overrule in class action jurisprudence, see: in Aust: *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA); in Ont: *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC); and in the US: *Eisen v Carlisle and Jacquelin*, 417 US 156, 94 S Ct 2140 (1974).

[8] Eg: the early Ontario appellate decision *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) was cited over two dozen times between then and 1999 by both plaintiff class members (because class actions could potentially cover factual scenarios concerning misrepresentations) and defendants (who emphasised how the weight given by the court to individual aspects ultimately denied certification): RL Hayley, "Book Review" (1999) 57 *Advocate* 283, 286 and fn 13.

[9] The Californian case of *Daar v Yellow Cab Co*, 67 Cal 2d 695 (1967) is one case oft-cited by those who support and decry cy-pres distribution of an aggregate assessment residue via a price reduction.

[10] *Rand Executive Summary*, 3, and also: *Rand Institute Report*, 7 ("The controversy about how to respond to the dilemma posed by damage class actions implicates deep beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society. In democracies such as ours, these kinds of controversies are extraordinarily difficult to resolve").

[11] RG Bone, "Agreeing to Fair Process: The Problem of Contractarian Theories of Procedural Fairness" (2003) 83 *Boston U L Rev* 485, 486.

B SELECTION OF FOCUS JURISDICTIONS

This section introduces the class action regimes of those particular jurisdictions ("the focus jurisdictions") which will constitute the focal points of the comparative analysis undertaken herein.

At the same time, it is noteworthy that class actions are not exclusively a device for common law legal systems. For example, Quebec,[12] Sweden[13] and Brazil[14] have developed, within their civil law systems, a formal doctrine of class actions, albeit that some view the class action as "a procedural mechanism whose peculiarities elude the fundamental concepts that characterise the formally defined structure of traditional civil litigation."[15] The emphasis in this book, however, is upon three common law jurisdictions where major and established class action statutory regimes are operative: the Australian federal class action regime,[16] the Canadian provincial regime operative in Ontario[17] (and, to the extent that it differs, that of British Columbia[18]), and the United States (US) federal class action rule[19] (more particularly, the damages class action category under that rule[20]). The class actions jurisprudence—legislative, judicial and academic—emanating from each of these three common law legal systems will be examined.

Within the focus jurisdictions, the following regimes are given only perfunctory consideration: the state-based class action regimes operative in the

[12] CCP (Que), arts 999–1030 (the first jurisdiction in Canada to implement class proceedings legislation, by An Act Respecting the Class Action, SQ 1978, c 8, in force 19 Jan 1979). For further discussion, see: W Branch, *Class Actions in Canada* (Vancouver, Western Legal Publications, 1996).

[13] Group Proceedings Act 2002. For discussion of an earlier proposal, see, eg: PH Lindblom, "Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure" (1997) 45 *American J of Comparative Law* 805, 824; R Nordh, "Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms and a Forthcoming Proposal" (2001) 11 *Duke J of Comp and Intl Law* 381.

[14] For discussion of the Brazilian system of class action, see A Gidi, "Class Actions in Brazil—A Model for Civil Law Countries" (2003) 51 *American J of Comp Law* 311. For an interesting snapshot about various civil-law systems that provide partial protection for group rights, as yet not extensively developed, but which have been influenced by the Brazilian legislation, see fn 1 of the article.

[15] RH Dreyfuss, "Class Action Judgment Enforcement in Italy: Procedural 'Due Process' Requirements" (2002) 10 *Tulane J of Intl and Comp Law* 5, 9–10 ("Among the fundamental tenets of European civil litigation that appear to exclude the adoption of American class actions are rules that require each plaintiff to execute a written power of attorney for litigation and rules that limit the binding effect of the judgment on parties to the action"). See also: T Rowe, "Debates over Group Litigation in Comparative Perspective" (2001) 11 *Duke J of Comp and Intl Law* 157, 160 for similar reservations.

[16] Pt IVA was inserted in the Federal Court of Australia Act 1976 (FCA) by s 3 of the Federal Court of Australia Amendment Act 1991, and commenced operation on 4 March 1992.

[17] CPA (Ont) commenced operation on 1 Jan 1993.

[18] CPA (BC) (in force 1 Aug 1995), first enacted as SBC 1995, c 21.

[19] FRCP 23.

[20] That is, class actions under r 23(b)(3).

Australian States of Victoria[21] and South Australia;[22] the state-based class action regimes which apply in several states of the United States;[23] and the later regimes in other provinces and jurisdictions of Canada.[24]

A brief summary of the background, implementation and terminology of the focus jurisdiction regimes is apposite to the text which follows:

Australia's federal regime. Pt IVA of the Federal Court of Australia Act 1976 applies only to plaintiffs whose causes of action arise under federal jurisdiction. The notion underpinning Pt IVA is that a proceeding may be instituted in the court by a "representative party", not only on his/her own behalf but also on behalf of others ("group members") when threshold criteria are met. On a terminological note, although the Part refers (perhaps deliberately) to a "representative proceeding", this is in the true sense of the term a class action, judicially acknowledged to "extend well beyond what was traditionally regarded as the scope of [the representative] rule".[25] The Australian Attorney General requested that the Australian Law Reform Commission (ALRC)[26] consider class action reform in 1977. Nearly twelve years later, the *ALRC Report* was presented to Parliament,[27] and a further three years later in March 1992, Pt IVA came into force (amid political criticism[28]).

[21] Pt 4A of the Supreme Court Act 1986 (Vic), which commenced operation on 1 Jan 2000, substantially reproduced, and superseded Ord 18A Supreme Court (General Civil Procedure) Rules 1996. Pt 4A, s 33ZK provided that "a proceeding commenced under [Ord 18A] on or after 1 January 2000 and before the passing of the new Act must be taken for all purposes to have been commenced under [Pt 4A] on the day on which it was commenced under [Ord 18A]."

[22] Supreme Court Rules 1987 (SA), r 34, which commenced operation on 1 Jan 1987.

[23] All states bar Mississippi and Virginia have enacted class actions. For further detail, see: American Bar Association Section of Litigation, *Survey of State Class Action Law* (originally published 1999, republished 2001 in *Newberg* (3rd), vol 5) and also see *Newberg* (4th), ch 13; LS Mullenix, *State Class Actions: Practice and Procedure* (Chicago, CCH, 2000).

[24] Federal Court Rules, SOR/98-106, R 299.1–299.42 (1998) (Can) (commenced Nov 2002); Class Actions Act, RSS, c C-12.01 (2001) (Sask) (in operation Jan 2002); Class Actions Act, SNL, c C-18.1 (2001) (St John's Nfld and Labrador) (in operation Apr 2002); Class Proceedings Act, SM, c 14 (2002) (Man) (in operation Jan 2003); Class Proceedings Act, SA 2003, c C-16.5 (Alta) (received royal assent 16 May 2003).

[25] *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 (CA) 388 (Gleeson CJ). It has been suggested that Australian commentators persist with the use of the terminology "representative proceeding" rather than "class action" precisely to avoid the negative perceptions and poor reputation which accompany the US class action: *Proposal for a New Supreme Court Rule on Representative Proceedings in NSW to the Supreme Court Rule Committee* (Centre for Legal Process of the NSW Law Foundation and Public Interest Advocacy Centre, 1998) 12, cited in EF Sherman, "Export/Import: American Civil Justice in a Global Context" (2002) 52 *DePaul L Rev* 401, fn 7.

[26] Referral by A-G (Aust) to the ALRC, Feb 1977 (to report on adequacy of law relating to class actions).

[27] ALRC, *Grouped Proceedings in the Federal Court* (Rep No 46, 1988), and several years earlier: *Access to the Courts—II (Class Actions)* (DP No 11, 1979). In Australia, there have been two other significant law reform commission reports: Law Reform Committee of South Australia, *Relating to Class Actions* (Adelaide, 1977) and *VLRAC Report*. For further background, see also: V Morabito, 'Ideological Plaintiffs and Class Actions—An Australian Perspective' (2001) 34 *U of British Columbia L Rev* 459, [4]–[6]; *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 458.

[28] Senator Durack noted at the time: "I do not think it is any secret that the Commission had considerable difficulty in coping with this question . . . this government's proposal is by no means

Pt IVA does not follow precisely the recommendations of the *ALRC Report*, and even where the legislature did accept the law reform agency's proposals, the draft legislation was reworded in some key respects. These are matters upon which there has been judicial comment when some of the more difficult conundrums under Pt IVA, such as multiple defendants or adequate notice, have required resolution.[29] In particular, the Government did not accept the Commission's proposals for contingency fees, or a public assistance fund, or the Commission's "grouped proceedings" approach whereby each group member was meant to constitute a party to the proceedings before the court.[30] Instead, class members "are not, in the context of Pt IVA, parties to the proceeding for the purposes of costs or otherwise".[31]

The general objectives of Pt IVA were identified in the second reading speech for the Federal Court of Australia Amendment Bill 1991,[32] and have been judicially cited since,[33] to comprise both providing access to a "real remedy" for those plaintiffs with claims so small that they would be economically unviable to recover in individual actions, and to deal efficiently with those plaintiffs with claims large enough to otherwise justify individual actions and where such plaintiffs are numerous (that is, twin-pillared objectives of access to justice and judicial economy). Substantive aspects of Pt IVA's operation have been considered by the High Court of Australia on one occasion since its enactment.[34] The ALRC has noted of Pt IVA that "[p]rocedures for representative proceedings generally appear to be working well and in accordance with the legislative intentions. The Federal Court does not view such cases as more problematic than other complex cases."[35] The ALRC's review of the operations of the legislation in 1999 prompted that body to call for specific amendments to be made to Pt

self-evident . . . I regret to say that it will cause a great deal of division of opinion in this chamber": Australia, *Parliamentary Debates*, Senate, 13 Nov 1991, 3019.

[29] Eg: *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) [110] (multiple defendants); *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [10] (notice requirements); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [35] (settlement offers to unrepresented class members); *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 461 (different method of proof of damages between representative and class members).

[30] Australia, *Parliamentary Debates*, Senate, 12 Sep 1991, 1447 ("The Government was not able to accept all the [ALRC's] recommendations. In particular, it has not adopted the . . . 'grouped proceedings' approach [and] . . . The Government believes that an opt out procedure is preferable on grounds both of equity and efficiency").

[31] Judicially reiterated in: *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) 94 FCR 167, [31]; *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1, [50]; *King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd)* (2002) 121 FCR 480, [39].

[32] Australia, *Parliamentary Debates*, House of Representatives, 14 Nov 1991, 3174–75.

[33] Eg: *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) 264; *Femcare Ltd v Bright* [2000] FCA 512, 100 FCR 331 (Full FCA) [10]; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [13]; *ACCC v Giraffe World Aust Pty Ltd* (1998) FCR 512, 520.

[34] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA). The constitutional validity of Pt IVA was to be considered by the HCA: *Femcare Ltd v Bright* (HCA, SL 110/2000, 15 Dec 2000), but because of ongoing litigation which rendered the appeal moot, the special leave order was rescinded: *Femcare Ltd v Bright* (HCA, Gummow J, 30 Oct 2001).

[35] ALRC, *Managing Justice* (Rep No 89, 1999) [7.92] (footnotes omitted).

IVA in limited respects,[36] and that the Attorney General should commission a review of Pt IVA.[37] At the time of writing, neither of these recommendations has been implemented.

Ontario and British Columbia's provincial regimes. Ontario's Class Proceedings Act 1992[38] was enacted after lengthy consideration, which commenced in 1976 when the Attorney-General requested the Ontario Law Reform Commission (OLRC) to conduct a detailed study of class actions. At the time, the Williston Committee stated that "we are convinced that the present procedure concerning class actions is in a very serious state of disarray".[39] That damning verdict was reiterated by the Canadian Supreme Court's view[40] in 1983 that Ontario's representative rule was "totally inadequate" to cope with "complex and uncertain" claims involving numerous parties similarly situated. The OLRC study, a three-volume analysis published in 1982,[41] is still regarded as "a seminal work on [the] topic."[42] The government of the day did not implement the OLRC's proposals, but again in 1989, following further impetus for the introduction of a class action procedure, the Attorney General of Ontario formed an Advisory Committee on Class Action Reform.[43] The report of this Committee,[44] tabled in the legislature in 1990, prompted the enactment of the statute in 1992. The eleven-year lapse between when the OLRC presented its work, and the eventual implementation of the class actions regime, was aptly referred to by one commentator as "an elephantine gestation period",[45] although it is evident that Australia's legislature took equally as long to ruminate about the introduction of a class action regime. Judicially, it has been observed that the Ontario studies are a useful background when considering the intent of the legislation, but they are not binding.[46]

[36] Viz, with respect to the closing of the class, and to enable the court to approve fee agreements between the representative party and/or class members with class lawyers: *ibid*, "Summary of Recommendations", 80.

[37] *Ibid*, "Summary of Recommendations", 81.

[38] SO 1992, c 6. This Act established the procedures for class proceedings, while the Law Society Amendment Act (Class Proceedings Funding), 1992 SO 1002, c 7 provided for funding of the actions.

[39] As cited in *ManLRC Report*, 7. Also see: *FCCRC Paper*, 9–10; *Abdool v Anaheim Management Ltd* (1995) 121 DLR (4th) 496, 21 OR (3d) 453, [32]–[33].

[40] *Naken v General Motors of Canada Ltd* (1983), 144 DLR (3d) 385 (SCC) 410.

[41] OLRC, *Report on Class Actions* (1982).

[42] See, eg, *AltaLRI Report*, "Acknowledgements", v ("It is a tribute to the Commission that its work continues to have this influence, while the Commission regrettably no longer operates").

[43] This political landscape was noted by *SALC Paper* [4.10], also citing M Cochrane, *Class Actions: A Guide to the Class Proceedings Act 1992* (Aurora, Canada Law Book Co, 1993) 2.

[44] Ontario A-G's Department, *Report of A-G's Advisory Committee on Class Action Reform* (1990).

[45] GD Watson, "Is the Price Still Right?" (Administration of Justice Conference, Toronto, 15 Oct 1997) 3, cited in V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U of British Columbia L Rev* 459, fn 19.

[46] *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [35]. See also the Supreme Court's reference to the 1990 report when deciphering the preferability requirement of CPA (Ont), s 5(1)(d) in *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [28].

The British Columbia Class Proceedings Act was enacted at the behest of the British Columbia Ministry of the Attorney General.[47] Its terms are similar to, but not identical with, the Ontario statute, and under both statutes, the terminology employed is the "class proceeding". The British Columbia statute is notable[48] for the fact that its legislature more closely adhered to the OLRC's extensive recommendations and draft legislation than did the Ontario legislature in several key features.[49] To that extent, the differences in application of the OLRC's recommendations have been interesting to observe and analyse. There has been "a definable evolution in the case law" under the Canadian regimes,[50] and their substantive aspects have now been considered by the Supreme Court of Canada on three occasions.[51]

United States' federal regime. In contrast to the relatively short duration of the aforementioned statutes, Rule 23 of the US Federal Rules of Civil Procedure (FRCP) has operated in its present form since 1966, and has generated considerable judicial analysis. As the "home of the class action",[52] it represents a valuable reservoir of judicial thinking as to how to commence and conduct class proceedings effectively. A class action procedure had previously been implemented when, in 1938, the US Federal Rules of Civil Procedure were adopted. However, the previous incarnation of Rule 23 was

[47] BC Ministry of the Attorney General, *Consultation Document: Class Action Legislation for British Columbia* (May 1994).

[48] Others have made a similar observation, eg: J Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Vancouver, Butterworths, 1997) 6; also cited: *AltaLRI Report*, [58].

[49] Eg, with respect to costs and funding recommendations, how to assess whether the common issues are significant enough to warrant class action treatment.

[50] W Winkler (the Hon), "Advocacy in Class Proceedings Litigation" (2000) 19 *Advocates' Society J* 6, 6, referring to the Ontario jurisdiction. Also: J Camp and S Matthews, 'Book Review' (1999) 57 *Advocate* 939, 940 ('emerging area of law').

[51] *Rumley v BC* (2002), 205 DLR (4th) 39, [2001] 3 SCR 184; *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC); *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534, a trilogy of cases said to "introduce the era of modern class actions in Canada": C Schmitz, "Trilogy of SCC Judgments Establish Requirements for Certifying Class Actions" (2001) *Lawyers Weekley* 21:26, quoting M McGowan, lawyer for Mr Hollick.

[52] Although often seen in literature that term is not intended literally, for class actions originated in England about the 12th century, by virtue of the compulsory joinder rule whereby "all parties materially interested in the subject of a suit had to be made parties so that there might be a complete decree to bind all": *OLRC Report*, 5–6, 8. US literature recognises this link to the English representative rule: see *Newberg* (4th) §§1.9, 3.1; T D Rowe, "A Distant Mirror: The Bill of Peace in Early American Mass Torts" (1997) 39 *Arizona L Rev* 711; W Weiner and D Szyndrowski, "The Class Action, from the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?" (1987) 8 *Whittier L Rev* 935; *OLRC Report*, 5–6; S Yeazell, *From Medieval Group Litigation to the Modern Class Action* (New Haven, Yale Uni Press, 1987); Z Chafee, "Bills of Peace with Multiple Parties" (1932) 45 *Harvard L Rev* 1297. Also: *Rand Executive Summary*, 1; and judicially: *Montgomery Ward & Co v Langer*, 168 F 2d 182, 187 (8th Cir 1948) ("The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs").

heavily criticised in its phrasing[53] and said to "baffle both courts and commentators",[54] and "distract attenion from the real issues",[55] so was redrafted by the Rules Advisory Committee in 1964. Following consideration of that draft, a new Rule 23 was adopted in 1966 that was intended to describe "in more practical terms the occasions for maintaining class actions".[56]

Essentially, the rule has two parts. Rule 23(a) outlines the four requirements that all class actions must meet (numerosity, commonality, typicality and adequacy of representation), and in addition to this (it has been judicially reiterated[57]), the class action must fit within one of the Rule 23(b)(1)[58] or (b)(2)[59] or (b)(3) categories. It is the last-mentioned of these categories which will comprise the main focus of consideration in this book. In comparison to its (b)(1) and (b)(2) counterparts, the Rule 23(b)(3) class action is, as Phair explains, "a more general form of class action to recover damages and secure judgments that bind all class members, save those who have opted out."[60] The Rules Advisory Committee considered that (b)(3) class actions were intended for scenarios where a (b)(1) or (b)(2) class action was unavailable, but where a class action "may nevertheless be convenient and desirable."[61] Commentators such as

[53] Under the rule, a jural relationship had to exist among class members before a class would be certified, and subdivided classes into a "true", "spurious" or "hybrid" action. This categorisation was difficult to implement, "highly conceptualised": *OLRC Report*, 8, and "had long proved inadequate": *Newberg* (4th) § 1.9 p 33, § 3.1 pp 210–11.

[54] Note, "Federal Class Actions: A Suggested Revision of Rule 23" (1946) 46 *Columbia L Rev* 818, 823, cited in *OLRC Report*, 9.

[55] B Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (Part 1)" (1967) 81 *Harvard L Rev* 356, 381.

[56] See Rules Advisory Committee, "Notes to the 1966 Amendments" (1966) 39 FRD 69, 99.

[57] *Georgine v Amchem Products Inc*, 83 F 3rd 610, 624 (3d Cir 1996) ("To obtain class certification, plaintiffs must satisfy all of the requirements of Rule 23(a) and come within one provision of Rule 23(b)"); *Senter v General Motors Corp*, 532 F 2d 511, 522 (6th Cir 1976); *Basile v Merrill Lynch, Pierce, Fenner and Smith Inc*, 105 FRD 506, 507 (SD Ohio 1985).

[58] Under this provision, there are two types of class actions permissible. A Rule 23(b)(1)(A) class action an "incompatible standard" class action, applies and allows a class to be certified when "the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." A Rule 23(b)(1)(B) class action, a "limited fund" class action, applies when there is a risk that "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." For examples and discussion, see: RP Phair, "Resolving the 'Choice-of-Law Problem' in Rule 23(b)(3) Nationwide Class Actions" (2000) *U of Chicago L Rev* 835, fn 11.

[59] Often termed an "injunctive" class action, and applies where the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

[60] Phair, *ibid*, 838, and B Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967) 81 *Harvard L Rev* 356, 389–90. Kaplan was former Reporter for the Advisory Committee on Civil Rules.

[61] Rules Advisory Committee, "Notes to 1966 Amendments to Rule 23" (1966) 39 FRD 69, 102. As Phair, *ibid*, notes, the category was also described by the Advisory Committee as "the most adventuresome of the new types": B Kaplan, "A Prefatory Note" (1967) 10 *BC Indust & Comm L Rev* 497, 497.

Newberg and Phair stress that the predominant aim was to provide greater access to the courts, with reference to the US Supreme Court's observation that "while the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" [62] Fleming has further remarked[63] that the Canadian and Australian class action regimes stand apart from the US rule, in that they specifically (ie, *expressly*) contemplate claims for damages for mass tort cases, unlike the US model.

The four requirements of Rule 23(a) are the only prerequisites for (b)(1) and (b)(2) class actions, but the Advisory Committee added two further requirements for (b)(3) class actions: that the common issues predominate over the individual issues; and that a class action is superior to other available methods for the fair and efficient adjudication of the dispute, such as test cases or consolidation.[64] The categorisation of class actions under Rule 23 also has other important ramifications: under (b)(3) actions, a right to opt out is preserved; and individual notice to class members who can be identified is mandated, whereas this onerous requirement is not applicable to class actions brought under (b)(1) and (b)(2).[65]

The class action categories under Rule 23(b) are said to be "functional in that they sort class action lawsuits according to the class's particular objectives."[66] This categorisation approach, however, was expressly rejected by the law reform agencies in the jurisdictions of Australia and Ontario. The ALRC declared that "[a]lthough [rule 23] was designed to produce a functional procedure to deal with the classes where class actions were appropriate, the degree of overlap and the absence of a coherent conceptual basis renders the four-fold classification unsatisfactory";[67] while the OLRC also noted that the categorisation approach was generally eschewed elsewhere, wasted too much time and effort in deciding which category was appropriate, and that requirements of commonality, superiority and notice should be treated consistently, no matter the type of class action.[68] Therefore, given that the other jurisdictions did not

[62] *Newberg* (4th) §§ 4.24, 17.13, and Phair, *ibid*, 839, citing *Amchem Products Inc v Windsor*, 521 US 591, 617, 117 S Ct 2231 (1997). Also: *Mace v Van Ru Credit Corp*, 109 F 3d 338, 344 (7th Cir 1997).

[63] JG Fleming, "Mass Torts" (1994) 42 *American J of Comparative Law* 507, 521.

[64] See Rules Advisory Committee, "Notes to 1966 Amendments to Rule 23" (1966) 39 FRD 69, 102–3.

[65] Observed in: *OLRC Report*, 334, and also see *Eisen v Carlisle and Jacquelin*, 417 US 156, 177, fn 14 (1974).

[66] RK Roth, "Mass Tort Malignancy" (1999) 79 *Boston U L Rev* 577, 583. See, for further discussion, *Newberg* (4th) § 1.8 pp 28–29; Note, "Developments in the Law—Class Actions" (1976) 89 *Harvard L Rev* 1318, 1626. For criticism of categorisation, see: J Bronsteen and O Fiss, "The Class Action Rule" (2003) 78 *Notre Dame L Rev* 1419, 1422 (contending that the descriptive categories serve no discernible relevant purpose and should be abolished).

[67] *ALRC Report*, App C, 194.

[68] *OLRC Report*, 334–36.

embrace this categorisation approach, it is the (b)(3) class action—encompassing damages claims, and a range of requirements that have been implemented in the statutes of the other jurisdictions—which merits specific consideration in the comparative analysis undertaken herein.

FRCP has been the subject of considerable (and deliberately paced) review in recent years. Indeed, the Rule remained virtually intact for three decades. Noting this, Cooper further explains[69] that "[a]fter a deliberate moratorium following the 1966 amendments, the Advisory Committee took the subject up again in 1991." Despite a number of investigations and working papers thereafter,[70] the first amendment adopted was the addition of a new Rule 23(f), effective 1 December 1998. This introduced a regime for permissive interlocutory appeals from orders granting or denying class certification.[71] Then, in May 2002, the Civil Rules Advisory Committee[72] recommended various amendments to Rule 23 and in September of that year, the Judicial Conference Committee on Rules of Practice and Procedure recommended that the proposed changes be approved.[73] This latest round of amendments to FRCP 23 focuses on four areas: the timing of certification decision and notice; judicial oversights of settlements; attorney appointment; and attorney compensation. Passed by the Supreme Court to Congress in March 2003, they became effective on 1 December 2003.[74] The amendments have been considered by some US commentators to amount to "small adjustments" only, certainly leaving the basic structure of the class action rule unaffected.[75]

[69] EH Cooper, "Simplified Rules of Civil Procedure" (2002) 100 *Michigan L Rev* 1794, fn 3.

[70] Eg: Administrative Office of the US Courts, *Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23* (1997); Advisory Committee on Civil Rules & Working Group on Mass Torts, *Report on Mass Tort Litigation* (15 Feb 1999), cited in Cooper, *ibid*.

[71] Committee on Rules of Practice & Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure*, 19–56 (1996). These proposed 1996 amendments: permitted appeals of class action certification decisions, allowed courts to certify settlement classes under (b)(3), and added two factors, "maturity" and "costs and burdens", to the superiority checklist provided in (b)(3). The first proposal is embodied in FRCP 23(f). See further: LS Mullenix, "The Constitutionality of the Proposed Rule 23 Class Action Amendments" (1997) 39 *Arizona L Rev* 615; J Bronsteen and O Fiss, "The Class Action Rule" (2000) 78 *Notre Dame L Rev* 1419, fn 46.

[72] See Administrative Office of the US Courts, *Report of the Civil Rules Advisory Committee to the Standing Committee on Rules of Practice and Procedure*, 101–7 (May, 2002).

[73] See Administrative Office of the US Courts, *Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States*, Agenda F–18, 8–21 (Sep 2002).

[74] The December 2003 amendments to Rule 23 are incorporated in the "Appendix." Some clauses are entirely new; some rephrase previously-existing clauses. Further proposed changes, via the proposed Class Action Fairness Act of 2003, seek to expand federal court jurisdiction over class actions and remove most state class actions to the federal court, but at the time of writing, have not been implemented.

[75] J Bronsteen and O Fiss, "The Class Action Rule" (2003) 78 *Notre Dame L Rev* 1419, 1422. Also, see generally: KS Rivlin and JD Potts, "Proposed Rule Changes to Federal Civil Procedure May Introduce New Challenges in Environmental Class Action Litigation" (2003) 27 *Harvard Environmental L Rev* 519; *2004 Federal Civil Rules Booklet* (Harvard, Dahlstrom Legal Publishing, 2004) "FRCP 23" section, available at <http://www.legalpub.com/pages/product%20frb.htm>.

Diversity of application. The experience in the more recent class action jurisdictions of Australia and Canada have shown a remarkable tendency to apply class action legislation for the pursuit of damages recovery in a variety of commonly-occurring scenarios: medical product[76] and medical negligence claims;[77] financial loss claims;[78] consumer claims, whether against product manufacturers[79] or service providers;[80] tobacco claims;[81] environmental problems,[82] including contaminated water;[83] disasters and accidents, where people who are situated together suffer losses from the same cause;[84] real estate disputes;[85] occupational health or other employment-related complaints;[86] commercial claims, such as misrepresentations in financial matters[87] or alleged cartel activity;[88] and claims against governments or agencies.[89] As the Supreme Court of Canada explained in a nutshell, class actions simply reflect "the rise of mass

[76] Eg: *Wilson v Servier Canada Inc* (2001), 50 OR (3d) 219 (SCJ) (weight-loss pills); *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) (Filshie clips).

[77] Eg: *Anderson v Wilson* (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) (allegations of contracting Hep B from clinic).

[78] Eg: *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) (alleged fraudulent financial scheme causing loss); *Schneider v Hoechst Schering Agrevo Pty Ltd* (2001) 50 IPR 555 (Full FCA) (losses from herbicide application to crops).

[79] Eg: *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) (breast implants); *Jonsandi Transport Pty Ltd v Paccar Australia Pty Ltd (No 2)* [1999] FCA 1788 (defective truck chassis alleged).

[80] Eg: *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) (education); *ACCC v Internic Technology Pty Ltd* (1998) ATPR ¶ 41-646 (FCA) (domain name services).

[81] Eg: *Ragoonanan Estate v Imperial Tobacco Canada Ltd* (2001), 51 OR (3d) 603 (SCJ) (non-fire-safe cigarettes); *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) (smoking-related disease).

[82] Eg: *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) (noxious fumes from land-fill site).

[83] Eg: *Smith v Brockton (Municipality)* (SCJ, 14 Jun 2001) (contaminated water in Walkerton, Ontario); *Ryan v Great Lakes Council* (1997) 78 FCR 309 (contaminated oysters from faeces in lake).

[84] Eg: *Godi v Toronto Transport Comm* (Gen Div, 20 Sep 1996) (subway disaster); *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 636 (Full FCA) (gas supply).

[85] Eg: *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) (condominium owners against developer); *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) (purchasers against developer of high-rise units).

[86] Eg: *Wicke v Canadian Occidental Petroleum Ltd* (1999), 40 OR (3d) 731 (Gen Div) (claims for unpaid overtime); *Woodhouse v McPhee* (1997) 80 FCR 529 (claims for leave and superannuation entitlements).

[87] Eg: *Maxwell v MLG Ventures Ltd* (1995), 7 CCLS 155 (Gen Div) (circular distributed by promoter); *King v GIO Aust Holdings Ltd* [2000] FCA 1543 (Full FCA) (corporate takeover). Indeed, class actions have rendered civil liability against companies more accessible in both jurisdictions, cf: R Edwards, "Corporate Killers" (2001) 13 *Aust J of Corporate Law* 231.

[88] Eg: *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) (alleged price-fixing of building products); *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1997) ATPR ¶ 41-585 (FCA).

[89] Eg: *Buffett v Ontario (A-G)* (1999), 42 OR (3d) 53 (Gen Div) (challenge to legislation, arguing that certain portions of the Fairness for Parents and Employees Act, 1997 were unconstitutional); *Huang v Minister of State for Immigration and Multicultural Affairs* (1997) 50 ALD 134 (FCA) (refugee claims).For some useful categorisation in the Canadian context, see also: *ManLRC Report*, 16–21; WK Branch, *Class Actions in Canada* (Vancouver, Western Legal Publications, 1996) ch 5.

production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs".[89a]

Throughout the 1970s and 1980s, "the predominant class actions for monetary damages [under FRCP 23] were cases brought under federal antitrust, securities, and civil rights laws."[90] As Sherman notes, "since that time, consumer class actions have blossomed against practices in such industries as insurance, banking, credit cards, and telecommunications, [but] courts have differed markedly in their willingness to certify such class actions," and further explains that "the most contentious arena for class actions in modern times concerns mass accidents (like plane or railway crashes or collapse of a building), environmental disasters (like the escape of toxic chemicals into the air or water), and defective products (like asbestos, prescription drugs, appliances, vehicles, or computer hardware/software)."[91] As Davis also observes,

> [e]arly attempts to certify class actions in mass tort cases after the 1966 amendments were few and routinely met with defeat. . . . In the late 1970s and early 1980s, at about the same time that products liability actions generally were on the increase, three "defective" products gave rise to thousands of injury claims, creating the "mass torts" that have since grabbed the attention of society and the federal judiciary. The presence of these mass torts—asbestos, Agent Orange, and the Dalkon Shield intrauterine device—in the judicial system seemed to have affected a change in attitude of the trial, and to a lesser extent, appellate, judiciary which was evidenced by a greater willingness to certify class actions.[92]

Sherman and others remind that "[t]he drafters' notes to the 1966 rule amendments stated that mass torts are inappropriate for class certification",[93] that the wisdom of this has been doubted by some who were involved in the drafting of

[89a] *Western Canadian Shopping Centres Inc v Dutton*, [2001] SCC 46 (SCC) [26].

[90] EF Sherman, "Export/Import: American Civil Justice in a Global Context" (2002) 52 *DePaul L Rev* 401, 407; RA Nagareda, "Autonomy, Peace and Put Options in the Mass Tort Class Action" (2002) 115 *Harvard L Rev* 747, 750.

[91] Sherman, *ibid*; and by the same author: "Class Action Practice in the Gulf South" (2000) 74 *Tulane L Rev* 1603, 1616–18.

[92] MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev* 157, 175–76. For other mass tort commentary, see: JC Coffee, "Class Wars: The Dilemma of the Mass Tort Class Action" (1995) 95 *Columbia L Rev* 1343; FE McGovern, "An Analysis of Mass Torts for Judges" (1995) 73 *Texas L Rev* 1821; GL Priest, "Procedural versus Substantive Controls of Mass Tort Class Actions" (1997) 26 *U of Chicago J of Legal Studies* 521; RH Trangsrud, "Mass Trials in Mass Tort Cases: A Dissent" (1989) *U of Illinois L Rev* 69; RA Nagareda, "In the Aftermath of the Mass Tort Class Action" (1996) 85 *Georgetown LJ* 295; DR Hensler, "Large-Scale Litigation: A US Perspective" (2000) 77 *Reform* 67.

[93] Sherman, n 90 above, 407, and citing: Rules Advisory Committee, "Notes to the 1966 Amendments" (1966) 39 FRD 69, 103 ("a 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action," and "would degenerate in practice into multiple lawsuits separately tried"). Thus, it has been said that "allowing a class action to be brought in a mass tort situation is clearly contrary to the intent of the draftsmen of the rule": RL Marcus, "They Can't Do That, Can They? Tort Reform Via Rule 23" (1995) 80 *Cornell L Rev* 858, 872, citing CA Wright *et al*, *Federal Practice and Procedure* (2nd edn, St Paul, Minn, West Publishing Co, 1992) 76.

FRCP 23,[94] that "situations in which large numbers of individuals are harmed by the same conduct, condition or product have led many courts to approve the possibility of certifying classes across the broad spectrum of tort law";[95] but that other decisions[96] exhibit a continuing reluctance to apply the US class action rule to such cases.

It appears fair to state that, notwithstanding the uncertainties that surround its most appropriate application, the US class action has become increasingly utilised, with one study noting that, "from 1990 to 2001, the number of class actions filed annually in federal courts steadily increased, from 922 to over 3000."[97]

C THE UTILITY OF A COMPARATIVE STUDY

As Markesinis explains, the full benefit of comparing legal systems arises where a comparison of "like with like" is possible[98] (albeit with perhaps differences in terminology[99]). Comparative studies are particularly apposite where similar problems are being faced in many jurisdictions—this "legitimately encourage[s] a

[94] As cited in Sherman, *ibid*, and also RL Marcus, "Benign Neglect Reconsidered" (2000) 148 *U of Pennsylvania L Rev* 2009, fn 116, Prof CA Wright: "I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that that is untrue", as quoted in *Newberg* (3rd), § 17.06 p 20; Judge Jack Weinstein: "As authority for this warning against attempts to use class actions in torts, the note cites an article [I] wrote as a law professor. As a judge [I have] been forced to ignore this indiscretion when faced with the practicalities of mass tort litigation. In the earlier 1960's we did not fully understand the implications of mass tort demands on our legal system": JB Weinstein and EB Hershenov, "The Effects of Equity on Mass Torts" (1991) *U of Illinois L Rev* 269, 288.

[95] Sherman, *ibid*, 408. Eg: *In re General Motors Corp Pick-Up Truck Fuel Tank Prods Liab Litig*, 55 F 3d 768, 784 (3rd Cir 1995) ("True, it was once thought that mass tort actions were ordinarily not appropriate for class treatment . . . However, the applicability of Rule 23 to mass tort cases has become commonplace, and the use of the class action device, specifically the (b)(3) class, has created some of the largest and most innovative settlements in these contexts. Prominent examples include the recent $4.2 billion settlement of the breast implant litigation: *In re Silicone Gel Breast Implant Prods Liab Litig*, 1994 WL 578353 (ND Ala 1994)").

[96] Two in particular may be cited: *In re Rhone-Poulenc Rorer Inc*, 51 F 3d 1293, 1304 (7th Cir 1995) (noting that "Those courts that have permitted [use of class actions in mass tort cases] have been criticized, and alternatives have been suggested which recognize that a sample of trials makes more sense than entrusting the fate of an industry to a single jury"); *In re Agent Orange Prod Liab Litig MDL No 381*, 818 F 2d 145, 167 (2nd Cir 1987) (mass tort class action used solely to decide a military contractor defence against all plaintiffs; if the case had been based on exposure to toxins in civilian affairs, certification would have been denied because causation too individualistic).

[97] Note, "Leading Cases: II Federal Jurisdiction and Procedure" (2002) 116 *Harvard L Rev* 332, 332, citing *Class Action Reports Inc*, Statistics Table 2, at <http://www.classactionreports.com/classactionreports/stats2.htm>.

[98] BS Markesinis, *Always on the Same Path* (Oxford, Hart Publishing, 2001) 306.

[99] BS Markesinis, *Foreign Law and Comparative Methodology* (Oxford, Hart Publishing, 1997) 198–99. As already noted, the concept of "representative proceeding" in the Australian Pt IVA schema is analogous to the "class proceeding" referred to in the Canadian statutes, which concept is termed a "class action" in FRCP 23.

search for help in the reasoning . . . of other countries."[100] A suitable framework by which to handle the multi-party conundrum is one such problem.

The comparative exercise undertaken in this book is reflected in the fact that international law reform commissions which have analysed and debated multi-party reform have uniformly undertaken comparative legislative and case law studies, as an opportunity to "learn lessons from experience elsewhere",[101] to "tak[e] heed of the difficulties that have been experienced" in other jurisdictions,[102] and to acknowledge that the reports and legislation emanating from other places can constitute "extremely valuable material" when considering reform for one's own jurisdiction.[103] Moreover, the different perspectives of group litigation as it is practised or proposed around the world have merited consideration on the agenda of major law conferences in recent times,[104] with the aim of "comparing approaches in different countries in the hope that all might learn from experience elsewhere."[105]

Perhaps even more importantly, the judiciaries responsible for implementing the class action regimes in the focus jurisdictions of Canada and Australia have been receptive to the jurisprudence that has emanated from the much longer-standing class action regime under FRCP 23. Litigants in Australia[106] and Canada[107] have sometimes sought to bring to the court's attention relevant US class actions jurisprudence with which they hope to align their own positions. Consequent upon this, and also at the behest of particular judges, there

[100] BS Markesinis, *Foreign Law and Comparative Methodology* (Oxford, Hart Publishing, 1997), 204.

[101] ID Willock, "Multi-Party Actions" (1995) 2 *Juridical Rev* 242, 243, commenting upon the exercise in comparative law undertaken in the *SLC Paper*.

[102] *AltaLRI Report*, [79].

[103] See *SALC Paper*, [4.10], referring particularly to the Ontario jurisprudence on class actions. Also: *ALRC Report*, [190] (re notice requirements applicable under FRCP 23(c)(2), for which now see FRCP 23(c)(2)(B)); [323] (re fluid-loss recovery).

[104] Eg, see: Debates over Group Litigation in Comparative Perspective (Geneva Switzerland, 21–22 Jul 2000) where papers were presented on perspectives from the US (DR Hensler), Europe (C Hodges), England (N Andrews), Canada (GD Watson), Australia (S Stuart-Clark and C Harris), Germany (H Koch) and Sweden (R Nordh), many of which are reproduced in: (2001) 11 *Duke J of Comp and Intl Law*. Also: Commonwealth Law Conference (Melbourne, Australia, Mar 2003), where papers were delivered on the class action regimes of Australia (eg, by M Wilcox (the Hon)) and Canada (G Mew and J Servinis); and the Supreme Court of Indonesia and Indonesian Centre for Environmental Law held the International Conference on Class Action Procedures and Their Implementation in the Indonesian Courts in Jakarta on 18–20 Feb, 2002.

[105] T Rowe, "Debates over Group Litigation in Comparative Perspective" (2001) 11 *Duke J of Comp and Intl Law* 157, 160. The usefulness of a comparison between the class action regimes of the US, Australia and Canada has also been noted in: EF Sherman, "Export/Import: American Civil Justice in a Global Context" (2002) 52 *DePaul L Rev* 401, 402; and in LS Mullenix, "Lessons from Abroad: Complexity and Convergence" (2001) 46 *Villanova L Rev* 1, 7.

[106] Eg: *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) (defendant unsuccessfully sought to rely on *Eisen v Carlisle* and the due process clause in the Fourteenth Amendment); *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453 (defendant referred to the certification requirements under FRCP 23).

[107] Eg: *Carom v Bre-X Minerals Ltd* (1998), 41 OR (3d) 780 (Gen Div) (representative plaintiff unsuccessfully sought to invoke the US fraud-on-the-market theory to raise a rebuttable presumption of reliance in favour of all class members).

are numerous examples of cross-fertilisation of ideas in the judgments, and recognition that another court's views may be helpful or of guidance. Of course, caution must inevitably be exercised, given the statutory drafting differences which exist across the jurisdictions, and these reservations about the degree of assistance that can be gained from US decisions has been judicially acknowledged in both Australia[108] and in Canada.[109]

However, the framework of class action *design* does not differ so very greatly from one focus jurisdiction to another. There are several common elements between the procedures; and operative problems in using the procedure tend to recur with uncanny frequency, regardless of the jurisdiction. For these reasons, many analyses undertaken by judges in the United States are, at the very least, of interest—as both Canadian[110] and Australian[111] judges have been prepared to acknowledge. To provide some specific examples of this cross-fertilisation: American jurisprudence has been considered by Canadian courts with respect to several matters arising from certification,[112] mass torts,[113] where there are competing class actions and therefore competing law firms seeking carriage of the

[108] Eg: *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 (Full FCA) 165, citing trial judge Spender J ("There is no requirement in Part IVA of the FCA Act similar to r 23(b)(3) of the United States Federal Rules of Civil Procedure, namely, that the common issues of fact or law predominate. Part IVA is meant to be a flexible procedure to advance the interests of justice"); *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [94] ("The wording of that Rule is substantially different to that of s33C(1) of the Federal Court of Australia Act").

[109] *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 360, [66] ("I believe that the assistance one can gain from US decisions on certification in determining whether certification should be granted under our Act is limited, given the very much different tests involved and also the fact that state laws on product liability can vary greatly"). Also: *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [67]; *Bunn v Ribcor Holdings Inc* (1998), 38 CLR (2d) 291 (Gen Div) [21]; *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [28].

[110] *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [136]; *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 360 (SCJ) [66] ("there are still some common elements between the procedures such that analyses undertaken by judges in the United States, as with similar analyses undertaken by judges in other Provinces, can nonetheless provide some guidance on the subject"); *Caputo v Imperial Tobacco Ltd* (1997), 148 DLR (4th) 566, 34 OR (3d) 314 (Gen Div) [12] ("Although the criteria for certification under [FRCP 23] differ from those in the Ontario Act, the American experience can, nevertheless, provide guidance. American jurisprudence has to date been considered by the Ontario courts in several class proceedings").

[111] *King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd)* (2002) 121 FCR 480, [46] ("I should mention that this Court has had recourse to American authorities concerning class actions in giving content to Pt IVA: see eg *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 especially at [19], notwithstanding significant differences between the scheme in that Part and methods of litigating group or class issues in the United States").

[112] Eg, in Ont: *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct); *Peppiatt v Royal Bank of Canada* (1996), 27 OR (3d) 462 (SCJ); *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [148]; *Williams v Mutual Life Ass Co of Canada* (2000), 51 OR (3d) 54 (SCJ) [51]–[53]. Eg, in BC: *Tiemstra v Insurance Corp of BC* (1998), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA) [16].

[113] Eg, in Ont: *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [136]; *Sutherland v Canadian Red Cross Soc* (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div) [23]–[25]. Eg, in BC: *Harrington v Dow Corning Corp* (1996), 22 BCLR (3d) 97 (BC SC) [18].

action,[114] the use of bar orders[115] in complex litigation,[116] and reimbursement for the representative plaintiff's time and effort;[117] and under the Australian federal regime, in respect of settlement with individual class members,[118] of the fairness of the settlement proposal generally,[119] and of the *res judicata* effect of a class action judgment.[120] Additionally, the newer regimes in Canada and Australia have been willing to draw upon or make reference to each other's jurisprudence on some issues.[121]

The need for a fulsome comparative study of class action design and implementation is also considered to be warranted and useful for those jurisdictions in which no class action regime presently exists. For example, the statutory regimes of Ontario and Australia had only been operative for a few years when Lord Woolf conducted his far-reaching review of civil procedure within the jurisdiction of England and Wales. Consequently and understandably, the law committee[122] whose work on multi-party actions Lord Woolf referred to in his Final Report[123] were not able to examine extensively the focus jurisdictions' regimes, nor was the Woolf Enquiry able to do so.[124] Since then, the case law from the post-FRCP 23 jurisdictions[125] has become more extensive and well-defined, thereby allowing useful comparisons to be made. One English commentator also notes that the emphasis in the multi-party context in England has tended to be placed upon litigation expenses rather than prin-

[114] No class action regime expressly deals with what is to occur if several firms of lawyers, on behalf of different representative plaintiffs, commence class actions covering the same claim; the US courts have raised various relevant factors in determining who should be appointed as solicitor of record in a class action: but see generally *Newberg* (3rd) § 9.35 pp 9-96–9-97, cited in *VitaPharm Canada Ltd v F Hoffman-LaRoche Ltd* (2000), 4 CPC (5th) 169 (SCJ) [49] (6 class actions on foot); also *Newberg* (4th) § 9.35 p 388.

[115] Where a bar order is granted, a partial settlement bars the non-settling defendants from asserting cross-claims for contribution against the settling defendant.

[116] *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (SCJ) [38]–[40].

[117] *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) [27].

[118] *King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd)* (2002) 121 FCR 480, [46] (referring to *Re General Motors Corp Engine Interchange Litig*, 594 F 2d 1106 (7th Cir 1979)).

[119] *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, [19] (referring to *In re General Motors Corp Pick-Up Truck Fuel Tank Prods Liab Litig*, 55 F 3d 768, 785 (3d Cir 1995) and *County of Suffolk v Long Island Lighting Co*, 907 F 2d 1295, 1323 (2nd Cir 1990)).

[120] *Zhang de Yong v Minister of Immigration, Local Govt and Ethnic Affairs* (1993) 45 FCR 384, [32].

[121] Eg: *Ragoonanan Estate v Imperial Tobacco Canada Ltd* (2000), 51 OR (3d) 603 (SCJ) [31] (referring to the standing requirements of a representative plaintiff under Pt IVA, s 33C(1)(a), as interpreted in *Philip Morris (Aust) Ltd v Nixon*); *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219 (SCJ) [93] (referring to jurisdictional issues, as dealt with in *Femcare Ltd v Bright* [2000] FCA 512).

[122] Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995).

[123] *Final Woolf Report*, ch 17, [4].

[124] Reference is made in *Final Woolf Report*, ch 17, [5] to a study of overseas regimes, with particular reference to the US.

[125] Throughout this book, the term "post-FRCP regimes" etc will refer to the Ontario, British Columbia and Australian regimes.

ciples,[126] and hence, a comparative analysis would appear to be useful for that reason too. Moreover, in 2001, a reform proposal was put forward by the Lord Chancellor's Department (LCD),[127] in which responses were sought and provided upon "the desirability of introducing a generic procedure for representative actions into civil law in England and Wales".[128] For the purposes of the proposal, the term "representative claims" was defined as

> claims made by, or defended by, a representative or representative organisation on behalf of a group of individuals who may, or may not, be individually named in a situation where an individual would have a direct cause of action.[129]

Given the breadth of this definition, the range of responses to the proposal (which has not to date been pursued by the LCD[130]) was very mixed.[131] Interestingly, none of the responses reproduced in the Consultation Response, nor the LCD's own commentary in that paper, mentioned the regimes of Australia or Ontario. Only the US schema received specific mention.[132] Yet, after a decade, a very useful body of jurisprudence has developed elsewhere, a consideration of which appears to be vital, should future law reform be envisaged for England or for other jurisdictions.

To sum up, a comparative analysis of the focus jurisdictions' class action regimes is viewed as having particular utility for four reasons: those responsible for proposing and drafting class action reform have plainly considered comparative analysis to be an important aspect of their recommendations; those responsible for implementing class action regimes have manifested a willingness to consider ideas from elsewhere; by focusing upon the class action device itself and the features that are capable of transplant, rather than the many accoutrements that may (depending upon the jurisdiction) accompany its use, the many different ideas permeating class actions jurisprudence can be drawn upon

[126] M Mildred, "Group Actions" in GG Howells, *The Law of Product Liability* (London, Butterworths, 2001) 375, 379 ("The treatment of the jurisprudence in each of these foreign jurisdictions outweighs in detail and volume of reported cases that in our domestic jurisdiction. It is predominantly from those jurisdictions that principles emerge: in the domestic jurisdiction considerations of litigation expense appear to predominate"). See also: JG Fleming, "Mass Torts" (1994) 42 *American J of Comparative Law* 507, 521 ("the vexing question of costs . . . has so bewitched English collective proceedings"). For a detailed discussion of costs in English group litigation, see, M Mildred, "Cost-sharing in Group Litigation: Preserving Access to Justice" (2002) 65 *Modern L Rev* 597.

[127] LCD, *Representative Claims: Proposed New Procedures: Consultation Paper* (Feb 2001). M Mildred, "Group Actions", 378, notes that debate in England has been largely driven by practitioners, legislative committees, and the LCD, and (n 126 above) that the Law Commission has declined to consider reform of multi-party procedures.

[128] LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (Apr 2002) [4].

[129] LCD, *Consultation Paper*, [13].

[130] *Consultation Response*, "Conclusions" [10].

[131] Some respondents dealt with the concept of the ideological representative plaintiff which the abovementioned definition sought to include, whilst other respondents considered the desirability of an opt-out class action regime which is also potentially encompassed by the definition.

[132] See, eg, the responses from Lovells Solicitors, C Hodges, and J Stein, all reproduced in [4].

for the enhancement of class actions design and implementation elsewhere; and a comparative study serves to illustrate that there are, quite apart from the US federal rule, a number of *other* effective class action regimes operative in the common law legal systems now whose experiences are also valuable and interesting.

D WHAT THIS BOOK COVERS

The overriding purpose of this book is to compare those aspects of the class action device, as it operates across the focus jurisdictions, where a transplant of the feature from one jurisdiction could be feasible. The focus is upon the class action device itself, and its "black letter law" components.[133] Certainly, there are several significant differences between the jurisdictions in respect of the substantially different practices and rules of civil procedure[134] or substantive laws governing general legal liability,[135] but these differences are quite distinct from the *substantive class action law* as it applies from one jurisdiction to another. As Gidi has noted:

> Importing class action law does not necessarily mean importing American-style litigation. The transplant can be "surgically controlled." There is no reason to believe that the whole "Yankee package" would invade a foreign system through the window opened by the class action device. Contrary to the traditional myth, class actions can succeed in the absence of discovery, contingent fees, the American cost rule, an entrepreneurial bar, and powerful and active judges, at least as effectively as can traditional individual litigation. It is revealing that the American Rule 23 does not even refer to discovery, attorney's fees, the right to jury trial, an entrepreneurial bar, or treble or punitive damages.[136]

[133] There is little, if any, empirical research to draw upon from either Australia or Canada in respect of class action litigation. The most cited such study in the US is the excellent work of DR Hensler, NM Pace, B Dombey-Moore, E Giddens, J Gross, EK Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, RAND Institute for Civil Justice, 2000). There is, as yet, no equivalent study available in the other focus jurisdictions, a gap which other commentators have lamented: P Cashman, "Consumers and Class Actions" (2001) *U Western Sydney L Rev* 9, 21; JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, [33].

[134] Eg, these aspects of practice in US federal courts are oft-cited as not being features of other common law jurisdictions: plaintiff-favouring rules on contingency fees; the American costs rule; civil jury trials to determine class actions: *ManLRC Report*, 13; JA Campion and VA Stewart, "Class Actions: Procedure and Strategy" (1997) 19 *Advocates' Q* 20, 58.

[135] Eg: note the various strict liability tort doctrines; extensive frequency and size of exemplary damages awards, applicable in the US compared to Australia: *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [94] (Wilcox J). Also: *Nantais v Telectronics Proprietary (Canada) Ltd* (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div) [45] (Brockenshire J) ("I recognize the inherent dangers of lifting statements from US decisions out of the US matrix, where the underlying assumption could be much different from ours"); *ManLRC Report, ibid*.

[136] A Gidi, "Class Actions in Brazil—A Model for Civil Law Countries" (2003) 51 *American J of Comparative Law* 311, 322–23, also making points similar to text accompanying nn 134–35.

Part I introduces the class action concept, by exploring the features which are commonly, but not universally, associated with this procedural device (chapter 2), and by describing the common and non-common objectives which underlie the use of the device across the focus jurisdictions (chapter 3).

One notable exception to those common law jurisdictions which have embraced a formal class action regime is the jurisdiction of England and Wales. The reasons as to why law reformers in England have rejected the class action concept, the ongoing impact of the English representative rule in class action design in the focus jurisdictions, together with an analysis of the group litigation order which facilitates multi-party litigation under the English Civil Procedure Rules, are examined in chapter 4.

Part II focuses upon the criteria which govern the commencement of a class action. Academic literature (including law reform commentary[137]) has identified that the criteria upon which an action may qualify as suitable "constitute[s] one of the most important and distinctive features of rules regulating a class action procedure."[138] The criteria governing commencement can be conveniently divided into four categories: suitability criteria; commonality criteria; superiority criteria; and representative criteria. This division facilitates a convenient structure for detailed analysis. Accordingly, chapters 5–8 address these respective categories.

Chapter 5—which discusses suitability criteria—canvasses the various options for prescribing minimum class size (numerosity), and examines a criterion of preliminary merits assessment in the class action context, together with the conundrum of class litigation against multiple defendants. Chapter 6—which discusses commonality criteria—addresses the appropriate nexus between class members' claims, and canvasses how to prove a common question of law or fact which the class action regimes unanimously require, and how substantial that common issue must be. Chapter 7—which discusses superiority criteria—examines whether class proceedings are preferable to alternative procedures, and discusses whether a class action is likely to promote the objectives of judicial economy, access to justice, and behaviour modification. Chapter 8—which discusses representative criteria—analyses the requirements of adequacy and typicality, and considers whether, and to what extent, conflicts of interest may arise between the representative plaintiff and class members.

Part III then proceeds to study key aspects of the conduct of a class action. Interesting comparisons may be drawn on several important aspects of statutory drafting and judicial interpretation between Canada, Australia and the US.

Chapter 9 examines the most important factors influencing the formation of the class membership (over and above the choice to elect an opt-out model). The

[137] Several reports have been prepared by international law reform commissions (see Bibliography pp 508–10), and reference will be made to these as appropriate, to draw upon their insights.

[138] Eg: *SLC Report*, [4.28]; also: "Multi-Party Actions: Court Proceedings and Funding" (1995) *Commonwealth L Bulletin* 174, 175, which summarises the *SLC Paper*. The division undertaken in Pt II of the book broadly adopts the categorisation of this Commission, but with some substantial differences.

chapter discusses how the class has been defined, what constitutes sufficient notice when advising class members of the litigation, and how and when to close the class in order to provide finality to the litigation. Chapter 10 focuses upon two potential hurdles to the conduct of a class action which have arisen repeatedly in the case law of some or all of the focus jurisdictions, viz, security for costs applications by the defendant against the representative plaintiff, and the impact of limitation periods upon class litigation. Chapter 11 discusses certain aspects pertinent to monetary relief, viz, the requirement for judicial approval of settlement agreements, and the criteria governing that assessment, together with the assessment and distribution of monetary relief for the class. Chapter 12 considers how the issue of costs and funding has been disparately handled, by reference to particular provisions which seek to protect or ameliorate financial burdens upon the representative plaintiff.

2

Features of Modern Class Action Regimes

A INTRODUCTION

THE DEFINITION OF a class action noted in the previous chapter,[1] whilst a generic description of the device, could not be expected to describe all of the features, both those commonly-found and those uniquely exceptional, which exist across the jurisdictions. For example, whilst class actions are usually subject to certification by a court according to a statutory set of criteria, they do not need to be, Australia's regime being the notable exception. Given this lack of uniformity, this chapter will compare and contrast the particular features of the focus jurisdictions' class action regimes with respect to how the proceedings are commenced, by certification or otherwise (section B); the use of the opt-out and other models in determining class membership (section C); the conundrum as to whether legislation or regulation ought to be invoked—which essentially turns upon the question of whether class actions modify the substantive law (section D); and the degree of tolerance for the defendant class action within the regimes (section E).

B CERTIFICATION

Certification, the preliminary hearing by which the class action can only proceed if and when the court condones the validity of that form of suit, is required under the regimes of Ontario[2] and the US,[3] as well as in numerous

[1] See p 3.

[2] CPA (Ont), ss 2, 5. Also: CPA (BC), s 2.

[3] FRCP 23(c)(1). The timing of certification decisions was the subject of amendment to FRCP 23, effective 1 December 2003. Conditional certifications are eliminated (previously, courts could make a class certification subject to alteration or amendment before the case was decided on the merits), and the court must now "at an early practicable time" determine whether to certify the class. This replaces the former wording, "as soon as practicable", which was criticised because it placed pressure on courts to decide certification motions without the benefit of sufficient information to make an informed decision. By virtue of the 2003 amendments, a court that is not satisfied that the requirements of Rule 23 have been met should refuse certification. The timing and content of the certification motion will not be further considered.

other jurisdictions in which class actions operate.[4] The Australian schema operates entirely differently, in that an action commenced as a class action under Pt IVA proceeds unless a judge orders otherwise. However, as with so many aspects of class action procedure, the question of whether certification ought to be mandated is one upon which views are polarised.

The primary justifications for certification are usually described in terms of protection for absent class members and for the defendant, as the following statement of the Canadian Federal Court Rules Committee typifies:

> [A] class proceedings cannot proceed as of right. . . . Since members of the class who are not active in the litigation will have their rights determined by the class proceeding, the court must decide whether the litigation is appropriate for class treatment, including that the absent members' interest will be adequately represented in the litigation. The certification motion also provides [the defendant] opposing certification to demonstrate why the litigation should not go forward as a class proceeding.[5]

The OLRC also suggested[6] that class actions are sufficiently different from unitary litigation to require a "special judicial filter to weed out" the inappropriate cases.

Other arguments in favour of certification contend that: it acts "as a counterbalance to other reforms that might be seen as favourable to class members (such as special costs rules)";[7] if a court is going to be requested to "effectively certify *ex post*" after the opposing party files a motion to strike out in any event, then it is better that the appropriateness of the class action be determined by certification;[8] and that, without judicial involvement by means of a special hearing at the outset, the risks of inadequate representation both by the representative parties and by class lawyers, possible intra-class conflicts of interest, and "sloppy class definition [which has] *res judicata* consequences", may manifest.[9]

The unusual Australian approach (which has been followed in Sweden[10] and which reflects the much earlier position under the English representative rule,[11]

[4] Eg: CCP (Que), arts 1002–3; all Canadian provincial regimes of Manitoba, Labrador, Saskatchewan, St John's and Labrador, Newfoundland, and Alberta; Rules of the Supreme Court of South Australia, r 34.02. The schema contained in Civil Procedure Rules (UK) 19.III governing group litigation orders also requires initial court screening: CPR 19.11(1); PD 19B, [3.3].

[5] *FCCRC Paper*, 38–39. See also: *SLC Report*, [4.18]; *ALRC Report*, [145]; *ManLRC Report*, 42. Additionally, *Robertson v Thomson Corp* (1999), 43 OR (3d) 389 (Gen Div) [4] summarises the argument thus: "certification motion is intended to screen claims that are not appropriate for class action treatment, at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation".

[6] *OLRC Report*, 281.

[7] *SALC Report*, [5.5.5].

[8] *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534 (SCC) [33] (writing about the Alberta Rules of Court, which do not require certification).

[9] EH Cooper, "Class Action Advice in the Form of Questions" (2001) 11 *Duke J of Comp and Intl Law* 215, 231.

[10] See Group Proceedings Act 2002, s 9. An action for a group is instituted in accordance with the Code of Judicial Procedure's rules concerning applications to commence actions, and no special leave to commence proceedings is required.

[11] A proceeding could continue in representative form "unless the Court otherwise orders": RSC Ord 15, r 12(1).

in which no special hearing to authorise the commencement of the proceeding was required) followed the ALRC's strong recommendation against certification.[12] This view was predicated upon the argument that "[i]n class actions in the United States and Quebec, the preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the court's discretion is involved, appeals are frequent, leading to delays and further expense."[13] The Commission considered, provided that the defendant had a right to dispute the validity of the procedure at any time, and that adequate opt-out notice was legislated for, that the interests of the parties were sufficiently protected, and that in class litigation, as in any other, the onus should be upon the defendant to prove that the formal steps for instituting an action had not been complied with (rather than upon the plaintiff to prove that they were). It concluded that there was "no value in imposing an additional costly procedure, with a strong risk of appeals involving further delay and expense, which will not achieve the aims of protecting parties or ensuring efficiency."[14]

Certification is often cited as "the chief battle of the litigation", which defendants will fight hard to avoid, but on the other hand, it is also apparent that certification is an extremely textured and nuanced process.[15] Quebec's experience, as the longest-standing of the Canadian regimes, is interesting. Some earlier statistics indicated[16] that certification was more likely to be refused than granted, but that if the action was certified, judgments were more often in favour of the class. More recent computations indicate that, generally, Canadian courts have tended towards certification,[17] and that, following certification, it is rare indeed for a common issues trial to ensue. This tendency toward settlement provides a further motive for a defendant to vehemently oppose certification.

A further useful snapshot of the certification process was provided by the RAND Institute's study of contemporary litigation practices in US damage class

[12] *ALRC Report*, [146]. Or, in the words of AJ Roman, "Class Actions in Canada: The Path To Reform?" (1987) *Advocates' Society J* 28, 31, "The purpose of certification appears to be to force the plaintiff to commence the action on bended knee; before the case even begins, he or she is put on the defensive. No other type of plaintiff is required to go through this kind of torture test to obtain a day in court".

[13] *ALRC Report*, [146].

[14] *Ibid*, [147].

[15] All phrases used to describe certification in: *ManLRC Report*, 42; GD Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 279; HT Strosberg, "The Class Struggle Continues: Chapter II" (Practical Strategies for Advocates IX The Advocates Society (Ontario) 4–5 Feb 2000) [13]; EF Sherman, "Export/Import: American Civil Justice in a Global Context" (2002) 52 *DePaul L Rev* 401, 430; *Rand Executive Summary*, 14.

[16] *Fonds d'Aide Aux Recours Collectif Rapport Annuel* (1997–1998) Tables VI and VII, as cited in: *FCCRC Paper*, 15–18, and fn 22. These statistics, from 1983–97, represent a reasonable batch of data. Also: Watson, *ibid*, 275.

[17] See the computations by JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, fn 78 ("The percentages of certified cases (some of which may have been on consent) were as follows: Quebec, 59%; Ontario, 78%; British Columbia, 67%"), [25].

actions.[18] The Institute interviewed practitioners on both plaintiff and defence sides of litigation, and conducted case studies of ten resolved class action lawsuits. Of the certification process, the authors stated:

> Defendants' responses to the class actions varied from case to case. In seven of the ten cases, they opposed class litigation vigorously, not only seeking to have the case dismissed on substantive legal grounds but also contesting certification, sometimes all the way up to the highest appellate courts. Once they lost the initial battle(s) over certification, however, these defendants joined with plaintiff attorneys in pursuing certification of a settlement class. In the remaining three cases, from the moment of filing, defendants seemed about as eager as plaintiff attorneys to settle the litigation by means of a class action, often after extensive individual litigation, previous class actions, or both.[19]

Canadian academic commentary supports this view that, when the initial certification battle has been lost, defendants may welcome the effects of certification, as a means of bringing finality to the dispute.[20]

The rejection of a certification requirement by the Australian law reformers and legislature warrants three critical comments. First and notably, most law reformers who have been charged with the responsibility of reviewing and proposing new class action regimes since the enactment of Australia's Pt IVA federal schema have been unwilling to implement a regime without some means of preliminary judicial authorisation. With rare exception,[21] the majority of law agencies around the world have preferred the certification approach.[22] The court's controlling of such actions by scrutinising their eligibility for class action treatment at the earliest possible stage has been considered by these agencies to be a most attractive feature.[23] Of course, judicial scrutiny of the class action is manifested under Pt IVA in a variety of other ways—for example, approving the opt-out notice to absent class members,[24] approving settlement of the action,[25] being able to substitute an inadequate representative with another class member

[18] See *Rand Executive Summary*, 14–15. As described fully in *Rand Institute Report*, 5, in 1996, the Rand Institute embarked on a study of damage class action—a study which has been perhaps the most-cited empirical research on class action practice to date. For selection of the cases studied, see ch 1, "Attention: All Persons and Entities"; ch 4, "Into the Fish Bowl".

[19] Noted by DR Hensler, "Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation" (2001) 11 *Duke J of Comp and Intl Law* 179, 197. See also the *Rand Institute Report*, 407–10.

[20] JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, [20] (noting that "in the Hep C litigation, the federal, provincial and territorial government defendants made no overtures toward compensating the victims of tainted blood products until class actions had been certified in British Columbia and Quebec and there was potential for certification of a national class as a result of the Ontario proceedings").

[21] Eg: *VLRAC Report*, [6.13] and recommendation 3.

[22] *SLC Paper*, [7.4]–[7.13] and *SLC Report*, [4.15]–[4.19]; *SALC Paper* [6.16]–[6.18] and *SALC Report*, [5.5.10]; *ManLRC Report*, 43; *Final Woolf Report*, ch 17, [16], [24]–[26]; *AltaLRI Report*, [186].

[23] See especially, *SLC Report*, [4.18].

[24] FCA (Aus), ss 33X, 33Y.

[25] FCA (Aus), s 33V(1).

as representative,[26] and approving the withdrawal of a representative.[27] Indeed, a series of interlocutory applications at the commencement of the proceedings usually determines whether the proceedings have been properly commenced under Pt IVA, acting as "a de facto certification process" in any event.[28] However, the absence of certification in Australia's schema has drawn one commentator to note, "[i]t is difficult to believe . . . that a group action can be maintained on any basis other than pure opt-in without some measure of court control."[29]

Secondly, the claim by the ALRC that, absent a certification procedure, delays and expense would be saved, must be seriously questioned in light of the chagrin which the Australian judiciary has displayed towards the conduct of litigation under Pt IVA. In an observation that has since been cited with approval,[30] Finkelstein J despaired in the long-running class litigation concerning allegedly defective sterilisation procedures in *Bright v Femcare Ltd*:[31]

> There is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications, including interlocutory appeals, that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of $500,000. I say nothing about the respondents' costs. This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible. One possible approach in these types of cases (that is, product liability or mass torts claims) is to bring the action on for speedy determination. By giving appropriate directions the court can ensure that the parties get on with the litigation and do not become bogged down in what are often academic or sterile arguments about pleadings, particulars, practices and procedures. What I say should not be taken as a particular criticism of the present respondents. But it is not unknown for respondents in class actions to do whatever is necessary to avoid a trial, usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful. I appreciate that there are times when the cause for interlocutory proceedings lies with the applicants, often because their pleadings are less than perfect. But even in that event, appropriate directions can remedy the position so that the litigation can be brought on quickly.

It would appear, then, that the streamlined process that was hoped for by the ALRC, and the avoidance of costs and delays, has not necessarily eventuated. It

[26] FCA (Aus), s 33T.

[27] FCA (Aus), s 33W.

[28] V Morabito, "Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States" (2003) 38 *Texas Intl LJ* 663, fn 195; and "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295, 297–98; P Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) 31 *Common L World Rev* 123, 139.

[29] EH Cooper, "Class Action Advice in the Form of Questions" (2001) 11 *Duke J of Comp and Intl Law* 215, 231. Cf: GD Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 286.

[30] *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [58].

[31] (2002) 195 ALR 574 (Full FCA) [160].

is arguable that one preliminary hearing to determine whether the formal requirements for a class action have been complied with would do away with some of the many interlocutory applications which are manifesting under Pt IVA. It would also potentially avoid the possibility of a purported class action coming on for trial when significant procedural steps in the conduct of the action which were legislatively envisaged for the absent class members had not occurred (especially a problem when the defendant does not actively defend the case).[32]

As a final comment in respect of the Australian approach, there is tension between two of the provisions under Pt IVA which are relevant to whether the proceedings are appropriate for class action treatment. Proceedings under Pt IVA are validly commenced if the legislative "threshold criteria"[33] in s 33C(1) are met (ie, numerosity and commonality requirements). However, s 33N(1) further allows class proceedings to be discontinued by the court for reasons which emulate, to a great extent, the certification criteria pertaining to superiority which exist under the regimes of the other focus jurisdictions. Applications to halt class actions under Pt IVA are commonly based upon two joint lines of attack: that the commencement criteria in s 33C(1) were not satisfied, and that the proceedings should be immediately terminated under s 33N(1).[34] In that respect, the powers under s 33N have been seen as "a substitute for certification,"[35] an observation with which this author concurs. Case law confirms that the court may also revisit whether the threshold criteria of s 33C(1) are met, when deciding an application under s 33N as to whether the proceedings should continue as a class action.[36] However, this raises an incongruity, as has been judicially pointed out. The commencement criteria in s 33C are mandatory—but a court can exercise its discretion under s 33N(1)(d) to discontinue proceedings if it appears appropriate to do so. One of those possible grounds of inappropriateness is that the threshold criteria were not met. The matter is then properly not one of the court's discretion under s 33N at all, but a failure to meet the legislatively-imposed mandatory requirements of s 33C.[37] In other words, an *ex ante* mandate and an *ex post* discretion are intertwined

[32] A problem that manifested in *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244, 253.

[33] The term used in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) 267 to describe the three requirements of s 33C; also: *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 61, [16]; and *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) 514 (Sackville J).

[34] J Kellam and S Stuart-Clark, "Multi-Party Actions in Australia" in C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [15.51]. As the court confronted in *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA), applications to discontinue under s 33N may be brought very early in the proceedings, and at the same time as the application that s 33C was not complied with.

[35] S Stuart-Clark and C Harris, "Multi-Plaintiff Litigation in Australia: A Comparative Perspective" (2001) 11 *Duke J of Comp and Intl Law* 289, 303.

[36] Eg: *Soverina Pty Ltd v Natwest Aust Bank Ltd* (1993) 40 FCR 452 (proceedings discontinued because of doubt about existence of any common issues); *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 533–34 (proceedings discontinued, inter alia, because of lack of seven persons with claims).

[37] As described in: *Huang v Minister of State for Immigration and Multicultural Affairs* (1997) 50 ALD 134 (FCA) 137; *Vasram v AMP Life Ltd* [2000] FCA 1676, [9].

unsatisfactorily on the face of the statute. The pro-certification regimes effectively avoid any such incongruity by providing for a series of criteria, with both mandatory and discretionary elements, that a court must assess before authorising the action to proceed. Thus, having regard to the past decade of Pt IVA experience, it is somewhat doubtful whether the "no certification" legislative experiment has been a complete success.

C THE OPTING-OUT APPROACH

The method of determining class membership, and who is to be bound by the class action judgment, is the most crucial, and possibly the "most controversial",[38] issue in the design of a class action regime. Essentially, it is a question of policy as to whether a person's legal rights should be determined without his or her express consent and mandate to participate in the litigation. Each of the focus jurisdiction regimes under consideration has implemented the opt-out model for their damages class actions. However, it should not be inferred from that show of uniformity that the choice is all one-sided. Indeed, a number of varying approaches have been preferred by those charged with the design of a class action regime, and these are discussed in the following section.

1. Other Options for Class Membership Formulation

The alternative procedures for the determination of class membership include: to enact by statute either an opt-in or opt-out approach; to statutorily dictate compulsory membership with no rights to opt out at all; to statutorily prescribe one approach or the other but then permit the courts to change the regime for a particular case at their discretion; or to provide by statute that the approach by which to determine class membership should be left entirely to the court's discretion.

Opt-in regimes. Under an opt-in regime, a potential class member must affirmatively opt into the class proceeding by taking some prescribed step within a stipulated period in order to become a member of the class, to be bound by judgment on the common questions or by settlement, and as a prerequisite to receiving any benefits from the action. For those who have advocated such a

[38] The OLRC made this express observation: *OLRC Report*, 467, agreed with in *SLC Report*, [4.48] and *ManLRC Report*, 63; and the Alberta Law Reform Institute, *AltaLRI Report*, [236], despaired that the issue "produced intense, protracted and essentially unresolved debate" among its members. After long debate, the ALRC chose the opt-out approach, but Baxt said: "[i]t was not convincing in its support of the opt-out system": B Baxt, "Class Action Legislation—A Mirage for the Consumer?" (1992) 66 *Aust LJ* 223, 223.

regime,[39] the main concern has been "the preservation of the liberty of the individual to participate in litigation only if he or she wishes to do so." Members of the community who desire not to litigate should not find themselves "roped in" to a class action as a result of mere silence, with the attendant disadvantages which litigation involves. Moreover, opting in reduces the chances of the litigation becoming unmanageable, it helps the defendant ascertain the size of the cadre of potential plaintiffs, and "all who stand to benefit will have shown at least some minimal interest in the litigation" by affirmative action. After all, class members usually must take some step to recover—with an opt-in regime (it is argued by the proponents of the approach), this step occurs at the beginning rather than at the conclusion when judgment or settlement has occurred. Finally, opting in is consistent with the usual procedures for commencing a law suit; and if a person does not opt in due to a conscious decision or ignorance, that person can bring his or her own action separately.

However, in spite of these positive arguments, the reality is that an opt-in regime has not often been statutorily implemented (although Sweden's group litigation regime is a notable exception[40]). An opt-in arrangement typically requires that class members, as well as the representative plaintiff, undertake some positive step to be identified at the outset in order to be bound. Both the present group litigation order in England and Wales,[41] and those class actions under the former FRCP 23,[42] illustrate schemas which are not representative class actions in the true sense, as they require that class members actively participate in the action as *parties*, and in that sense, they have been judicially[43] and academically[44] described as nothing more than "permissive joinder devices". In a true class action, the absent class members are non-parties whose interests are represented by the representative plaintiff.

In addition, on several occasions where the opt-in approach has been enacted, it has been less than endorsed. For example, scenarios have occurred whereby the regime has been rarely used by litigants when an opt-out regime is also avail-

[39] These arguments are derived from comprehensive discussion in: *SLC Report*, [4.51], [4.54], [4.55] and recommendations 13 and 14; and see earlier provisional preference for an opt-in regime: *SLC Paper*, [7.31]. Also, derived from the lengthy discussion of the merits and demerits of the opt-in approach in: *AltaLRI Report*, [239]–[240] (which eventually favoured the opt-out approach); and from V Morabito, "Class Actions: The Right to Opt Out" (1994) 19 *Melbourne U L Rev* 615, Pt III.

[40] Group Proceedings Act 2002, s 14.

[41] Contained in CPR 19.III and PD 19B.

[42] Under former FRCP 23, in those class actions seeking damages, the so-called "spurious" class actions, which were roughly analogous to the existing FRCP 23(b)(3) damages class actions, a judgment only bound those class members who actively participated in the action as parties, either as plaintiffs or intervenors.

[43] The spurious class action was "considered merely a permissive joinder device": *Eisen v Carlisle and Jacquelin*, 41 FRD 147, 149 (SD NY 1966).

[44] *ManLRC Report*, 64; *OLRC Report*, 470; A Gidi, "Class Actions in Brazil—A Model for Civil Law Countries" (2003) 51 *American J of Comp Law* 311, fn 244; RO Faulk, "The International Class Action: Comments On The Geneva Group Action Debates" (Gardere, Wynne, Sewell & Riggs, 20 Oct 2000); *Newberg* (4th) § 1.9 p 33.

able to them;[45] or the opt-in regime has ultimately been replaced by an opt-out regime;[46] or the opt-in approach has been employed as the exceptional rather than the usual scenario under the class action regime.[47]

Compulsory class membership. Class membership is, on the face of the rule, mandatory under the FRCP 23 regime in certain kinds of proceedings where, generally speaking, damages are not claimed, that is, under (b)(1) and (b)(2) classes. It will be recalled that, respectively, these classes apply where there is a limited fund[48] for recovery by the plaintiff class,[49] or where the representative plaintiff seeks final injunctive relief or corresponding declaratory relief for the entire class.[50] No absolute right of exclusion is expressly given to absent class members in these categories. When FRCP 23 was revised in 1966, it was considered that the class in these types of actions would generally be "more cohesive", and that judgment in an action brought by the representative necessarily would impact upon the class members,[51] lessening the need for opt-out rights. Under

[45] Eg: Trade Practices Act 1974 (Aus), s 87(1B), which provides that where in either criminal or injunction proceedings instituted by the ACCC, a person is found to have engaged in conduct in breach of the consumer protection provisions, the ACCC may make application for compensation orders on behalf of persons identified in the application, provided those persons have given written consent; described as "far more burdensome" for the ACCC to instigate class actions than Pt IVA: C Wood, "Class Actions and the Internet" (1998) 21 *U of New South Wales LJ* 632, 633; "too narrow in its approach": Note, "Class Actions—Opt In or Opt Out?" (1988) *Reform* 77, 78; and where "many potential claimants and their identities are unknown, . . . almost unworkable": A Asher, "Representative Actions and the Trade Practices Commission" (1993) 4 *Aust Product Liability Reporter* 94, 94.

[46] Eg: Supreme Court Act 1986 (Vic), ss 34, 35 (opt-in approach where > 3 people had same right of relief against same defendant; revoked in 2000 and replaced by new Pt 4A, in almost identical terms as the opt-out Pt IVA regime), with opt-in problems of ss 34, 35, oft-discussed, eg: *Reform* (*ibid*); D Nelthorpe, "Consumer Trust Funds" (1988) 13 *Legal Services Bulletin* 29, V Morabito, "Taxpayers and Class Actions" (1997) 20 *UNSWLJ* 372, 375–76, and also, 'Class Actions—The Right to 'Opt Out'" (1994) *Melbourne U L Rev* 615, 633.

[47] Eg: those who are not BC residents are required to opt in to a class action under CPA (BC), s 16(2), whereas in the usual course of class member residents, an opt-out schema is adopted: s 16(1). The philosophy behind this differentiation was that opting-in "had the advantage of indicating that the non-resident accept[ed] the jurisdiction of the court such that they would be precluded by *res judicata* from later suing or benefiting from a suit brought in another jurisdiction": *AltaLRI Report*, [232]; *AltaLRI Memorandum*, [75], cited with approval in *Harrington v Dow Corning Corp* (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA) [74].

[48] Eg: claims limited by a contractual ceiling (such as insurance payouts), and claims against an admiralty fund or bankruptcy fund.

[49] FRCP 23(b)(1)(B).

[50] FRCP 23(b)(2).

[51] See *OLRC Report*, 472–73, citing also Note, "Developments in the Law—Class Actions" (1976) 89 *Harvard LR* 1318, 1487: "the grant of opt-out rights makes sense only if the individuals removed from the class can truly be insulated from the effect of the class judgment. Thus, the distinction rule 23 draws between (b)(1) and (b)(2) classes, whose members have no right to exclude themselves, and (b)(3) classes, whose members may opt out, has at least some practical justification. Most (b)(1) and (b)(2) classes are suing for relief which cannot be readily limited to only some class members. . . . Rule(23)(b)(3) class suits . . . are generally brought to recover money damages, relief which may be awarded in a manner which distinguishes among individual class members, and which therefore may be shaped to respect the rights of individuals who have excluded themselves from a lawsuit."

these categories, it was considered that "individual choice should be subordinated to the interests of the class."[52] A further reason for absence of express opt-out rights in these categories of class action may be that it is often difficult to identify all class members, thus rendering delivery of adequate opt-out notice very problematical.

Legislatively dictate approach, but with judicial discretion to alter. It has been academically[53] and judicially[54] noted that courts presiding over (b)(1) and (b)(2) classes do have the discretionary power[55] to allow exclusions in these categories, despite their mandatory provisions. Although courts have generally declined to exercise their discretionary power to permit opt-outs from these categories of class actions, that discretion may be more likely to be exercised since the advent of the "hybrid" class, which has partly undermined the cohesiveness theory.[56] That is, where class members bring a (b)(2) class action in which they seek monetary relief, in addition to classwide injunctive or declaratory relief, the class action may functionally resemble a damages (b)(3) suit rather than a (b)(2) suit, "at least in the relief stage", in which case the court may consider opt-out protection for absent class members more appropriate.[57] Notably, the converse argument that, in some damages-seeking scenarios, a right to opt out should be excluded and the class made mandatory, continues to manifest under FRCP in respect of (b)(3) actions.[58]

Consistent with the permissible discretion in the case of hybrid classes, the choice advocated by some law reform agencies (notably, those of Ontario[59] and the State of Victoria[60]) was to assert that any right to opt out by class members was to be regulated by the court, such that the approval of the court was

[52] *Van Gemert v Boeing Co*, 590 F 2d 433, 439, fn 14 (2nd Cir 1978). Also: *Dosier v Miami Valley Broadcasting Corp*, 656 F 2d 1295, 1299 (9th Cir 1981) (clarifying that "[n]or does due process require the unnamed plaintiffs be given a chance to opt out of Rule 23(b)(2) class actions").

[53] *Newberg* (4th) § 16.17 pp 210–11; S Cottreau, "The Due Process Right to Opt Out of Class Actions" (1998) 73 *New York U L Rev* 480, 485.

[54] Eg: *County of Suffolk v Long Island Lighting Co*, 907 F 2d 1295, 1303 (2nd Cir 1990) ("we believe that there are instances in which fairness would support a district court's decision to allow a Rule 23(b)(1)(B) plaintiff to opt out, as here"; county permitted to opt out of mandatory ratepayer class); *Eubanks v Billington*, 110 F 3d 87, 96 (DC Cir 1997) (district court has discretion to grant opt-out rights in 23(b)(2) class action).

[55] Under FRCP 23(d).

[56] Discussed in: *Newberg* (4th) § 16.17 pp 213–15; Cottreau, n 53 above, 498; *OLRC Report*, 486.

[57] Eg: *Penson v Terminal Transport Co Inc*, 634 F 2d 989, 994 (5th Cir 1981); *Holmes v Continental Can Co*, 706 F 2d 1144, 1152 (11th Cir 1983) ("Because many monetary claims in this case are unique to individual class members, we hold that the right to opt out of the class, normally accorded only to members of classes certified under Rule 23(b)(3), must be extended to all members of this (b)(2) class"); *Allison v Citgo Petroleum Corp*, 151 F 3d 402, 413, and fn 7 (5th Cir 1998).

[58] Eg: D Rosenberg, "Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases" (2002) 115 *Harvard L Rev* 831.

[59] *OLRC Report*, 487, 489–91. The Commission noted prior support for its view in Advisory Committee on Civil Rules "Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Court" (1964) 34 FRD 325, 386, but that its view was unusual in comparison with then-existing class action models.

[60] *VLRAC Report*, [6.24] and recommendation 5.

required before a class member could exclude himself or herself from the class. This view continues to draw intermittent academic support.[61] It would mean that the proposed schemas did not incorporate a general right to opt out (even in damages actions), but proposed to leave it to the court's discretion to decide whether it was necessary for the fair and efficient adjudication of the dispute to prevent opting out. Both agencies recommended that a list of relevant criteria to be considered by the court when making its decision should be provided in the legislation.[62] This recommendation did not ultimately meet with favour by the Ontario[63] or Victorian[64] legislatures.

It has also been judicially clarified in both the US[65] and Canada[66] that if the class action legislation adopts an opt-out approach, then unless express language is used to the contrary, the court is *not* allowed a discretionary power to order that members of a class may not opt out of the proceeding. In other words, the experience of these focus jurisdictions is that, whilst a regime that indicates mandatory class membership may feasibly permit opt-outs in limited circumstances, an opt-out regime will not be permitted (by judicial discretion) to assume the appearance of a mandatory class regime.

Leave opt-in or opt-out entirely to the court. As an alternative to the election between an opt-in or opt-out regime being made by the legislature, another option is to give the court the discretion to decide whether class members should be required to opt into or out of the proceeding. The designation of court powers to progress the class action "on either an opt-in or opt-out basis, whichever

[61] MW Friedman, "Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action" (1990) 100 *Yale LJ* 745; V Morabito, "Class Actions: The Right to Opt Out" (1994) 19 *Melbourne U L Rev* 615, Pt IV.

[62] *OLRC Report*, Draft Bill, cl 20(2), and *VLRAC Report*, [6.24] and recommendation 5.

[63] Under the Ontario scheme, an absolute right to opt out is provided for all plaintiffs. Note that the Attorney General's Advisory Committee chose not to adopt the OLRC's earlier recommendation, and specifically drafted the precursor to s 9 to provide for an "Opt-Out Entitlement": Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990) 33. The Report immediately preceded the enactment of CPA (Ont), and its draft provision on opting out is almost identical to s 9. For contemporary critical comment of the OLRC's proposal as "unnecessarily controversial", see: JRS Prichard, "Class Action Reform: Some General Comments" (1984) 9 *Canadian Business LJ* 309, 319–20.

[64] The Victorian schema implemented originally under ss 34, 35 enacted an opt-in regime, which was subsequently replaced by the opt-out regime in Pt 4A of the Supreme Court Act 1986 (Vic).

[65] *Ortiz v Fibreboard Corp*, 527 US 815, 845, 119 S Ct 2295 (1999) ("It is simply implausible that the Advisory Committee, so concerned about the potential difficulties posed by dealing with mass tort cases under Rule 23(b)(3), with its provisions for . . . the right to opt out . . . would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B)"); *Phillips Petroleum Co v Shutts*, 472 US 797, 811–12, 105 S Ct 2965 (1985) ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, . . . it must provide minimal procedural due process protection. . . . [which] requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class").

[66] *Berry v Pulley* (2001), 197 DLR (4th) 317 (SCJ) [45] (plaintiffs failed in submission that order could be made under CPA (Ont), s 12 whereby defendants were prohibited from opting out of the defendants' class); *Buffett v Ontario (A G)* (1999), 42 OR (3d) 53 (Gen Div) [27].

is most appropriate to the particular circumstances and whichever contributes best to the overall disposition of the case," has been the law reform recommendation of choice in England[67] and South Africa.[68] Its advocates have noted the virtue of flexibility which judicial choice entails—a proceeding "might commence on an opt-out basis and later be converted to an opt-in proceeding as more facts become known, the class becomes more closely defined, and the criteria for membership in the class are better established", but perhaps because of the considerable problems associated with judicial choice—namely, that "it places parties in a position of uncertainty because they do not know in advance which procedure will be followed, and it invites litigation over the procedural choice"[69] —the option has never, so far as can be ascertained, been enacted.

2. The Opting-out Model Further Explained

As mentioned, an opt-out model, by which persons are bound as members of the class unless they take an affirmative step to indicate that they wish to be excluded from the action and from the effect of judgment, has been overwhelmingly adopted among the common law jurisdictions. The opt-out approach allows a class action to be commenced by the representative plaintiff without (except in limited cases[70]) the express consent of the class members.

To give some idea of the extent of its endorsement, an absolute right to opt out has been conferred expressly under the regimes of Quebec,[71] Ontario,[72] British Columbia,[73] the later Canadian provincial class action regimes,[74] Australia's federal regime[75] and state regime of Victoria.[76] Prior to all of these, an absolute opt-out right was conferred implicitly[77] under class actions insti-

[67] *Final Woolf Report*, ch 17, [42], [46], and recommendation 9.

[68] *SALC Paper*, [5.23]; *SALC Report*, [5.11.4].

[69] See *AltaLRI Report*, [241], [242]. The Institute refused to condone this method of class membership, instead recommending opt-out arrangements: [243].

[70] Under FCA (Aus), s 33E(2), the Commonwealth, State or Territory, or ministers or officers thereof, or any body corporate established for a public purpose, must consent in writing to become a class member, because these "may be subject to legislative and other restraints which make inappropriate the inclusion of such person in a representative proceeding without consent": *Explanatory Memorandum*, Federal Court of Australia (Amendment) Bill 1991, [14].

[71] CCP (Que), arts 1006(e), 1007.

[72] CPA (Ont), s 9.

[73] CPA (BC), s 16(1). However, the *FCCRC Paper*, 58–59, and fn 123, noted that s 19(3)(f) makes a puzzling reference to "whether some or all of the class members may opt out of the class proceeding", which wording conjures up the otherwise unmentioned possibility of compulsory classes.

[74] Class Actions Act (Sask), s 18(1); Class Proceedings Act (Man), s 16; Class Actions Act (SNL), s 17(1).

[75] FCA (Aus), s 33J.

[76] Supreme Court Act 1986 (Vic), s 33J.

[77] Prior to 1 Dec 2003, the wording of r 23(c)(2) stated that the mandatory notice for (b)(3) suits "shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favourable or not, will include all members who do not request exclusion". The same implicit recognition of opting-out can be seen from the revised wording in FRCP 23(c)(2)(B) that the notice must state "that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded".

tuted under FRCP 23(b)(3), where actions are usually for damages.[78] The drafters of the 1966 amended Rule 23 preferred the opt-out regime because of the likelihood that persons who might qualify as class members would, for reasons such as ignorance, inertia, intimidation or unfamiliarity, simply not take the affirmative step of sending to court a request for class membership, and so effectively lose their rights.[79] The US Supreme Court later confirmed that, in addition to being adequately represented and receiving appropriate notice of the class action, absent class members must be afforded the right to exclude themselves from the action as a matter of due process in class actions for damages.[80] That is not to say that support for the opt-out approach within this jurisdiction is unanimous, however. Within the US, Sherman notes that there is continuing argument about the utility of the opting-out approach; insurance and business interests, for example, continue to wage a campaign to change the opt-out provisions in FRCP 23 to require an affirmative act to opt in.[81]

Nevertheless, given the preponderance of the opt-out approach as a feature of the class action device, recent law reformers have recommended that it ought to be followed in order to discourage forum shopping,[82] which emphasises that, for all the rhetoric about the respective advantages and disadvantages of opting out (which are summarised in Table 2.1 below), it is the clearly preferred choice in modern common law systems.

The opt-out procedure involves two stages. First, the representative plaintiff must take steps to *notify* those who may qualify as class members about the class action being on foot. The second stage requires that *opt-out notices be lodged* by those people who fall within the class description and who do not wish to participate in the action. Despite legislative differences in expression, the manner of exercising opt-out rights across the focus jurisdictions remains very similar. Written notice, signed and lodged with the court, is the usual procedure, and the opt-out period may be anything between one and six months in the normal course.[83]

[78] FRCP 23(c)(2)(B), formerly FRCP 23(c)(2), only applies to r 23(b)(3) actions: *Eisen v Carlisle and Jacquelin*, 417 US 156, 177 fn 14, 94 S Ct 2140 (1974).

[79] B Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I"(1967) 81 *Harvard L Rev* 356, 398.

[80] *Phillips Petroleum Co v Shutts*, 472 US 797, 813–14, 105 S Ct 2965 (1985).

[81] EF Sherman, "Export/Import: American Civil Justice in a Global Context" (2002) 52 *DePaul L Rev* 401, 411, citing testimony of AW Cortese on behalf of Lawyers for Civil Justice to the Advisory Committee on Civil Rules (13 Feb 2002) 3.

[82] *AltaLRI Report*, [242] ("an 'opt out' system is the normal choice in Canada. We view harmony with the law in other Canadian jurisdictions and the discouragement of forum shopping as important").

[83] Eg, under CPA (Ont): *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [72] (6 mths); *Nantais v Telectronics Proprietary (Canada) Ltd* (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div) [85] (3 mths); *Peppiatt v Nicol* (1993), 16 OR (3d) 133 (Gen Div) [50] (3 mths). Eg, under FCA(Aus): *Philip Morris (Aust) Ltd v Nixon* [1999] FCA 1281 (Full FCA) (3 mths, although class action later discontinued as invalidly constituted); *McMullin v ICI Aust Operations Ltd* (FCA, 15 Dec 1995) (2 mths); *Darcy v Medtel Pty Ltd* [2001] FCA 1369 (2 mths); *Poignand v NZI Securities Aust Ltd* (1992) 37 FCR 363 (3 wks from court order). Eg, under CPA (BC): *Gerber v Johnston* [2001] BCSC 687 [58] (2 mths). Eg, under FRCP 23(b)(3): *In re Arizona Bakery Products Litig*, 1976 WL 967, para C (D Ariz 1975) (1 mth); *Werfel v Kramarsky*, 61 FRD 674, 683 (SDNY 1974) (2 mths).

The absent class members under an opt-out regime occupy a unique status, quite contrary to that seen in unitary litigation. As the Australian Federal Court explained in *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)*,[84] class members are not parties to the proceeding for the purposes of costs or otherwise, but on the other hand, any judgment or settlement obtained in the proceeding would bind those who had not opted out, so to that extent, they are interested in the outcome of the action to the same extent as if they were plaintiffs. The ALRC would have held differently, but its proposal[85] that the representative plaintiff and the group members all be formal parties to the litigation, with their separate claims all bundled together and conducted by the representative on behalf of all of them, was not enacted. Similarly, class members are not plaintiffs in the *traditional* sense, but on the other hand, it cannot be said that they have "no control"—the High Court rebutted this argument by noting that "the unwilling can opt out".[86]

The US Supreme Court has further explained[87] the status of the absent class member under the FRCP 23 regime as a passive party, not physically present but represented before the court:

> The court and named plaintiffs protect his interests. Besides this continuing solicitude for their rights, absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. . . . She or he may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for [her or] his protection.

On the other hand, just as the Australian courts have noted above, the US Supreme Court has observed that non-named and absent class members may be parties for some purposes—for example, they are parties to the proceedings in the sense of being bound by a settlement (or judgment),[88] and also in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them.[89] Canadian courts have indicated similarly the ethereal status of absent class members.[90] Of course, one of the concomitants of the peculiar status occupied by absent class members is the uncertainty surrounding the ethical and legal duties owed by class lawyers to the absent class members, a conundrum that can arise in various scenarios under an opt-out regime.[91]

[84] (2002) 121 FCR 480, [39]. Also: *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) 94 FCR 167, [31]; *Trong (Nguyen Thanh) v Minister for Immigration, Local Govt & Ethnic Affairs* (1996) 66 FCR 239, 245; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [36].

[85] *ALRC Report*, [94].

[86] *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1 (HCA), [50]–[51].

[87] *Phillips Petroleum Co v Shutts*, 472 US 797, 809–10, 105 S Ct 2965 (1985). Also: *US Parole Comm v Geraghty*, 445 US 388, 415 and fn 8, 100 S Ct 1202 (1980). Also: *Newberg* (4th) §1.3.

[88] *Devlin v Scardelletti*, 536 US 1, 10, 122 S Ct 2005 (2002).

[89] *American Pipe and Construction Co v Utah*, 414 US 538, 94 S Ct 756 (1974).

[90] *Prendiville v 407 ETR Concession Co Ltd* (SCJ, 27 Jun 2002) ("The members of the proposed class, while not technically parties to the action, nonetheless have a direct interest in this action generally, and specifically in respect of the certification motion").

[91] Eg, the communications permitted between defendant lawyers and absent class members; and the settlement of individual class members' claims by the defendant who bypasses the representative

Table 2.1 ***Competing arguments: the opt-out approach***[92]

The pros	The cons
• defendants are unlikely to have to deal with any claims other than those made in the class action, and if they do, then they can know more precisely how many class members they may face in subsequent individual proceedings;	• it is objectionable that a person can pursue an action on behalf of others without an express mandate;
• opt-out regime enhances access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically and who would be unable for one reason or another to take the positive step of including themselves in the proceedings;	• a person is required to take a positive step to disassociate from litigation which he/she has done little or nothing to promote;
• efficiency and the avoidance of multiplicity of proceedings are increased for all concerned;	• class actions may be raised by busy-bodies, encouraged by unprincipled entrepreneurial lawyers;
• access to justice is the basic rationale for class actions, and inclusiveness in the class should be promoted (ie, the vulnerable should be swept in);	• absent class members may know about the litigation too late to opt out, in which case they are bound by result, whether or not they want to be;
• safeguards can prevent 'roping in', eg, adequate notice explaining opt out rights, permission to opt out late in the action, and other procedural requirements;	• unfairness to defendants is increased by creating an unmanageably large group in which the members are not identified by name and it is very difficult to undertake negotiations for a settlement;
• for each class member, the goal of individual choice whether or not to pursue a remedy can be achieved if the decision for the class member is whether to continue proceedings rather than commence them;	• it is unattractive for a court to enforce claims against the defending party at the instances of plaintiffs who are entirely passive and may have no desire to prosecute the claim;
	• opt-out regimes create potential for the general *res judicata* effect of the class action judgment to be undermined by individual class members exercising their right of exclusion;

plaintiff to do so. For excellent discussion of the comparative stance in respect of the latter issue in Canada, Australia and the US, see: V Morabito, "Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States" (2003) 38 *Texas Intl LJ* 663. Also, for US commentary: DL Bassett, "Pre-Certification Communication Ethics in Class Actions" (2002) 36 *Georgia L Rev* 353, 389; RC Rice, "Defendant Communications with Absent Class Members in Rule 23(b)(3) Class Action Litigation" (1985) 42 *Washington & Lee L Rev* 145, 165–66.

[92] The text of these arguments, extensive and divided, are derived from a variety of law reform and secondary sources: *SLC Report*, [4.49]–[4.53]; *Final Woolf Report*, [42]–[44]; *ALRC Report*, [101]–[108]; *OLRC Report*, 478–91; *FCCRC Paper*, 57–58; *AltaLRI Report*, [237]–[240]; *ManLRC Report*, 63–64; British Columbia, Ministry of the Attorney General, *Class Action Legislation for British Columbia* (Consultation Document, 1994) 8; Uniform Law Conference of Canada, *Class Actions Discussion Paper*, 24; B Kaplan, "Continuing Works of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure" (1966) 81 *Harvard L Rev* 356, 397–98: V Morabito, "Class Actions: The Right to Opt Out" (1994) 19 *Melbourne U L Rev* 615, Pt III.

Table 2.1 (*cont*)

The pros	The cons
• opting out more effectively ensures that defendants are assessed for the full measure of the damages they have caused rather than escaping that consequence simply because a number of class members do not take steps to opt in; • the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, so class members should not be denied whatever benefits are secured by the class action by failing to act at an early stage of the action—fairer for the silent to be considered part of the class than not.	• to the extent that class members exercised opt out rights for the purpose of prosecuting their individual suits, the desired economies would suffer and the risk of inconsistent decisions would increase; • opt-out regimes do not cure the fact that persons will not want to engage in litigation because they are timid, ignorant, unfamiliar with business or legal matters, or do not understand the notice—the same persons who would not opt in may also opt out, which can undermine the purpose of inclusive class membership.

For those members who opt out, they are thereafter entitled to bring their own proceedings, or dissociate from the dispute altogether; however, they are not entitled to share in any relief obtained by the class, nor are they bound by a judgment against the class. On the other hand, for those who fail to act at all, they will be bound by the judicial determination of the common questions or settlement of the action, and, if either of these is in favour of the class, they may receive their share of monetary relief, depending upon the outcome of their individual issues.

D LEGISLATION OR REGULATION?

One question which is relevant for consideration, where a class action regime is implemented, is whether it would be more appropriately introduced by way of statute, rather than by amendment of relevant existing rules of court. It is notable that Australia, Ontario and British Columbia enacted legislation to introduce their regimes, whereas the US rule is encompassed within the Federal Rules of Civil Procedure.

The dilemma is that, typically, the powers of a civil procedure rule-making body or committee are limited to the making or amending of rules of court for governing the court's practice and procedure. In an expanded class action enacted by *statute* rather than by rules, the drafters are able to deal freely with matters of substantive law, and need not simply address issues which relate only to "practice and procedure" so as to avoid any modification of a substantive right. In other words, if a rule is adjudicated as dealing with substantive law, it

may be argued that it should be struck down as *ultra vires* or beyond the powers conferred upon the committee by the enabling Act. Whether this is a legitimate concern with respect to class actions law is an issue upon which law reform commissions around the world appear to be divided.

On the one hand, the OLRC recommended[93] that a class action regime be introduced in that Province by means of statute rather than by rules because of the problem of separating substantive and procedural law. It is certainly arguable that implementation of a class actions procedure entails some modification of the substantive laws that would otherwise apply to unitary litigation. For example, various commentators have postulated the following possibilities: expansion of limitation periods; revised *res judicata* rules; and aggregate assessment of damages.[94] The OLRC also regarded the introduction of a formal class action regime as a controversial step which entailed many important issues "that deserve to be debated fully in the Legislative Assembly, rather than passed by way of regulation".[95] In addition to these arguments, the Alberta Law Reform Institute argued that "statutory implementation gives class proceedings high visibility, signifying that class proceedings differ significantly from other litigation".[96]

On the other hand, the Scottish Law Commission considered that any class action regime was within the scope of the Act of Sederunt's rule-making power.[97] Moreover, judicial rule-makers have been responsible for the US class action rule.[98] This is against a backdrop where there is a strong presumption in favour of the validity of a rule of civil procedure,[99] and where, as Mullenix notes, the US Supreme Court has never clearly defined how best to determine

[93] *OLRC Report*, 306, having outlined its dilemma at 305–6.

[94] See, eg: J Jacob, "Safeguarding the Public Interest in English Civil Proceedings" (1982) 1 *Civil Justice Q* 312, 346; *ManLRC Report*, 38; *OLRC Report*, 306, and also citing Note, "Developments in the Law—Class Actions" (1976) 89 *Harvard L Rev* 1318, 1358; *Eisen v Carlisle and Jacquelin*, 479 F 2d 1005, 1014 (2nd Cir 1973). Similarly, Lord Woolf indicated that the suspension or freezing of limitation periods was an issue that would require primary legislation: *Final Woolf Report*, ch 17, [45].

[95] *OLRC Report,* 306.

[96] *AltaLRI Report*, [484], and recommended statutory rather than rule implementation.

[97] *SLC Report*, [4.9]–[4.11], also noted: *ManLRC Report*, 38.

[98] The Rules Enabling Act, 28 USC § 2072 authorises the making of rules for the US Federal Court on the following terms: "Rules of procedure and evidence; power to prescribe: (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right." Also: *Newberg* (4th) § 1.2 p 16; *ManLRC Report*, 38.

[99] *Newberg* (4th) § 1.10, p 35, explaining that just prior to the adoption of amended Rule 23 in 1966, the Supreme Court reaffirmed the "strong presumption of validity of a rule of civil procedure" in *Hanna v Plumer*, 380 US 460, 464–65, 85 S Ct 1136 (1965), and pointed out (at 471) that a challenge to a rule can succeed "only if the Advisory Committee, this [Supreme] Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions", and also: M Frankel, "Some Preliminary Observations Concerning Civil Rule 23" (1967) 43 FRD 39, 45.

whether a rule is "substantive" or "procedural" in any event.[100] In support of its validity, it has been argued that the US class action rule is only a joinder device, and the FRCP 23(b) categories merely describe the possible functional categories or groupings of class members that a federal judge may approve for group dispute resolution, but do not license the federal courts to create substantive law.[101] Further, it is evident that certain theories have been adopted to facilitate class treatment under FRCP 23 because the class action mechanism has, in the words of Marcus, "put a premium on simplification and blending".[102]

If the adoption of a class proceedings regime "only introduces a mechanism by which pre-existing rights may be exercised", then these types of changes are ordinarily within the power of any rule-making body; and one of the supposed advantages of introducing a class action regime by way of rules of court is that this option is simpler (the rules "can be amended more easily when problems arise"),[103] although this latter contention is very jurisdiction-specific. For example, it appears that there is wide agreement among US scholars that reform of the type that was witnessed when FRCP 23 was revised in 1966 is increasingly difficult to accomplish,[104] with Yeazell noting that "it requires more steps to amend a Federal Rule of Civil Procedure than it does to amend the US Constitution."[105] It also supposes that the rule-making body is in a good position "to ensure compatibility between class actions and the general rules for conducting civil suits, accustomed as it is to dealing with procedural matters."[106] Both suppositions have been supported implicitly in Canada for, while acknowledging the previous concerns of the OLRC, the Rules Committee of the Federal Court of Canada preferred that a rule addressing an expanded class proceedings would be sufficient, as "[c]lass proceedings are much less controversial now than they were when reform initiatives began over two decades ago."[107]

[100] LS Mullenix, "The Constitutionality of the Proposed Rule 23 Class Action Amendments" (1997) 39 *Arizona L Rev* 615, 618. The following distinction has been drawn in *Burlington Northern Railway Co v Woods*, 480 US 1, 5, 107 S Ct 967 (1987), that "Rules which *incidentally* affect litigants' substantive rights do not violate [§ 2072] if reasonably necessary to maintain the integrity of that system of rules" (original emphasis), a test which the Supreme Court has said to constitute a "substantial hurdle" for any successful challenge to a Rule of Civil Procedure: *Business Guides Inc v Chromatic Communications Enterprises Inc*, 498 US 533, 552, 111 S Ct 922 (1991) (challenge to Rule 11).

[101] Mullenix, *ibid*, 625 (although contending that the proposal for creation of a settlement class violated the Rules Enabling Act because of the substantive nature of settlement classes).

[102] RL Marcus, "They Can't Do That, Can They? Tort Reform Via Rule 23" (1995) 80 *Cornell L Rev* 858, 873, referring to adoption of the fraud-on-the-market theory in *Basic Inc v Levinson*, 485 US 224, 108 S Ct 978 (1988). Also citing: JB Weinstein, "Some Reflections on the 'Abusiveness' of Class Actions" (1973) 58 FRD 299, 301–2.

[103] Respectively: *ManLRC Report*, 38–39 (however, that body recommended legislation be enacted, which approach has been followed since: Class Proceedings Act, 2002), and *OLRC Report*, 305.

[104] The problem and the various academic views are discussed fulsomely in RL Marcus, "Litigation in a Free Society: Reform Through Rulemaking?" (2002) 80 *Washington U L Q* 901.

[105] SC Yeazell, "Judging Rules, Ruling Judges" (1998) 61 *Law and Contemporary Problems* 229, 235 cited in Marcus, *ibid*, 911.

[106] Noted in: *OLRC Report*, 305.

[107] *FCCRC Paper*, 27.

An example of the dilemma in practice occurred recently in the jurisdiction of England and Wales. The Civil Procedure Rules Committee's powers are restricted, under the Civil Procedure Act 1997,[108] to making or amending rules for "governing the [courts'] practice and procedure".[109] That power "is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient."[110] In respect of the Lord Chancellor Department's 2001 proposal[111] to introduce a generic procedure for representative actions into that jurisdiction's Civil Procedure Rules, it is notable that some of the judiciary's responses[112] exhibited a desire for primary legislation in respect of the introduction of any concept into English law whose impact was likely to be fundamental. The Vice-Chancellor went so far as to say that *any* further extension of the right to bring representative proceedings "is a matter for parliament",[113] and expressed concerns as to whether such a schema would be *ultra vires*.

Perhaps the most unusual experience of the regulation versus legislation conundrum is that of the State of Victoria, which ultimately ran the gamut of court rules, litigant challenge, appellate judicial consideration, and ultimately, legislation—not a precedent which, it is suggested, ought to be followed. Following a positive Law Reform report,[114] the Victorian Supreme Court suggested to the then Attorney-General that Parliament should legislate similarly to Pt IVA. As Brooking JA noted,[115] "[t]he suggestion seemed to be well received. But by 1999 no legislation had been introduced or even foreshadowed and so the judges turned their minds to the introduction of the Federal Court system by means of Rules of Court." That was duly done by amendment to the governing civil procedure rules.[116]

However, the very first defendant sued under the new rules[117] alleged that the schema exceeded the powers of the rule-making body to make rules of court "for or with respect to . . . any matter relating to the practice and procedure of the Court".[118] By a very narrow majority of 3 to 2, the Victorian Court of Appeal held that the rules were valid, and that they were rules of practice and procedure. Of the majority, Phillips JA declared:

[108] Civil Procedure Act 1997 (UK) c 12.

[109] Section 1(1).

[110] Section 1(3).

[111] LCD, *Representative Claims: Proposed New Procedures*, both *Consultation Paper* (Feb 2001) and *Consultation Response* (Apr 2002). The proposal was intended to supplement rather than replace CPR 19.6 and CPR 19.III.

[112] See, especially, those of the Master of the Rolls, Lord Phillips; the Vice-Chancellor, Sir Andrew Morritt; May LJ; and Association of District Judges. The remainder of judicial responses to the *Consultation Paper* were silent about this issue.

[113] LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (Apr 2002) [4].

[114] *VLRAC Report* (1997), and report co-author V Morabito also discusses the Victorian experience in "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U of British Columbia L Rev* 459, fn 13.

[115] *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Aust Ltd* (2000) 1 VR 545 (CA) [9].

[116] Supreme Court (General Civil Procedure) Rules 1996 (Vic), Ord 18A, effective 1 Jan 2000.

[117] *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Aust Ltd* (2000) 1 VR 545 (CA).

[118] Conferred by Supreme Court Act 1986 (Vic), s 25(1)(f)(i).

> No doubt in this respect the procedure described in O18A is somewhat novel, but that is only to measure it against prior practice. These days we hear so often that the Courts must adapt and move with the times and such novelty as exists in O18A does not, I think, mean that the new rules go beyond what may fairly be called rules of practice and procedure.[119]

Ormiston JA, also of the majority, considered[120] that, whatever their practical effect might be, the rules merely created a "new form of representative proceedings", whereby for many centuries, courts have permitted, in one way or another, parties to sue by representatives who have claimed the right to sue on behalf of others. His Honour did not think that even arguably substantive aspects of the binding effect of judgments and the application of *res judicata* went beyond the court's rule-making power. In contrast, the minority view held[121] that what the schema permitted (particularly the aggregate assessment of damages, thereby involving departures from the principles governing individual assessments) affected substantive rights in a way not authorised by the rule-making power of the Supreme Court Act, and that the schema was thus *ultra vires*. Given such a fine division of views, application for special leave to appeal to the High Court was filed by the defendant.[122] The concern that the High Court might strike down the regulatory schema galvanised the introduction, in November 2000, of Victoria's present statute which is almost identical to the federal regime.[123] Thus, caution ultimately dictated the statutory route.

It is evident that the confusion inherent in the Victorian jurisdiction would be completely avoided by enactment of primary legislation, and that this "legislation versus regulation" dilemma is a matter upon which reasonable opinion does differ.

E CATERING FOR DEFENDANT CLASSES

Class action legislation (and literature[124]) is skewed decidedly toward plaintiff proceedings. For example, whilst the Ontario statute contemplates defendant class actions,[125] there are no provisions pertaining to procedures for their

[119] *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Aust Ltd* [2000] 1 VR 545 (CA) [59].

[120] *Ibid*, [39]–[41], Charles JA concurring.

[121] *Ibid*, Brooking JA [29]; Winneke P [5].

[122] See Editor's Note inserted in IF Turley, "Group Proceedings" (2001) 75 *Law Institute J* 44, 44.

[123] Supreme Court Act 1986 (Vic), Pt 4A. This legislative schema was given retrospective effect, from 1 Jan 2000. A challenge to the validity of the entire legislation upon constitutional grounds also failed on 26 Jun 2002: *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1 (HCA).

[124] For notable early exceptions (predominantly under FRCP 23) which provide an informative analysis of special and common (with plaintiff) issues pertaining to defendant class actions, see: BM Wolfson, "Defendant Class Actions" (1977) 38 *Ohio State LJ* 457, and Note, "Defendant Class Actions" (1978) 91 *Harvard L Rev* 630, cited in *OLRC Report*, 43; *Newberg* (4th) §§ 4.46–4.72; Note, "Statutes of Limitations and Defendant Class Actions" (1983) 82 *Michigan L Rev* 347.

[125] CPA (Ont), s 5(1)(b)—"representative plaintiff or defendant"; s 5(1)(c)—"claims or defences of the class members".

conduct.[126] That lack of provision undoubtedly follows from the fact that the OLRC declined to consider the matter, arguing that defendant class actions merited separate and detailed study.[127] The inclusion of any provisions in the Ontario statute at all stems from the determination of the Ontario Advisory Committee to recommend their inclusion, although the discussion of the Committee on the point was extremely brief.[128]

Similarly, FRCP 23 recognises that a class member may "sue or *be sued*" on behalf of a class,[129] but again, the remainder of FRCP 23 contains no provision expressly outlining procedures for the conduct of defendant class actions. The brevity of provision may stem from the background to the rule: the Advisory Committee Notes to the 1966 revisions to Rule 23 do not describe the relevance of the rule to defendant classes. Newberg postulates that this may imply that the Advisory Committee intended defendant classes to mirror plaintiff class actions, but that "[t]his conclusion is true only on the surface of things. The practical and theoretical considerations and problems for maintaining a defendant class action are fundamentally unique from those governing plaintiff class suits."[130] Alternatively, Lilly argues[131] that the lack of specific provision may simply reflect the drafters' cognisance of the "uniform historical acceptance of defendant class actions", in that they represented some of the earliest significant US class suits.[132]

Unlike its focus jurisdiction counterparts where, at the very least, defendant classes are contemplated within the legislative framework, Australia's Pt IVA regime does not acknowledge or provide for defendant class actions at all. In this respect, the legislature (unlike Ontario) followed the deliberate decision of the ALRC, which also made no recommendations with respect to defendant classes. It said that "[a]lthough defendant classes appear to mirror plaintiff classes they in fact differ in several important respects."[133] Similarly, the decision not to include defendant class actions within the British Columbia statute was a deliberate choice.[134]

[126] CPA (Ont), s 4, requires their certification, just as in the case of plaintiff class actions.

[127] *OLRC Report*, 44.

[128] Ontario A-G's Department, *Report of A-G's Advisory Committee on Class Action Reform* (1990) 29–30 ("The Committee anticipates the need for defendant class proceedings and developed this provision [s 4] to ensure that such proceedings were available and mirrored plaintiff class proceedings"). The brevity of this reasoning is noted in *AltaLRI Report*, [430] fn 356.

[129] FRCP 23(a), opening line, (emphasis added).

[130] *Newberg* (4th) § 4.46 p 336.

[131] GC Lilly, "Modeling Class Actions: The Representative Suit as an Analytic Tool" (2003) 81 *Nebraska L Rev* 1008, 1040.

[132] Lilly cites the following: *Smith v Swormstedt*, 57 US 288 (1853); *Ex p Wall*, 107 US 265 (1883).

[133] *ALRC Report*, [6] ("special rules needed").

[134] See R Rogers, *A Uniform Class Actions Statute: Proceedings of the 1995 Uniform Law Conference of Canada*, App O, 5–6. This author prepared the discussion paper for the ULCC as a representative of the A-G (BC): cited in *AltaLRI Report*, [432].

The differences between plaintiff and defendant class actions have been judicially[135] and academically[136] stated to include the following: unlike a representative plaintiff, a defendant representative does not voluntarily undertake that role as "champion of the absent class members", but is selected (perhaps unwillingly[137]); a representative plaintiff who brings proceedings on behalf of a class subjects the class members to the risk that their claims will be lost, but no personal liability attaches—whereas proceedings against a representative defendant exposes class members to the risk of direct liability for damages, which suggests that greater protection is required for absent class members;[138] the effect of opting out by defendants would be to force plaintiffs to bring individual actions against them; to require that the defence raises "common issues" is not to the point, it is more likely that the defences of the class raise a common issue because the claims *against them* raise a common issue;[139] to require court approval for discontinuance seems unnecessary in the case of defendant class actions ("how [would] the represented defendants be prejudiced if the plaintiff was simply permitted to discontinue the action?" asks the Alberta Institute); and the suspension of limitation periods as against class members during the class proceedings would work injustice if it applied to defendant class actions. Therefore, in these respects, defendant class actions are, in the view of many "fundamentally unique".

Interestingly, it has been intimated in all focus jurisdictions that there is an alternative to allowing defendant class actions under a formal class action regime. For example, the ALRC recommended that the existing representative procedure[140] should be retained to enable defendant representative actions to be brought in appropriate circumstances. Along the same lines, and ironically, it has been judicially noted[141] that the much criticised defendant representative

[135] *BT Australasia Pty Ltd v State of NSW* (FCA, 24 Dec 1997) 27 (Sackville J).

[136] Eg, these various arguments are derived from: *AltaLRI Memorandum*, [143]–[144], and *AltaLRI Report*, [438]–[473]; DP Wood, "Adjudicatory Jurisdiction and Class Actions" (1987) 62 *Indiana LJ* 597, 607–18; Note, "Defendant Class Actions" (1978) 91 *Harvard L Rev* 630; E Barker Brandt, "Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23" (1990) *New York U L Rev* 909, 921; RE Holo, "Defendant Class Actions: The Failure of Rule 23 and a Proposed Solution" (1990) 38 *U of California at Los Angeles L Rev L Rev* 223, 232–33; *Newberg* (4th) § 4.46, closing quote at p 336; DJ Gross, "Mandatory Notice and Defendant Class Actions" (1991) 40 *Emory LJ* 611, 624; *ALRC Report*, [6].

[137] Witness, eg, the defendant class in *Chippewas of Sarnia Band v Canada (A G)* (1996), 137 DLR (4th) 239, 29 OR (3d) 549 (Gen Div), in which none of the defendants wished to be appointed as representative. Thus, the court appointed 11, "in order to share the burden of the defence": (1996), 138 DLR (4th) 574 (Gen Div).

[138] Such as individual and personal notice to class members without exception: *ALRC Report*, [6].

[139] For this reason, *AltaLRI Report*, [462], recommended that commonality be expressed thus, to cater for defendant classes: "the claims of or against the class members raise a common issue".

[140] Federal Court Rules, Ord 6, r 13(1).

[141] Noted in *National Life Ass Co of Canada v Hucker* (2001), 6 CPC (5th) 212 (Ont Master) [2], although the certification tests under CPA (Ont) have been judicially held to apply, with necessary modification, to claims under r 12.07: *Ginter v Gardon* (2001), 53 OR (3d) 489 (SCJ) [14].

rule was re-enacted in Ontario[142] (after being repealed when Ontario's Class Proceedings Act came into force) precisely to facilitate actions against defendant classes without the need for certification and other compliance with Ontario's class action regime. Under FRCP 23, it has also been suggested[143] that, because of the difficulties that accompany defendant class actions, the joinder device should be used instead.

Defendant class actions have been (just as predicted[144]) extremely rare in Ontario,[145] and, of course, non-existent under Pt IVA. Notably, the US experience has shown that, even in that more developed class action regime, defendant class actions are, in the words of Coffee, figuratively "as rare as unicorns",[146] and according to Newberg, "relatively sparse".[147] According to Lilly,[148] in over 30 years of FRCP 23's operation, the US Supreme Court has encountered only eight certified defendant class actions, and observes that this small number perhaps "helps explain why the Supreme Court, in its few cases involving defendant classes, has merely acquiesced to the existence of a defendant class as long as the prerequisites of Rule 23 are satisfied." Therefore, given the dearth of case law in the focus jurisdictions which canvasses the issues associated with an action against defendant classes, a rigorous comparative study of defendant class actions is not possible, and the comparative analysis of the commencement and conduct of *plaintiff* class actions which is the theme of this book will be the focus.

[142] As Rule 12.07 of the Rules of Civil Procedure (Ontario), inserted by O Reg 465/93, s 2.

[143] J Bronsteen and O Fiss, "The Class Action Rule" (2003) 78 *Notre Dame L Rev* 1419, 1422.

[144] GD Watson, "Ontario's New Class Action Legislation" [1992] *Butterworths J of Intl Banking and Financial Law* 365, 365.

[145] *Chippewas of Sarnia Band v Canada (A G)* (1996), 137 DLR (4th) 239, 29 OR (3d) 549, supp reasons: (1997), 138 DLR (4th) 574 (Gen Div); *Berry v Pulley* (2001), 197 DLR (4th) 317 (SCJ). According to Ontario academic commentary, defendant classes are useful in that jurisdiction in patent cases, because the judgment on the patent's scope and validity binds all persons who have violated the patent: JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, fn 63.

[146] JC Coffee, "Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation" (2000) 100 *Columbia L Rev* 370, 388.

[147] *Newberg* (4th) § 4.46 p 339 (citing securities litigation, patent infringement cases and actions against local officials in challenges to state law as the primary areas where the defendant class action is used).

[148] GC Lilly, "Modeling Class Actions: The Representative Suit as an Analytic Tool" (2003) 81 *Nebraska L Rev* 1008, 1041.

3

Objectives of Class Action Regimes

A INTRODUCTION

IT IS INEVITABLE that judicial attitudes about the suitability of a class action to a *particular scenario* will alter, in light of experience and practice. For example, judicial shifts of opinion have been starkly manifest under FRCP 23 in the treatment of mass torts, under the Ontario regime in respect of misrepresentation claims, and under the Australian regime in respect of the accommodation of multiple defendants. This cautious and incremental development is understandable, particularly given the diversity of actions which may be litigated under a class action regime,[1] and which may, or may not, have been foreshadowed by the drafters.[2] However, certain *general* objectives of the class action procedure have been oft-repeated and emphasised by both law reformers and judiciary, no matter the type of litigious scenario. These may loosely be grouped under two headings: those objectives upon which the focus jurisdictions are in substantial agreement (section B), and the particular "objective" upon which they are not (section C).

B COMMON OBJECTIVES

1. Principle and Predictability

The expense of instituting and conducting class actions can be, and often times is, daunting, and it is therefore vitally important that they are commenced only in the appropriate circumstances. Much of the responsibility for screening occurs well prior to the first court hearing, that is, by the advices provided by the lawyers who have been consulted about the prospects of mooted class litigation. That evaluation by the legal profession of the purported claims is crucial to the eventual allocation of courts' resources and judicial efficiency.[3] The benefit to

[1] Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995) [6.9.4] ("it is not practicable to lay down criteria that will be applicable to all cases, even if it were desirable to do so"), also [6.9.1].

[2] Cooper states that during hearings on proposals to amend FRCP 23 in 1996, three veterans who assisted in framing the 1966 rule commented that no-one had anticipated the uses that actually have been made of it: EH Cooper, "Class Action Advice in the Form of Questions" (2001) 11 *Duke J of Comp and Intl Law* 215, 221; also see L Harbour *et al*, "Class Actions: An American Perspective" in C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [13.42].

[3] Also acknowledged by ALRC, *Managing Justice* (Rep No 89, 1999) [7.90].

counsel and plaintiffs of having concrete rules by which to commence such complex litigation—so as to avoid "procedural uncertainty at the outset"[4]—has been academically advocated.[5] Equally, as the Alberta Law Reform Institute has noted, "the civil justice system should provide defendants with an opportunity to make their defence in a proceeding in which the rules are known".[6]

The fact is that the introduction of class action regimes has regularly followed calls for further guidance where previously there was no such regime. The pattern has been repeated, particularly where the existing procedure has been perceived as inadequate. It has been evident in Australia,[7] Alberta,[8] Manitoba,[9] Ontario,[10] Victoria[11] and Scotland.[12] In each of these instances, law reform

[4] *AltaLRI Memorandum*, [31], when discussing the disadvantages of ad hoc group litigation.

[5] Eg, in non-US jurisdictions, at times when the absence of better guidance was lamented: in Canada: *ManLRC Report*, 8; in England: P Balen, F Cartwright and H Dickins, "Group Actions in a Product Liability Context" [1994] *Consumer LJ* 199, 201; M Mildred, "Group Actions" in GG Howells, *The Law of Product Liability* (London, Butterworths, 2001) 411; in Australia: T Pinos, "Class Actions in Victoria" [1984] *Law Institute J* 955, 957; V Morabito, 'Taxpayers and Class Actions' (1997) 20 *UNSWLJ* 372, 375–76, and by the same author, *VLARC Report*, 14–20; A Cornwall, "Class Actions Get Go Ahead" (1995) 20 *Alternative LJ* 138, 138 (noting absence of appropriate provisions in NSW); and M Doyle, "Nature of Representative or Class Actions in the Context of Compensation Claims Against Resource and Utilities Companies" [1999] *AMPLA Ybk* 277, 293 ("both sides of the action have a clearer idea of what is required" under class action statutes).

[6] *AltaLRI Memorandum*, [15].

[7] Eg: *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 (HCA) 404: "Much as one might prefer to have a detailed legislative prescription by statute or rule of court regulating the incidents of representative action". The ALRC subsequently admitted that "[w]ith the absence of clear statutory rules concerning such litigation in many [state] Supreme courts, most practitioners opt to bring representative actions within federal jurisdiction wherever possible": *Review of the Federal Civil Justice System* (DP No 62, 1999) [10.9].

[8] Eg: *Western Canadian Shopping Centres Inc v Dutton* (1998), 73 Alta LR (3d) 227 (CA) [20]: "this area of the law is clearly in want of legislative reform to provide a more uniform and efficient way to deal with class action law suits" (Russell JA, Irving JA concurring).

[9] Eg: *Ranjoy Sales & Leasing Ltd v Deloitte, Haskins & Sells* [1985] 2 WWR 534 (Man CA) 537: "[w]hile we wait for legislation on the matter [of class actions] or for specific rules of practice which have not yet been evolved" (Monnin CJM).

[10] Eg: *Naken v General Motors of Canada Ltd* [1983] SCR 72, 105, 144 DLR (3d) 385, 410: "the rule, consisting as it does of one sentence of some thirty words, is totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty of this one": Estey J. Also, Arnup JA in Ont CA: "it would be highly desirable that there be enacted legislation or rules of practice or both, pursuant to which such actions could be conducted": (1979), 92 DLR (3d) 100 (Ont CA) 113. The Williston Committee also described the then-existing representative rule, r 75 of the Rules of the Ontario Supreme Court, in its 1981 report, as "in a very serious state of disarray": cited in GD Watson and C Perkins, *Holmested and Watson: Ontario Civil Procedure* (Toronto, Carswell Thomson, 1984) [looseleaf] vol 2, 12–13.

[11] *Zentahope Pty Ltd v Bellotti* (VSC, 2 Mar 1992) 24 (describing the then-existing ss 34, 35 of the Supreme Court Act (Vic) "overly brief and enigmatic provisions").

[12] Eg: *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179, 184, in which the action of *actio popularis* (an action brought by a pursuer in his capacity as a member of the public to vindicate or defend a "public right") was described by Lord Clyde as "somewhat special and limited". See, also: *MacCormick v Lord Advocate* 1953 SC 396, 413, and the discussion in *SLC Paper*, [2.20]. Indeed, Scotland has perhaps the longest history of considering multi-party litigation of all Commonwealth jurisdictions, with earlier detailed reports: *Class Actions in Scottish Courts: A New Way for Consumers to Obtain Redress?* (Glasgow, Scottish Consumer Council, 1982); SLC, *Multi-Party Actions: Report of Working Party* (1993); CR Barker, ID Willock and JJ McManus, *Multi-Party Actions in Scotland* (Edinburgh, Scottish Office Central Research Unit, 1994).

commissions answered the call by recommending the introduction of a developed class action regime.[13] The advantage of that reform has been explained by the Supreme Court of Canada:

> While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise *ad hoc* solutions to procedural complexities on a case-by-case basis. . . . The *Class Proceedings Act, 1992*, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than *ad hoc* basis, with the increasingly complicated cases of the modern era.[14]

The American experience in 1966, when the present FRCP 23 was drafted, is equally as illustrative. Rule 23 represented a "sweeping innovation"[15] on the previous incarnation of rule 23 which had gone before it. According to Kaplan, it had been suggested that the class rule should revert to an earlier incarnation[16] which simply contained a numerosity requirement[17] and a "common question" requirement (but including also some provisions regarding the procedural management of the action). However, that approach was specifically rejected by the Civil Procedure Rules Advisory Committee in 1966:

> Such a reform . . . would not have been helpfully informative; it would have remitted to case-by-case judicial development a subject and a set of problems on which there had now been large if checkered experience, and which ought to be capable of restatement in a rule providing more than minimal guidance to courts and litigants. The Advisory Committee, at any rate, thought a further effort should be made.[18]

In addition to predictability of rules, predictability of outcome is equally as important. As US jurisprudence has particularly reiterated,[19] the class action "protects defendants from inconsistent obligations that may be created by varying results in different courts, and similarly, it promotes the equitable principle that similarly situated plaintiffs should receive similar recoveries."

[13] *OLRC Report* (1982); *ALRC Report* (1988); *SLC Paper* (1994) and *SLC Report* (1996); *VLRAC Report* (1997); *ManLRC Report* (1999); *AltaLRI Memorandum* (2000), and *AltaLRI Report* (2000). Also: the Rules Committee of the Federal Court of Canada adopted the more expansive British Columbia class proceedings statute as a model, because "it provides the most guidance to a Court faced with deciding a certification motion" and "a developed framework for the Court to explicitly analyze competing alternatives": *FCCRC Paper*, 42.

[14] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [14].

[15] The description given by *Newberg* (4th) § 1.10 p 33 to describe the 1966 amendments.

[16] See especially, Z Chafee, *Some Problems of Equity* (Ann Arbor, Michigan Law School, 1950) 281.

[17] "so numerous as to make it impracticable to bring them all before the court".

[18] B Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (Part 1)" (1967) 81 *Harvard L Rev* 356, 386.

[19] *US Parole Comm v Geraghty*, 445 US 388, 402–3, 100 S Ct 1202 (1980); Rules Advisory Committee "Notes to the 1966 Amendments" (1966) 39 FRD 69, 102–3 (class actions might achieve "economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated"); *Newberg* (4th) § 1.10 p 36; RP Phair, "Resolving the 'Choice-of-Law Problem' in Rule 23(b)(3) Nationwide Class Actions" (2000) 67 *U of Chicago L Rev* 835, 837 (quote).

2. Proportionality, Not Perfection

In 1996, Lord Woolf commented, "the effective and economic handling of group actions necessarily requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole".[20] Later, his Lordship referred to the need to provide "proportionate methods of resolving [multi-party] cases".[21] As Zuckerman notes,[22] whereas once rectitude of decision was a paramount philosophy of civil procedure, considerations of timely justice and reasonable costs are now relevant and important considerations in the allocation of finite judicial resources. This philosophy has been academically[23] and judicially[24] noted in the focus jurisdictions in respect of class actions. As one US commentator has succinctly stated: "The fact that the class action procedure requires compromises is an insufficient reason to fear and thus reject it."[25] Naturally, in a perfect world without concern for time or money or court resources or number of "actors" or quantum of issues or information technology logistical problems or communications difficulties involved (the list could go on), some of the compromises evident in class action litigation would not need to be considered.

For example, the permissibility of global evidence, whereby a few class members give evidence on a particular issue and the court is asked to draw inferences that such evidence would accurately reflect the situation of all other class members, is a relevant factor under a superiority assessment; and other possible time-saving judicial devices[26] impact upon an assessment of whether the class action (if permitted) would be manageable—but their use ultimately involves

[20] Lord Woolf, *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996) [2], [2(a)].

[21] *Final Woolf Report*, ch 17, [2].

[22] AAS Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" in Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford, OUP, 1999) 17–18; and for similar comments by the same author: "Reform in the Shadow of Lawyers' Interests" in R Cranston and A Zuckerman (eds), *Reform of Civil Procedure: Essays on Access to Justice* (Oxford, Clarendon Press, 1995) 76, and in the same essay volume: Greenslade DCJ, 'A Fresh Approach', 128.

[23] Eg: J Basten, "Representative Proceedings in NSW" (1996) 34(2) *Law Society J* 45 ("Arguments which support high levels of individual procedural fairness for group members will tend to subvert these principles [access to justice]": at 50). Re FRCP 23: "The object is to get at cases . . . without *undue* dilution of procedural safeguards for members of the class or for the opposing party": B Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (Part 1)" (1967) 81 *Harvard L Rev* 356, 389–90 (emphasis added). For an argument that the proceduralist's concern with the traditional right to individualised, case-by-case adjudication and the judicial system's perceived need to maintain and ensure its integrity only through that traditional adversary system has stifled the mass tort class action under FRCP 23, see: MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev* 157, 159ff.

[24] *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (SC) [58] ("the object of the [BC statute] is not to provide perfect justice, but to provide a 'fair and efficient resolution' of the common issues": Smith J).

[25] MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev 157*, 232.

[26] See pp 260–69.

compromises to suit class litigation. The principle of proportionality also manifests in respect of whether the cost–benefit of the action warrants its commencement at all. As will be discussed later, there may be a point at which the benefit to class members individually is too slight in terms of the costs, "a point at which the consumer or person suffering injury must reasonably accept the risk of injury because the cost of providing compensation is too high relative to the benefit."[27] Additionally, the fact that some people may wish to litigate, but an insufficient number to fulfill the numerosity requirement so as to meet the minimum mandatory class size, is yet a further example of overriding the wishes of a few for the greater good of all court users.

As a further compromise, the aggregate assessment of classwide damages has been expressly recognised in some class action statutes to require a reasonable level of accuracy only.[28] It has even been suggested[29] that class actions, whilst facilitating access to compensation, actually result in lesser amounts of damages than may have been obtained through unitary actions. For example, in respect of the Ontario case of *Nantais v Telectronics Proprietary (Canada) Ltd*[30] (a class action which concerned the implantation of allegedly defective pacemakers into class members and which was ultimately settled[31]), the Manitoba Law Reform Commission stated of the settlement amounts of between $10,000–$15,000 per member: "[t]hese amounts, had the cases been litigated individually and assuming liability [had been established], would very likely have been higher, but a class action results in a fairer, and more expeditious, distribution of the assets among all eligible members."[32] US case law has also noted that the notion that individual plaintiffs could recover higher damages if they were to pursue their own claims "is implicit in the very idea of a class action, [yet] is part of the balance that is struck in Rule 23".[33] Therefore, certifying a class action may well entail the proportionality of lower compensatory awards.

It is evident that the potentially burdensome field of class litigation has embraced the shift from perfection to proportionality, and reflects the objective

[27] *ALRC Report*, [342].

[28] See pp 412–16.

[29] *ManLRC Report*, 24. However, the opposite suggestion was made in J Campion and V Stewart, "Class Actions: Procedures and Strategies" (1997) 19 *Advocates' Q* 20, 26 fn 16, albeit without examples or authority. Also: *AltaLRI Report*, [341] (compensation "uneven").

[30] (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div), leave to appeal refused: (1996), 129 DLR (4th) 110, 25 OR (3d) 347 (Div Ct).

[31] T Claridge, "Heart Patients Settle Class Action, Canadians Who Get Defective Pacemaker Part to Share in $23.1 Million" *The Globe and Mail* (6 Oct 1997) A1, cited in *ManLRC Report*, 24.

[32] *ManLRC Report*, 24.

[33] *Macarz v Transworld Systems Inc*, 193 FRD 46, 55 (D Conn 2000) (defendant unsuccessfully argued class action not superior because putative class members would receive < $50 each as class, but could seek up to $1,000 in statutory damages were they to bring individual actions); *Mace v Van Ru Credit Corp*, 109 F 3d 338, 344 (7th Cir 1997). Reduction in recoveries for those with the most potent claims is also noted by Judge Weinstein, who has presided over Agent Orange, asbestos, breast implant, repetitive stress syndrome, prisoner, education and civil rights class actions: JB Weinstein "Compensating Large Numbers of People for Inflicted Harms: Keynote Address" (2001) 11 *Duke J of Comp and Intl Law* 165, 174.

that, "[e]very system contains a percentage of error; and if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost, it is only the idealist who will revolt."[34] After all, as Scott and Black point out, if class litigation is to work at a pragmatic level, the interests of the class must sometimes prevail over individual licence to run litigation as he or she would wish.[35]

3. Access to Justice

According to commentators, access to justice is the "cornerstone of class proceedings";[36] a binding prerequisite where class actions "take on a life of their own";[37] "[their] most important benefit",[38] so as to provide "a meaningful remedy to large numbers of otherwise disenfranchised victims of breached obligations."[39]

The improvement of access to justice has been judicially and frequently described under the Canadian provincial regimes to be a crucial goal of their statutes.[40] The criterion of preferability[41] requires that the determination of the common issues will both advance the proceeding and promote access to justice.[42] Likewise, the second reading speech of the Federal Court of Australia Amendment Bill 1991 by the then Attorney-General noted[43] that one of the goals of the new Pt IVA would be to "provide a real remedy" to those in the community who individually had uneconomically viable claims, but where overall, the total amount at issue was significant. Access to justice has been judicially cited since[44]

[34] Lord Devlin, quoted in M Zander (ed), *What's Wrong with the Law* (London, BBC, 1970) 76, cited in Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), ch 4, [5].

[35] C Scott and J Black, *Cranston's Consumers and the Law* (3rd edn, London, Butterworths, 2000) 122.

[36] JJ Camp and SD Matthews, "Actions Brought Under the Class Proceedings Act, RSBC 1995, c 50" in CLE Society of BC *Torts—1998 Update* (1998) [4.1.06], cited in *ManLRC Report*, 23.

[37] *Final Woolf Report*, ch 17, [8].

[38] V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U of British Columbia L Rev* 459, [64], and 'Taxpayers and Class Actions' (1997) 20 *UNSWLJ* 372, 379.

[39] MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev* 157, 169.

[40] For an early statement under CPA (Ont), see: *Abdool v Anaheim Management Ltd* (1994), 15 OR (3d) 39 (Gen Div) [25], aff'd: (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [36] (O'Brien J, Flinn J concurring) [118] (Moldaver J). Also: *Hollick v Metropolitan Toronto (Municipality)* (1998), 18 CPC (4th) 394 (Ont Gen Div) [19], reiterated, although overall decision ultimately reversed: *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [15], [33]; *Millgate Financial Corp v BF Realty Holdings Ltd* (1999), 28 CPC (4th) 72 (Gen Div) [22]; *MacRae v Mutual of Omaha Ins Co* (2000), 2 CPC (5th) 121(SCJ) [7].

[41] CPA (Ont), s 5(1)(d); CPA (BC), s 4(1)(d).

[42] *Schweyer v Laidlaw Carriers Inc* (2000), 44 CPC (4th) 236 (SCJ) [44].

[43] *Parliamentary Debates* Senate, 14 Nov 1991, 3174 (Mr Duffy).

[44] Eg: *Marks v GIO Aust Holdings Ltd* (1996) 66 FCR 128, 140; *Woodhouse v McPhee* (1997) 80 FCR 529, 533; *Ryan v Great Lakes Council* (1998) 154 ALR 584 (FCA) 587; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) [20]; *Schanka v Employment National (Admin) Pty Ltd* (2001) 114 FCR 379, [16].

to justify class actions. The US Supreme Court has also emphasised that one of the justifications that led to the development of the modern class action was to facilitate spreading litigation costs among numerous litigants with similar claims.[45]

There are four particular aspects of the objective, "access to justice". The first of these is that class actions can provide the substantive law with teeth. It is sobering but accurate—"a sad reality"[46]—that a "sophisticated jurisprudence on tort and contract law means little if there is no practical, economical method of asserting and enforcing a claim."[47] The relationship between class actions and the substantive law is most eloquently stated by Prichard:

> In the absence of effective procedural mechanisms for pursuing legitimate and legally cognizable claims, the full meaning of our substantive law can never be known. Thus, both common law and statutory statements of our legal rights are often illusory in that they may generate high expectations that are subsequently dashed on the rocks of procedural barriers.[48]

The second aspect of this objective is to overcome cost-related barriers which consist not only of the repetitive costs incurred if the same issues have to be heard and decided separately,[49] but also the interaction between the damages claimed and legal costs[50]—improved access is especially a goal in circumstances where the plaintiffs' claims "might have merit, but the legal costs of proceeding are disproportionate to the amount of each claim."[51] Case law in the focus jurisdictions of Canada,[52] Australia[53] and the US[54] regularly demonstrates the

[45] *US Parole Comm v Geraghty*, 445 US 388, 402, 100 S Ct 1202 (1980), cited in: *In re General Motors Corp Pick-Up Truck Fuel Tank Prods Liab Litig*, 55 F 3d 768, 784 (3d Cir 1995).

[46] *VLRAC Report*, [2.5].

[47] *ManLRC Report*, 23.

[48] JRS Prichard, "Class Action Reform: Some General Comments" (1984) 9 *Canadian Business LJ* 309, 322–23.

[49] *ALRC Report*, [19], that is, if the claim is individually viable and recoverable.

[50] *ALRC Report*, [16]–[17].

[51] Definition provided in *Hollick v Metropolitan Toronto (Municipality)* (1998), 18 CPC (4th) 394 (Ont Gen Div) [19] (Jenkins J).

[52] Eg: *Harrington v Dow Corning Corp* (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA) [67]–[68] ("a class proceeding is probably the only way she [recipient of a breast implant] might have a chance to press her claim effectively. The cost of a risk assessment in terms of time and money would burden even the plaintiff with extremely serious injuries. For those with more modest claims the cost would be prohibitive. As with pacemakers in *Nantais v Telectronics Proprietary (Canada) Ltd* . . . toilet tanks in *Chace v Crane Canada Inc* . . . and heating panels in *Campbell*, this case about breast implants seems ideally suited for resolution by a class action").

[53] Eg: *King v GIO Aust Holdings Ltd* [2000] FCA 1543 (Full FCA) (33,000 of the 68,000 shareholders who declined a takeover offer by AMP able to pursue their claims by class action). Academically described as a victory for small plaintiffs: W Pengilley, "33,000 Shareholders Can Take Class Actions Against GIO, Its Directors and Advisers" (2001) 12 *Aust Product Liability Reporter* 14; M Duffy, "Shareholder Representative Proceedings: Remedies for the Mums and Dads" (2001) 39(7) *Law Society J* 53.

[54] Eg: *Amchem Products Inc v Windsor*, 521 US 591, 617, 117 S Ct 2231 (1997) ("while the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all. . . . The

overriding principle that providing sufficient incentive to get at small claims is an important goal of class litigation.

A third and related facet is to ensure that the parties are on an equal footing.[55] As Newberg notes, class members "gain a more powerful adversarial posture than they would have through individual litigation" which "serves to balance a currently imbalanced adversarial structure, in which large defendants with sufficient economic means are able to enjoy an overwhelming advantage against parties with small individual claims."[56] The ability of class proceedings to achieve an equal footing between the parties has also been judicially recognised.[57] Class actions legislation does not always promote absolute parity however: in some jurisdictions, it is notable that a class has stronger appeal rights in respect of a refusal to certify a proceeding as a class action than has the defendant in the event of an affirmative decision to certify.[58]

One further dimension of access to justice which should be mentioned in the context of class action litigation is timeliness of commencement, conduct, trial or settlement. There are three things which are off-putting about litigation,

policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor'", citing *Mace v Van Ru Credit Corp*, 109 F3d 338, 344 (7th Cir 1997)). For further discussion of the importance of small recovery class actions, see SM Hill, "Small Claimant Class Actions: Deterrence and Due Process Examined" (1995) 19 *American J of Trial Advocates* 147.

[55] Expressly encompassed within the English Civil Procedure Rules, r 1.1(2)(a). The court must also have regard to the financial position of each party in that jurisdiction when interpreting the rules: CPR 1.1(2)(c)(iv).

[56] *Newberg* (4th) § 5.57 p 478; also PH Lindblom and GD Watson, "Complex Litigation—A Comparative Perspective" (1993) 12 *Civil Justice Q* 33, 74 ("the defendant . . . will meet a stronger opponent than the usual 'one-shot litigant' in an ordinary case").

[57] Eg: *Eisen v Carlisle and Jacquelin*, 417 US 156, 186 (1974) (Douglas J dissenting) ("The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth"); *Chace v Crane Canada Inc* (1998), 44 BCLR (3d) 264 (CA) [28] ("a class proceeding would place the parties on a more even footing than the pursuit of individual claims": Huddart JA). Also, a more equal footing as between their legal representatives: *Scott v TD Waterhouse Investor Services (Can) Inc* (2001), 94 BCLR (3d) 320 (SC) [146].

[58] Ontario: CPA (Ont), ss 30(1)–(2), and also Rules of Civil Procedure, r 12.06 (order certifying class action: appeal allowed only with leave; order refusing class certification: appeal allowed as of right); leave refused in *Nantais v Telectronics Proprietary (Canada) Ltd* (1996), 129 DLR (4th) 110, 25 OR (3d) 347 (Div Ct). Quebec: CCP, arts 1010, 1041 (order certifying class action: no appeal allowed; order refusing class certification: appeal allowed as of right). The article as originally enacted in 1978 provided that appeals were open to both parties to the authorisation as of right, but that was amended by LQ/SQ 1982, c 37, art 22. Discussed further in: J Campion and V Stewart, "Class Actions: Procedures and Strategies" (1997) 19 *Advocates' Q* 20, 41, and more recently, see: *Vaughan v New York Life Insurance Co* (2003), 120 ACWS (3d) 170 (Que CA, 23 Jan 2003). There is no difference manifest under FRCP 23(f): *Blair v Equifax Check Services Inc*, 181 F 3d 832, 834 (7th Cir 1999). Nor does BC make any distinction between appeal rights available to class plaintiffs and defendants: CPA (BC), s 36(1)(a).

"costs, risks and delays".[59] As one task force succinctly put it: "it takes too long and it costs too much".[60] The importance of timeliness, where the civil procedure system may have once embraced rectitude of decision to the exclusion of all else, has been explicitly recognised in some modern procedural regimes,[61] and has been particularly endorsed in class actions jurisprudence.[62] The following statements of Cumming J, an experienced class actions motion judge in Ontario, were made in circumstances where an application to add third parties was likely to delay the outcome of the class action considerably:

> Timeliness in the determination of claims on their merits is critical to achieving fairness to the parties. Justice must be done and it must be seen to be done in a timely way and manner. . . . To grant [the defendant's] motion would inevitably have the result of delaying and frustrating a determination of the common issues on their merits. A basic objective of the judicial system is access to justice. Indeed, that is an express policy objective underlying the CPA [citation omitted]. Access to justice means access to timely justice.[63]

Although the "glacial pace" of some class actions has been academically noted[64] to place an encumbrance upon the goal of judicial economy that class actions legislation supposedly embodies, certain of the class action features mentioned in later chapters (such as the requirement to consider all available dispute resolution methods or the use of judicial devices to manage non-common issues) reflect the principle that timeliness of the decision for class members is as important as the right decision.

However, there are two important caveats to the objective, "providing access to justice". For one thing, it is evident that the objectives discussed in this section may not always be conjointly present in one class action. Indeed, they may pull in different directions, and act as "competing themes",[65] particularly in the

[59] For discussion of this triumvirate as a reason for supporting multi-party actions, see, eg: *McKrow v Manufacturers Life Ins Co* (1998), 28 CPC (4th) 104 (Gen Div) [7] and *Dabbs v Sun Life Ass Co of Canada* (1999), 40 OR (3d) 429 (Gen Div) [10]; *Carnie v Esanda Finance Corp Ltd* (1996) 38 NSWLR 465 (SC) 468 (Young J).

[60] Manitoba Civil Justice Litigation Committee, *Civil Justice Review Task Force Report* (1996) 7, and cited in *ManLRC Report*, 1.

[61] For example, the English Civil Procedure Rules, introduced in 1998, again explicitly state this as an overriding objective of civil procedure in that jurisdiction: CPR 1.1(2)(d)—"ensuring that [the case] is dealt with expeditiously and fairly". See, for further discussion of the general importance of timeliness in civil litigation: AAS Zuckerman, "Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments" (1994) 14 *Oxford J of Legal Studies* 353, 360–62; and by the same author: "Justice in Crisis: Comparative Dimensions of Civil Procedure" in Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford, OUP, 1999) 1, 6–7, 17.

[62] MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev* 157, 232 ("timely and meaningful vindication of rights and enforcement of responsibilities").

[63] *Wilson v Servier Canada Inc* (SCJ, 30 Nov 2001) [23].

[64] JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, fn 50, citing *Nadon v Anjou (Ville)* [1993] RJQ 1133 (Que CS) as an example.

[65] S Yeazell, "From Group Litigation to Class Action, Pt 2" (1980) 27 *U of California at Los Angeles L Rev* 1067, 1100.

case of small economically unviable claims. The burden on court resources actually increases by adjudicating on claims in a class context that may never otherwise have come before the courts. Thus, there is debate as to whether class actions are intended in fact to reduce litigation by allowing consolidation of numerous suits, or to facilitate litigation which would otherwise be difficult to institute.[66] Although it has been argued that class proceedings should not be encouraged because it will "stir up" litigation,[67] it is a reality that "stirring up" valid litigation (ie, that which satisfies any applicable preliminary merits test and which is not frivolous or vexatious) is one of the goals of the legislative schemes.[68] After all, as Tur points out, the converse of the argument that only those willing to take legal action should benefit and that a class action gives redress gratuitously to those not actively seeking it is that the law-breaker obtains an unjust enrichment where individuals do not assert their rights by way of litigation.[69] Enabling illegal activity (where "the cost is met not by the person who the law says should meet it, but by the persons suffering the loss or by the community"[70]) is the natural consequences of legally enforceable rights which are neither asserted nor enforced.[71] In the event of any inconsistency between access to justice and the competing theme of judicial economy, some judicial opinion has expressly preferred the former.[72]

[66] See, eg: JA Jolowicz, "Book Review" (1988) 47 *Cambridge LJ* 486, 487; D Owles, "Class Actions in the English Courts—Tranquillisers" [1991] *Product Liability Intl* 30, 30; PH Lindblom and GD Watson, "Complex Litigation—A Comparative Perspective" (1993) 12 *Civil Justice Q* 33, 50 (a "two-edged sword"); JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, [15] ("conspicuously in tension").

[67] Perhaps one of the most striking examples of this type of allegation was that made by one Australian politician who is reputed to have decried the Pt IVA reforms on the basis that "the American economy was in a parlous state because society was dominated by avaricious lawyers with a self-interest in promoting excessive litigation": as paraphrased in J Griffiths, "Class Actions in Administrative Law—An Australian Perspective" [1990] *Intl Legal Practitioner* 53, 54.

[68] MJ Peerless and MA Eizenga, "Class Actions in Breast Implant Litigation" (1996) 16 *Health Law in Canada* 78, 78; B Kaplan, "A Prefatory Note" (1969) 10 *BC Indust & Comm L Rev* 497 ("the dual missions of the class-action device: (1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) *even at the expense of increasing litigation*, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all": emphasis added). Also, see *ALRC Report*, [123] ("[i]nforming people . . . is not to be equated with pushing people").

[69] RHS Tur, "Litigation and the Consumer Interest: The Class Action and Beyond" (1982) 2 *Legal Studies* 135, 159.

[70] *ALRC Report*, [340]. The defendant continues the illegal activity "without incurring costs of either prevention or compensation".

[71] *SALC Paper*, [1.3]–[1.4].

[72] Eg: *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [50]; *Nantais v Telectronics Proprietary (Can) Ltd* (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div) [8]. For a similar view under the BC regime, see: *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (BC SC) [54] (Smith J), although certification was ultimately overruled on the basis of a different point: (1998), 157 DLR (4th) 465, 48 BCLR (3d) 90 (CA); *Reid v British Columbia (Egg Marketing Board)* [2003] BCSC 985, [36]; *Brogaard v Canada (A G)* (2002), 7 BCLR (4th) 358 (SC [in Chambers]) [116]; *Koo v Canadian Airlines Intl Ltd* [2000] BCSC 281, [67]. In Aust, see, eg: *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 (Full FCA) 267.

The second caveat is that access to justice is "a two-way street": class action jurisprudence must also seek to ensure that the defendant is protected from unmeritorious claims, and understands, and can plead a defence to, the case brought against it. Class action statutes are intended to set up a procedural mechanism only, not to create any new cause of action to confront the defendant.[73] Having said that, however, it is judicially acknowledged that procedural statutes by their very nature can have far-reaching effects upon substantive justice, and the class action legislation is no exception.[74] Moreover, the use of the class action device to protect the defendant from inconsistent obligations that may be created by varying results in different courts has already been noted.[75] In addition, "defendants should not have to spend money or face adverse publicity as a result of unfounded claims brought against them"—"the procedural balance must not be tipped too far on the side of the plaintiffs."[76] For whatever the language used in the class action statutes of the focus jurisdictions which may reflect an endorsement of class proceedings, the experience to date has shown that there remains considerable scope for the defendant to attack successfully their commencement on legal, procedural, financial and factual grounds.[77]

4. Judicial Economy

Judicial economy achieved by class litigation is particularly relevant to individually *recoverable* claims—those in which class members' claims are individually viable to litigate.[78] The need for a judicially-effective device, to enable the legal system "to free itself from the individual approach to the granting of legal remedies",[79] is especially important, given that "[a]s we become an increasingly mass

[73] For an example of a purported attempt to certify a proceeding of defamation on the basis of a statement made about a group, which the court considered would broaden the Canadian law of defamation dramatically, see: *Kenora (Town) Police Services Board v Savino* (1997), 3 CPC (4th) 159 (Gen Div) [16], [18].

[74] *909787 Ontario Ltd v Bulk Barn Foods Ltd* (Div Ct, 15 Oct 1999) [28]. Also: MD Kirby (the Hon), 'Class Actions and Corporations' (Association of Corporation Solicitors, Melbourne, 1979) 12, reprinted as ch 9 'Procedural Reforms and Class Actions' in Kirby, *Reform the Law* (Melbourne, OUP, 1983) 161.

[75] See p 49.

[76] *AltaLRI Memorandum*, [15], reiterated in *AltaLRI Report*, [97], and which proposition is also summarised in "Courts Practice and Procedure" (2000) 26 *Commonwealth L Bulletin* 958, 970; J Kellam and S Stuart-Clark, "Multi-Party Actions in Australia" in C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [15.83].

[77] See, eg: M Bielecki, *Defending Class Actions* (Law Society Product Liability and Class Actions Seminar Sydney 16 Sep 1992) 3–4; C Mauro, "Class Actions: The Defendant's Perspective" (1994) 5 *Canadian Insurance L Rev* 27; J Kerr *et al*, "Defending Class Actions" (1996) *Asia/Law* Special Supp 165; EM Stewart, "Defending against Certification" (2001) 24 *Advocates' Q* 428, 434; MJ Somerville and F Gowling, "These Plaintiffs Have No Class: A Defendant's Perspective to Defeating or Avoiding Certification" (County of Carleton Law Association Que 2–3 Nov 2001).

[78] *OLRC Report*, 118.

[79] *ALRC Report*, [13].

producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people."[80] In such circumstances, as Trebilcock notes, "individually tailored law-suits for consumers are often as much an anachronism as the concept that all cars that are put on the market should be handcrafted . . . economies of scale now dictate mass redress procedures for consumers prejudiced by a common legal wrong."[81] The manifestation of this objective within the class action statutes differs considerably across the focus jurisdictions. The US Supreme Court stated in *General Telephone Co of Southwest v Falcon*[82] that class certification in appropriate cases promotes "the efficiency and economy of litigation which is a principal purpose of the procedure." Various aspects of the US Rule specifically endorse the achievement of efficiency, especially in the context of FRCP 23(b)(3) actions, where the court is directed to have regard to the "fair and efficient adjudication of the controversy".[83] In contrast, and despite its undoubted importance in class action adjudication in these jurisdictions, the concept of judicial economy is only included in the Australian and Canadian class action statutes implicitly, not expressly. In *Murphy v Overton Investments Pty Ltd*,[84] the Australian Federal Court noted that the question of judicial economy is a direct determinant of whether or not class proceedings are considered "inappropriate" under s 33N(1), in which case the proceedings must be discontinued. The parliamentary goal of achieving litigation efficiency by means of Pt IVA, so as to minimise complexity, difficulty and expense in litigation, has been judicially reiterated.[85] Similarly, a number of Ontario[86] and British Columbia[87] decisions, and the Supreme Court of Canada,[88] have held that judicial economy, inter alia,

[80] Submission by National Consumer Council, cited in *Final Woolf Report*, ch 17, [1]. See also, eg: R Alkadamani, "The Beginnings of 'Class Actions'?" (1992) 8 *Aust Bar Rev* 271, 275.

[81] MJ Trebilcock, *A Study on Consumer Misleading and Unfair Trade Practices* (Ottawa, Information Canada, 1976) vol 1, 270, and cited with approval in *ALRC Report*, [58].

[82] 457 US 147, 159, 102 S Ct 2364 (1982), citing: *American Pipe and Construction Co v Utah*, 414 US 538, 553, 94 S Ct 756, 766 (1974).

[83] Eg: FRCP 23(b)(3). Also, eg: FRCP 23(b)(3)(C) "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; FRCP 23(d)(1) "prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument".

[84] [1999] FCA 1123, [69], [87]. Also: *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) ATPR ¶41–679 (FCA) [55], aff'd: [1999] FCA 636 (Full FCA).

[85] See: Australia *Parliamentary Debates* House of Reps, 14 Nov 1991, 3174 (Mr Duffy), referred to, eg, in: *Sreika v Cardinal Financial Securities Ltd* [2000] FCA 1647, [9]; *Batten v CTMS Ltd* [2001] FCA 1493, [12].

[86] Eg: *Wicke v Canadian Occidental Petroleum Ltd* (1999), 40 OR (3d) 731 (Gen Div) [15]; *Ho-A-Shoo v Canada (A G)* (2000), 47 OR (3d) 115 (SCJ) [58]; *Knowles v Wyeth-Ayerst Canada Inc* (2001), 16 CPC (5th) 330 (SCJ) [14]; *Carom v Bre-X Minerals Ltd* (2001), 196 DLR (4th) 344, 51 OR (3d) 236 (CA) [4]; *Edwards v Law Society of Upper Canada* (1996), 40 CPC (3d) 316 (Gen Div) [22]; *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [36], [118]; *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) [13] (Somers J, Thomson J concurring).

[87] Eg: *Harrington v Dow Corning Corp* (2000), 82 BCLR (3d) 1, 193 DLR (4th) 67 (CA) [64]; *Howard Estate v BC* (1999), 66 BCLR (3d) 199 (SC) [40]; *Elms v Laurentian Bank of Canada* (2001), 90 BCLR (3d) 195 (CA) [52]–[55].

[88] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [15], [27].

should be considered and weighed when determining whether the preferability requirement in the respective statutes is met.

In fact, to the extent that judicial economy has not been given the weight that, in retrospect, it deserved in a particular Ontario case,[89] thus causing subsequent repetitive trials,[90] that has been the subject of criticism by Canadian commentators.[91] A similar criticism has been made of the US asbestos litigation:

> Why should a defendant or group of defendants be entitled to thousands of chances to convince thousands of jurors that one identical set of facts does not give rise to liability? That is what happened in the asbestos litigation that consensus says has been a dismal failure of judicial efficiency and fairness to litigants.[92]

It is plain, however, that not every scenario in which the plaintiffs seek a class action will promote judicial efficiencies, as later discussion will demonstrate.[93] The limited empirical analysis of class actions[94] indicates that they are far more consumptive of judicial resources than a typical civil case,[95] although caution has been advocated that, were individually recoverable claims to be litigated one by one, the hearings would undoubtedly be duplicative and would cumulatively occupy far more court resources.[96] If the class action is appropriately commenced, then ultimate knock-on judicial economies which have been argued are

[89] The example usually cited is that of *Sutherland v Canadian Red Cross Soc* (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div) (blood transfusion case). It was not certified for a variety of reasons: subjective class definition, representative plaintiff was not a typical representative, no common issues across the class, other individual suits on foot, and joinder of third parties required.

[90] *Pittman Estate v Bain* (1994), 112 DLR (4th) 257 (Gen Div); *Walker Estate v York Finch General Hospital* [1997] OJ 4017 (Gen Div). Each took about 100 days of court time; and in *Walker*, [203]–[205], Borins J set out a list of "common issues" and strongly indicated that they would have been better decided in a class proceeding to avoid the judicial waste of repetitive trials.

[91] *ManLRC Report*, 27; A Dickson, "Class Proceedings Certification" (1998) 22(9) *Canadian Lawyer* 51, 59; D Lennox, "Building a Class" (2001) 24 *Advocates' Q* 377, 397; GD Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 270; SJ Page, "Class Actions in Canada: How They Work and Their Impact on Health Organisations and Businesses" (2000) 21 *Health Law in Canada* 1, 11.

[92] MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev* 157, 232. See also *State of Illinois v Harper & Row Publishers Inc*, 301 F Supp 484, 490 (ND Ill 1969) ("In 1966 there was a single suit purporting to be a class action. The entire litigation might have been concluded without further complexity. But defendants successfully opposed the class suit, with the result that lawsuits have blossomed throughout the country. Rather than the original handful of attorneys, lawyers are now so plentiful that the entire courtroom is filled at each pretrial conference").

[93] See pp 239–45.

[94] The following study is usually cited: TE Willging, LL Hooper and J Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996). The Federal Judicial Centre undertook a study of all class actions (except mass tort class actions) terminated between 1 Jul 1992 and 30 Jun 1994 in four federal district courts. The author is not aware of any detailed empirical research in either Australia or Ontario to date.

[95] Class actions typically took 2–3 times longer from filing to disposition, and consumed 5 times as much judicial time, as typical civil cases: *ibid*, 9; also cited *ManLRC Report*, 26.

[96] Eg: *ManLRC Report*, 26; *Newberg* (4th) § 5.53.

that: few plaintiffs opt out;[97] the vast majority of class actions (like other civil proceedings) settle before trial;[98] and class actions can bring about early settlements.[99]

Whilst the presently-espoused objective of judicial economy tends to be viewed from the perspective of the court and the class members who are saved from relitigation, an ancillary benefit of class litigation is to produce a measure of finality for the defendant. This is achieved by the central tenet in each class action regime[100] that adjudication on the common questions, whether favourable or not, will be binding upon all class members who have not opted out.[101] The achievement of class-wide resolution of claims, particularly through settlement, has been reiterated by the RAND Institute, which noted that defendants sometimes see class-wide settlement as advantageous, will aim for as wide a definition of the class as possible to bind class members definitively, and pursue certification when it appears to offer an efficient means of capping liability exposure.[102] From its review of post-FRCP 23 regimes, the Alberta Institute also concluded that one of the benefits to defendants of a class action regime is the opportunity for early closure: "Rather than waiting for individual claims to pile up, corporate defendants can clean up their liabilities in one proceeding, without risking inconsistent decisions or facing multiple lawsuits in numerous jurisdictions."[103]

5. Balancing Judicial Activism and Personal Autonomy

Given that one of the principal objectives of class actions is to protect absent class members, the need for active case management in order to protect absent plaintiffs has been reiterated both academically[104] and judicially.[105] As later discussion

[97] According to TE Willging *et al*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996) 10, only 0.1%–0.2% of the total class membership opted out; and discussed by *ManLRC Report*, 27 (also n 98 below).

[98] Again, according to TE Willging *et al*, *ibid*, 13, less than 4% of class actions filed went to trial.

[99] Eg, the government compensation scheme offered by the Ministers of Health following the institution of the HIV/blood transfusion case: *Endean v Canadian Red Cross Soc*, cited by *ManLRC Report*, 28.

[100] FCA (Aus), s 33ZB; CPA (Ont) s 27(3); FRCP 23(c)(2)(B).

[101] Described as the "pivotal provision" of Pt IVA, eg: *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [25]; and the "fundamental effect" of FRCP 23 by *Newberg* (4th) § 1.7.

[102] *Rand Institute Report*, 410, 402. Also: *Rand Executive Summary*, 15; *AltaLRI Report*, [121], [124].

[103] *AltaLRI Report*, [122].

[104] Eg: *Report of the Civil Rules Advisory Committee* (2001) 122 SCR Ct R–33, R–37; *OLRC Report*, 446; *ManLRC Report*, 4; *AltaLRI Report*, [277], [282], and see the 23 "judicial tools" referred to in App B of the *AltaLRI Memorandum*, "Discretionary Power of Court"; Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) 211.

[105] Eg: *US Parole Comm v Geraghty*, 445 US 388, 402, 100 S Ct 1202 (1980) ("The justifications that led to the development of the class action include . . . the protection of the interests of absentees"); *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 (Gen Div) [42] ("case management and supervision exercised by the court . . . are to ensure that the interests of absent class members are protected").

will demonstrate, this principle has been explicitly recognised by those who framed the focus jurisdictions' regimes, requiring, for example, judicial approval of settlement and providing for extensive judicial case management powers. Empirically, the absolute importance of judicial activism has been substantiated by the RAND Institute (with an additional comment that it could generally be performed better under FRCP 23).[106] Further, and practically speaking, when a certification hearing is part of the schema, then the class comes into being due to the action of the court in granting class certification. Thus, the multi-party litigation is truly "a creation of the court",[107] and the court has special responsibility to consider the ramifications upon absent class members of authorising it.[108]

However, and notwithstanding the need for judicial activism, an allowance for some degree of personal autonomy pervades class litigation, as each of the focus jurisdiction regimes has recognised. For example, under FRCP 23(b)(3)(A), the court is required to consider the interest of class members in individually controlling the prosecution or defence of separate actions when deciding whether a class action would be superior to other means of dispute resolution, and British Columbia has a similar provision.[109] Particularly in the mass tort context, it was judicially repeated under the earlier decisions of FRCP 23 that personal injury plaintiffs, whose claims were large, were entitled to the individualised treatment that the class action did not cater for.[110] Whilst not explicitly recognised in their respective regimes, the willingness of plaintiffs to pursue individual relief that can demonstrate an interest that the individuals have in controlling their separate actions rather than through a class representative, has been judicially recognised and supported in Ontario[111] and Australia.[112] Other measures variously implemented across the focus jurisdictions to allow for individual autonomy include:[113] a statutory notice program to alert all interested persons to the status of the litigation, and allow them to opt-out; class members can apply to participate in the litigation if desired; and

[106] See generally: *Rand Institute Report*, 485–86, and 497 ("Judges need to be told that damage class actions are *not* just about problem solving"). Also: *Rand Executive Summary*, 24 ("However one assesses the bottom line, the evidence from our case studies suggests strongly that what judges do is the key to determining the cost–benefit ratio").

[107] To use the terminology of the *Report of the Civil Rules Advisory Committee* (2001) 122 SCR Ct R–47.

[108] See, eg, the discussion in *AltaLRI Report*, [179], [277].

[109] CPA (BC), s 4(2)(b), and see: *Tiemstra v Insurance Corp of BC* (1996), 22 BCLR (3d) 49 (SC) [18], aff'd (1998), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA).

[110] *Hobbs v Northeast Airlines Inc*, 50 FRD 76, 79 (ED Pa 1970) (aircraft crash); *Causey v Pan American World Airways Inc*, 66 FRD 392, 399 (ED Va 1975) (same); *Yandle v PPG Industries Inc*, 65 FRD 566, 572 (ED Tex 1974) (asbestos workers' claims). Also: MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev* 157, 176, and fn 64.

[111] *Sutherland v Canadian Red Cross Soc* (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div) [37]; *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Ont Div Ct) [36].

[112] *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (1997) ATPR ¶ 41-585 (FCA) (referring to "[t]he action taken by some public authorities to commence their own proceedings").

[113] These factors are among the several advantages listed in *Bouchanskaia v Bayer Inc* [2003] BCSC 1306, [152] in respect of class actions for plaintiffs.

the court is allowed to create simplified structures and procedures for individual class members' claims.

Nevertheless, any class litigation scenario will starkly lower individualism in litigation. Several of these instances are eloquently stated by Cooper as follows.[114] First, an opt-out model may cause attendant difficulties in communicating notice to the absent class members and providing them with sufficient information to exercise an informed choice as to whether to remain within the class. Those absent class members will usually take no part in a privately negotiated settlement of the action, and these disadvantages cannot be completely overcome (says Cooper) by judicial scrutiny and approval of the settlement agreement. Secondly, conflicts between class members, or between class members and the representative plaintiff, may be sought to be overcome by the creation of sub-classes, for example, but the fact remains that such conflict would not be present were individual proceedings invoked. Thirdly, Cooper argues, the selection of the representative plaintiff, the choice of defendants, the causes of action alleged, the selection of class lawyers, and the timing of the litigation, are all matters over which the absent class member loses control to a large extent, but which can greatly influence the outcome of the litigation. Fourthly, in reality, if there was to be no litigation at all, absent a class action, then the loss of individualism means little. As Cooper notes, in summary, these concerns about loss of individualism under FRCP 23 "are not fully allayed by the justifications that class adjudication achieves efficiency, enforces rights . . . and achieves the social good of enforcing the law."

The difficult issue of individual rights in the class action context have arisen for consideration in the US where the Fifth and Fourteenth Amendments ensure an opportunity to be heard. In the context of class actions, the US Supreme Court has rejected any opt-in requirement for absent class members, and has determined that the minimum process required in order for a court to exercise personal jurisdiction over absent class members to bind them to a judgment on their personal individual claims is that they be adequately represented, receive "best practicable" notice of the class action, and be afforded the right to exclude themselves from the class.[115] The Australian position is similar. As Spender observes,[116] constitutional issues, such as the right to individual notice[117] and aggregate damages assessment,[118] have also been judicially considered in the Australian context in favour of the regime's validity, although, in that commentator's opinion, a genuine controversy about due process entitlements in class actions in that jurisdiction remains a possibility.

[114] EH Cooper, "Class Action Advice in the Form of Questions" (2001) 11 *Duke J of Comp and Intl Law* 215, 223–25, concluding quote at 224. Lack of autonomy also discussed in *Newberg* (4th) § 5.22ff; *AltaLRI Report*, [138]; *Rand Executive Summary*, 9–10.

[115] *Phillips Petroleum Co v Shutts*, 472 US 797, 808, 812–14, 105 S Ct 2965 (1985).

[116] P Spender, "Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability" (2003) 25 *Sydney L Rev* 223, 241.

[117] *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [29].

[118] *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Aust Ltd* (2000) 1 VR 545 (CA).

The fact is that, in the words of Issacharoff, "[a] class action is simply, when all else is stripped away, a state-created procedural device for extinguishing claims of individuals held at quite a distance from the 'day in court' ideal of Anglo-American jurisprudence."[119] For this reason, the interplay between individual rights and the state sponsorship of a class action mechanism is a sensitive and difficult issue for all focus jurisdictions.

C NON-COMMON OBJECTIVE

Defendants whose actions have the capacity to, or did, involve many members of the community could expect the court to take into account the importance of achieving some means of deterrence, so as to prevent unjust enrichment of the defendant, and to require wrongdoers to fully compensate the costs of their illegal activity. Interestingly, however, the focus jurisdictions are not in unanimous agreement as to whether the objective of deterrence and behaviour modification should form an overarching principle of class litigation at all.

The Ontario Attorney-General's Advisory Committee on Class Actions (supported by other Canadian law reform bodies[120]) certainly thought that it should:

> the presence of effective remedies of any sort inevitably must contribute to a sharper sense of obligation to the public by those whose actions affect large numbers of people. . . . An effective class action procedure has the potential to contribute to improved compliance with such obligations.[121]

In accordance with this view, one of the three goals judicially contemplated by class proceedings in Ontario is the principle of modification or deterrence of wrongful behaviour on the part of actual or potential defendants.[122] It is an objective of the Canadian class action focus regimes to seek to change the conduct of those who might otherwise be wrongdoers "by making it feasible for victims to recover damages from wrong doers who were previously insulated from having to account for their wrongs because of economic and other barriers to individual proceedings."[123]

Similarly, enforcement of laws and deterrence of violations has been recognised by the US Supreme Court as one consequence of having a class certified—it is

[119] S Issacharoff, "Preclusion, Due Process and the Right to Opt Out of Class Actions" (2002) 77 *Notre Dame L Rev* 1057, 1058.

[120] *ManLRC Report*, 28, 30, 35; *AltaLRI Report*, [115]; *OLRC Report*, 140–46.

[121] *Report of the Attorney-General's Advisory Committee on Class Action Reform* (1990) 17, and cited in *ManLRC Report*, 28. See also: *FCCRC Paper*, 13.

[122] First manifested in *Abdool v Anaheim Management Ltd* (1994), 15 OR (3d) 39 (Gen Div) [25], aff'd: (1995), 121 DLR (4th) 496 (Div Ct) [36], [118]. Since, eg: *Hollick v Metropolitan Toronto (Municipality)* (1998), 18 CPC (4th) 394 (Ont Gen Div) [19], reiterated, although overall decision ultimately reversed: *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [15]; *Scott v Ontario Business College (1977) Ltd* (SCJ, 20 Sep 1999) [2d]; *Ho-A-Shoo v Canada (A G)* (2000), 47 OR (3d) 115 (SCJ) [58]; *Cotter v Levy* (SCJ, 24 Mar 2000) [7] (noting that, in addition to the "remedial legislation" of CPA (Ont), "the tort law is an important instrument in the modification of behaviour").

[123] *Webb v K-Mart Canada Ltd* (2000), 45 OR (3d) 389 (SCJ) [44] (Brockenshire J).

more aligned with the right to maintain "private attorney general litigation"[124] than with any traditional "personal stake" test of standing.[125] The Supreme Court has further observed that "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government."[126] Other US authority similarly supports the deterrence function of class litigation.[127]

The deterrent goal of class proceedings by "turning small individual claims into large and expensive lawsuits",[128] transforming non-threatening individual actions into mass tort litigation,[129] by "counter-balancing corporate weight",[130] and by inspiring legislative change or "filling the gaps left by regulators",[131] has been widely touted academically in the North American jurisdictions. The RAND Institute has claimed that one effect of class actions under FRCP 23 has been to cause corporations to rethink their financial and employment practices, and that it has also had a positive effect upon manufacturers' product design decisions.[132] As the Alberta Institute noted, "even if the regulatory enforcement of standards is not the core purpose of class actions procedure, it is surely a useful by-product."[133]

It must again be acknowledged, however, that the objective of behaviour modification will not always co-exist with the previously mentioned objectives of access to justice and judicial economy, especially in a case which involves many small claims. In an Ontario price-fixing case, the court, in permitting certification at first instance (the decision was subsequently overturned on other grounds[134]), observed:

> If the present action is to be certified, among these three objects, the primary one to be served would be behaviour modification. . . . it is apparent from the nature and size of the claim of any individual that the goal of providing a procedure to ensure that vic-

[124] Used in the sense here to mean that private individuals institute actions so as to augment, support and fill the gaps in enforcement activity carried out by governmental regulatory agencies.

[125] *US Parole Comm v Geraghty*, 445 US 388, 403, 100 S Ct 1202 (1980).

[126] *Deposit Guaranty National Bank, Jackson, Missouri v Roper*, 445 US 326, 339, 100 S Ct 1166 (1980).

[127] *Blackie v Barrack*, 524 F 2d 891, 903 (9th Cir 1975); *In re Dreyfus Aggressive Growth Mutual Fund Litig*, Fed Sec L Rep ¶91,505, fn 11 (SDNY 2001) (noting the deterrent effect has been undercut in securities class actions for various reasons); *In re Firstplus Financial Inc*, 248 BR 60, 71 (Bankr ND Tex 2000); *In re Gap Stores Securities Litigat*, 79 FRD 283, 295 (ND Cal 1978).

[128] SJ Page, "Class Actions in Canada" (2000) 21 *Health Law in Canada* 1, 1.

[129] J Kellam, "Toxic Torts" (1998) 8 *Aust Product Liability Reporter* 161, 167. Also: JA Campion and VA Stewart, "Class Actions: Procedure and Strategy" (1997) 19 *Advocates' Q* 20, 26.

[130] C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992) 113.

[131] D Lennox, "Building a Class" (2001) 24 *Advocates' Q* 377, 380; *Newberg* (4th) § 1.6 p 27, § 5.47 pp 467–69. For further argument that class actions raise investor confidence in the integrity of capital markets, see J Donnan, "Class Actions in Securities Fraud in Australia" (2000) 18 *Company and Securities LJ* 82, 84.

[132] *Rand Executive Summary*, 9. Also, see generally: *Rand Institute Report*, 50, ch 15, section 4, and Table 15–6.

[133] *AltaLRI Report*, [115], also citing the Rand finding, n 132 above.

[134] *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct), aff'd: (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA), leave to appeal refused: SCC, 17 Jul 2003.

> tims of wrongdoing are actually compensated is secondary. Similarly, as it is unlikely that any claim would come before the court absent a class action, judicial economy would not be significantly enhanced.[135]

As with so many aspects of class action jurisprudence, authorities may be found for polarised positions. Some courts have equally found that class certification was warranted, even though the only one of the triumvirate of goals likely to be served by doing so was the potential for behaviour modification,[136] while others have declared that this goal, and the public scrutiny of a commercial practice that would flow if the class was successful in its claim, did not weigh sufficiently to make a class action the preferable procedure.[137] It has also been pointed out by one Ontario commentator[138] that, far from the suggestion that it is *corporate* behaviour that needs modification consequent upon class actions jurisprudence, one of the significant aspects of the Canadian class action experience is that federal and provincial governments and institutional defendants have been major defendants, both in terms of amount of litigation and damages sought, and that governmental behaviour has been a "prime target" for those seeking to deter future unlawful behaviour.

The objective of behaviour modification is, however, one purported goal with which some other jurisdictions do not concur, asserting that any deterrent effect of the expansion of access to legal remedies as an incidental effect only. For example, the Scottish Law Commission rejected the suggestion that defendant behaviour modification should be relevant as to whether to permit class proceedings. It stated that the "sole proper object" of a civil action, even a multi-party proceeding, "is to obtain compensation."[139] The ALRC agreed, and although noting the objectives of increased access to justice and judicial efficiency, did not advance behaviour modification or deterrence as a goal of its mooted grouped proceedings.[140] It remarked that whilst "the expansion of access to legal remedies might lead to greater enforcement of legal liabilities [and compliance with the law], and as a result, increase the amount of monetary relief paid" by defendants, that was but "incidental" to the primary goal of providing access to the remedy the law prescribed.[141] The Commission also argued that liability for wrongdoing in class suits was likely to be covered by insurance if claims were successful, thereby

[135] Eg: *Chadha v Bayer Inc* (2000), 45 OR (3d) 29 (SCJ) [17].

[136] *Scott v TD Waterhouse Investor Services (Can) Inc* (2001), 94 BCLR (3d) 320 (SC) [142].

[137] *Kumar v Mutual Life Ass Co of Canada* (2003), 226 DLR (4th) 112 (Ont CA) [55]. Also: *Joanisse v Barker* (SCJ, 5 Aug 2003) [57] (class members patients of a maximum security psychiatric hospital; alleged that they were required to participate in programmes that constituted human experimentation not based on credible proven scientific research; class not certified; programmes long since abandoned, so behaviour modification could only apply in the "very general sense"; insufficient on its own).

[138] JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, [36].

[139] *SLC Report*, [2.23].

[140] See *ALRC Report*, [354] "Policy goals achieved".

[141] *ALRC Report*, [67], [323].

spreading the costs among producers or consumers.[142] Some academic commentary has suggested that the refusal of the ALRC to countenance deterrence as a goal was, in truth, politically motivated,[143] and that such a goal should truly form part of the objective of the Australia class action regime.[144] In any event, the Australian judiciary has not been vocal about this goal, undoubtedly as a result of the lukewarm terms in which the ALRC discussed it.

D CONCLUSION

In summary, the common objectives of a class action regime encompass the following: to increase the efficiency of the courts and the legal system and to reduce the costs of legal proceedings by enabling common issues to be dealt with in one proceeding; to enhance access by class members to legally enforceable remedies in the event of proven wrongful behaviour in a timely and meaningful fashion; to provide defendants with the opportunity to avoid inconsistent decisions over long periods of time and possibly in different forums; to take account of personal autonomy of putative class members where appropriate; to provide predictability of procedural rules and outcomes; and to arrive at an outcome employing the philosophy of proportionality rather than perfection.

However, the purported objective of deterrence has not met with unanimous agreement. One of the most significant differences between the Australian regime and its North American counterparts is that the former's objective is to compensate individuals, and not to punish defendants or to deter behaviour to any greater extent than can be achieved by enforcement of already subsisting substantive law. For this reason, upholding a class action on the basis of its likely effect of modifying defendants' behaviour (whether the current defendant engaged in the class action lawsuit or others who may be minded to engage in similar conduct in the future) is not viewed as a valid objective in Australian class action jurisprudence.

Of course, the aforementioned objectives are not the exclusive province of a class action statute. Other multi-party devices seek to achieve similar goals (but with, arguably, more procedural disadvantages than a class action regime entails), as the English regimes the subject of discussion in the following chapter demonstrate.

[142] *ALRC Report*, [67], [341].

[143] It has been suggested that the ALRC did not advance deterrence as a goal of its Draft Bill class actions because it may be politically attractive to governments fearful of otherwise introducing punitive legislation and so being accused of "making criminals out of businessmen": W Pengilley, "Class Actions: A Legislative Hammer to Crack a Nut?" [1988] *Law Society J* 28, 31.

[144] W Pengilley, "Representative Actions Under the Trade Practices Act: The Lessons for Smokers and Tobacco Companies" (2000) 8 *Competition and Consumer LJ* 176, 179; P Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) 31 *Common Law World Rev* 123, 127.

4

A Different Approach for England

A INTRODUCTION

THE AMBIT OF multi-party litigation is not confined solely to formal class action devices, as adopted in the focus jurisdictions, and elsewhere. One notable stand-out jurisdiction which has not opted for the class action device is that of England and Wales (for convenience, England/English in this chapter). As one of the most historically and socially influential of international common law jurisdictions, England has set its face against the introduction of a formal class action regime.

That is not to say that English jurisprudence is bereft of legal devices for litigating multi-party claims—quite the contrary. Indeed, the English system has a very longstanding record of legislative and judicial pronouncements for multi-party litigation which, for various reasons dealt with in this text, have not found favour with many contemporary common law jurisdictions. Notwithstanding, the English jurisprudence with respect to multi-party actions has had a reasonably profound influence upon the enactments of the focus jurisdictions of Canada and Australia, particularly as to what to avoid.

Albeit that the theme of this book is a comparative analysis of class action schemas (of select jurisdictions), it is instructive to an understanding of multi-party litigation and of much interest to class action scholarship generally, to inform on the characteristics and to assess the merits of the English system. There are two main strands to the English multi-party jurisprudence, viz, the representative rule and group litigation orders, each of which is introduced briefly as follows.

With effect from 2 May 2000, Pt 19 of the English Civil Procedure Rules (CPR) implemented new provisions dealing with group litigation.[1] Under CPR 19.10, the court can make a group litigation order (GLO) for the "case management of claims which give rise to common or related issues of fact or law". On the same date, CPR 19.6 came into effect, preserving the old representative action "where more than one person has the same interest in a claim".[2] Importantly, in decisions such as that of the Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd*,[3] a high degree of resistance to the notion of

[1] Inserted by the Civil Procedure (Amendment) Rules 2000, SI 2000/221, r 9, sch 2.
[2] Formerly contained in Rules of the Supreme Court 1965 Ord 15, r 12,
[3] [1910] 2 KB 1021 (CA).

representative actions has been consistently (although not uniformly) demonstrated by the erection of significant barriers to their commencement. As a result of the restrictive interpretation generally accorded to the "same interest in a claim" requirement stipulated by the representative rule in CPR 19.6 (as between those persons represented who allege claims against the defendant), the representative rule has languished little used. With limited exception,[4] the general view[5] is that the representative rule has not been successful in facilitating multi-party litigation in England and Wales, and is of extremely limited utility. The "GLO issues", on the other hand, are of much wider scope. As one commentator has noted,[6] the restrictiveness of the "same interest" requirement under the representative rule undoubtedly contributed to the GLO's introduction.

Discussion of the English system in this chapter is had with reference to: specific reasons which have contributed to the English position (section B); the influence of the English jurisprudence within the focus jurisdictions (section C); and critique of the GLO schema, and ways by which class action devices might address some of its deficiencies (section D).

B A CLASS ACTION? NOT FOR ENGLAND

Two reasons contributed to the implementation of the group litigation order as the principal means by which to handle multi-party litigation in England, rather than the class action device. First, class action regimes are perceived to lack utility and flexibility. Secondly, unfavourable comments have repeatedly been made in respect of the US class action regime. However, for reasons which are explained in this section, neither of these reasons is convincing.

[4] JA Jolowicz, "Representative Actions, Class Actions and Damages—A Compromise Solution?" (1980) 39 *Cambridge LJ* 237, 238–39; D Kell, "Evolution of Representative Actions" (1993) 3 *Lloyds Maritime and Commercial LQ* 306, 307.

[5] Eg: Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995) [3.1]; RHS Tur, "Litigation and the Consumer Interest: The Class Action and Beyond" (1982) 2 *Legal Studies* 135, 154; J Jacob, "Safeguarding the Public Interest in English Civil Proceedings" (1982) 1 *Civil Justice Q* 312, 345; HP Glenn, "The Dilemma of Class Action Reform" (1986) 6 *Oxford J of Legal Studies* 262, 264–65; R Campbell and W Morrison, "Class Actions" (1987) 84 *Law Society Gaz* 2585, 2585; K Uff, "Recent Developments in Representative Actions" (1987) 6 *Civil Justice Q* 15, 18; A Lockley, "Regulating Group Actions" (1989) *New LJ* 798, 799; S Hedley, "Group Personal Injury Litigation and Public Opinion" (1994) 14 *Legal Studies* 70, 75; M Day, P Baker and G McCool, *Multi-Party Actions: Practitioners' Guide to Pursuing Group Claims* (London, Legal Action Group, 1995) 11–12; GR Hickinbottom, "Multi-Party Actions in England and Scotland" (1995) *Litigator* 190, 192; N Armstrong and A Tucker, "Class Struggles" (1996) *Journal of Personal Injury Litigation* 94, 96; M Laughton, "More Group Actions in the UK?" (1997) *Intl Commercial Litigation* 39, 39; A Lindley, "Group Actions" (1997) *Information and Technology Law* 177, 179; M Irvine, "Class Actions" (1998) *IntI Ins L Rev* 257, 257.

[6] C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [9.08]. Also: G Carney and E Morony, "Class Actions" [2002] *Global Counsel* 59, 62–63; M Mildred, "Group Actions" in GG Howells (ed), *Law of Product Liability* (London, Butterworths, 2001) 411.

1. Class Actions Not Appropriate

In *Access to Justice: Final Report*, published in 1996, the following paragraph encapsulates why Lord Woolf declined to endorse a formal class action procedure with in-built certification:

> The earlier the court exercises control in a potential multi-party action the better chance of managing the case to a satisfactory resolution. Other jurisdictions have achieved this by requiring certification of a group or class action where there is an identifiable class or a specified number of persons, and the claims give rise to common issues of fact and law and where handling them together appears to the court to provide the best and most practicable approach. The disadvantage of the solution usually adopted in other jurisdictions is that there may be many claimants with similar complaints but their claims may be more satisfactorily dealt with, at least in part, in separate proceedings. In this situation, it is likely that a group action will not be certified even though the case would benefit from collective management by the court.[7]

There is a recurring view amongst judiciary and academics in England that the class action model is too didactic, does not permit of sufficient creativity on the part of the managing judge, and that personal scenarios differ widely for which different procedural solutions will be required. For example, in the pre-CPR *Norplant* litigation, May J considered that it is "obvious that a procedure which suits one situation may not suit another."[8] Lord Woolf earlier noted that "[t]he need for imagination and creativity in dealing with such litigation is attested to by every judge who has tried such a case."[9] Academically, it has also been suggested that the GLO schema is less rigid, and more flexible, than a formal class action. Commentators have variously contended that the GLO schema allows for each class member's claim to be pleaded and so allow the court to fully consider both common issues and individual divergences,[10] or that the aims of multi-party litigation in England are different from those in a class action regime such as that in the US:

> There is a fundamental difference of approach here between the English model of a multi-party action and the US Federal class action model. Since decisions under the latter bind all class members, flexibility is inappropriate and the certification criteria must be applied strictly. In contrast, the former is a management tool for efficient administration and the claims of individual group members *may not be resolved in the same way*, so flexibility and innovation are acceptable.[11] (emphasis added)

[7] *Final Woolf Report*, ch 17, [16].
[8] *Foster v Roussel Laboratories Ltd* (QB, 30 Jun 1997).
[9] *Final Woolf Report*, ch 17, [32].
[10] N Andrews, "Multi-Party Proceedings in England" (2001) 11 *Duke J of Comp and Intl Law* 249, 264.
[11] C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [2.04 fn 10], and [3.24]. Also: *Final Woolf Report*, ch 17, [17].

In response to Lord Woolf's suggestions that a class action is an "inflexible" device which does not allow for sufficient "collective management" of similar claims, three counter arguments may be raised. First, the English views tend to understate the enormous diversity of procedures which are available under a class action regime. For example, the situation may variously call for determination of preliminary issues that may dispose of the litigation, or of one common issue only;[12] the group may be sufficiently cohesive to be treated as one band of plaintiffs, or the creation of sub-classes may be more appropriate;[13] the court has wide powers to determine individual issues within the class action if, and in the manner, it considers fit;[14] and the court has broad discretion to discontinue the class proceedings, particularly if it appears that some other method of determination, such as unitary actions, is more appropriate.[15] The statutes of both Ontario[16] and Australia[17] make specific provision for the determination of individual issues after disposition of the common issues, where separate proceedings may ultimately be required to resolve each class member's claim; whilst under FRCP 23, courts have frequently allowed class actions limited to particular issues, while deferring or severing individual issues of the representative plaintiffs or the class for later hearing.[18]

As discussed later,[19] judgment on the common issues in a class action does not require to be determinative of liability, or of the litigation, or produce finality of outcome for the litigants. A considerable amount of jurisprudence in the focus jurisdictions practically and successfully demonstrates the bifurcation process. Thus, Lord Woolf's assertion that it is "likely" that the class action would not be permitted in those circumstances is neither supportable by the legislative framework nor by the case law which has been determined under those regimes to date.

Secondly, there exists both a legislative and judicial recognition in the focus jurisdictions that the courts presiding over class proceedings must have an overriding managerial function. There is a general power conferred upon the courts under the US,[20] Australian[21] and Ontario[22] regimes to make appropriate orders

[12] FCA (Aus), s 33C(1); CPA (Ont), s 5(1)(c); FRCP 23(a)(2).
[13] FCA (Aus), s 33Q(2); CPA (Ont), s 6(5); FRCP 23(c)(4)(B).
[14] FCA (Aus), s 33Q(1); CPA (Ont), s 25; FRCP 23(c)(4)(A).
[15] FCA (Aus), ss 33L, 33M and 33N; CPA (Ont), s 10.
[16] CPA (Ont), s 25.
[17] FCA (Aus), ss 33Q, 33R, or by entirely separate proceedings: s 33S.
[18] *Newberg* (4th) § 9.47 p 422.
[19] See pp 167–70.
[20] FRCP 23(d)(1). FRCP 23(d) also incorporates FRCP 16 by reference to the fact that "orders may be combined with an order under Rule 16". Rule 16, as amended in 1983 and 1993, provides, inter alia: Pretrial conferences; Scheduling; Management. (a) In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action;. (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation; and (5) facilitating the settlement of the case.
[21] FCA (Aus), s 33ZF(1).
[22] CPA (Ont), s 12.

at any stage for the purpose of ensuring that the litigation is conducted fairly and expeditiously. Respectively, it has been noted in these jurisdictions that the responsibility of the courts is to adopt a more interventionist role;[23] that "the Court's powers in relation to representative proceedings are there to enable the Court properly to deal with problems which might otherwise beset an individual litigant";[24] and that the legislation "is replete with provisions or 'judicial tools', which enable the court to assume a pro-active and continuing role in the litigation, as it progresses to the final determination."[25]

Thirdly, it is certainly not a prerequisite of class actions that all class members will receive the same determination after a full hearing of all aspects of their claims. Assuming a proper class definition, then a decision on the common questions will pertain to all claims in the class. However, the resolution of individual issues in separate trials after the class proceeding may produce differing results for different class members (for example, reliance upon a misrepresentation may be proven by some class members and not by others). It is not accurate on the basis of this reasoning to depict the class action as inflexible in comparison with the GLO regime.

[23] *Hoffmann-La Roche Inc v Sperling*, 493 US 165, 171–72, 110 S Ct 482 (1989); *Gulf Oil Co v Bernard*, 452 US 89, 100, 101 S Ct 2193 (1981). Academically: *Rand Institute Report*, 445 and *Rand Executive Summary*, 25 ("In the class actions we studied, . . . the evidence suggests that what mattered most in determining law-suit outcomes is what the judge required of settlements and how the judge approached the issue of attorney fees. . . . How judges exercise these responsibilities determines the outcomes of the class actions that come before them. But even more important, how judges exercise these responsibilities determines the shape of class actions to come"); R Peckham, "The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition" (1981) 69 *California L Rev* 770.

[24] *Lopez v Star World Enterprises Pty Ltd* (FCA, 18 Apr 1997) 1. Also: *McMullin v ICI Aust Operations Pty Ltd (No 6)* (1998) 84 FCR 1, 4, where Wilcox J said of s 33ZF(1) that it "was intended to confer on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding"; *Trong (Nguyen Thanh) v Minister for Immigration, Local Govt and Ethnic Affairs* (1996) 66 FCR 239, 245 (a class action "can give rise to a greater responsibility on the part of the Court in relation to the conduct of the hearing. Under Part IVA, the group members are not strictly parties in the proceedings able to give instructions as such. Yet group members are bound by the result"); M Wilcox (the Hon), "Class Actions in Australia" (13th Commonwealth Law Conference, Melbourne, 2003) 5 ("A well-resourced respondent might advocate a mega-hearing concerning all issues, and continuing over many months, in the hope of exhausting the representative party's finances. The Court may need to resist this tactic. Also, one or both the parties might see merit in trying issues out of their normal order. The Court has to decide the structure of the hearing and ensure preparations consistent with that structure").

[25] *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 (Gen Div) [42] (Winkler J). Also, see an application for the exercise of such powers in *Webb v 3584747 Canada Inc* (2001), 54 OR (3d) 587 (SCJ), reversed in part: (2002), 24 CPC (5th) 76 (Div Ct) (decisions concerned a revision of the hearing process for the individual claims of class members because, over the course of approx 24 hearings before a retired judge, in most cases the cost of those hearings far exceeded the compensation given to the plaintiff); and *Guglietti v Toronto Area Transit Operating Authority* (2000), 50 CPC (4th) 355 (SCJ) [10] (to extend time for class members to file claim forms for compensation under settlement agreement, where no evidence of bad faith, no fault attributable to class member, and no prejudice to the defendant); *Endean v Canadian Red Cross Soc* (BC SC, 6 Feb 1997) [10] (to order that defendant's obligation to respond to rep plaintiff's discovery demand be deferred until after certification); *Howard Estate v BC* (1999), 66 BCLR (3d) 199 (SC) [46] (to narrow the common issues). Also see: W Winkler (the Hon) "Advocacy in Class Proceedings Litigation" (2000) 19 *Advocates' Society J* 6, 9.

2. Fear of US-style Litigation

One of the reasons evident from Lord Woolf's seminal report for the opposition to a class action regime was that it would be a mistake to emulate the US class action.[26] However, it should not be implied that some features of the US litigation landscape which are, by and large, inimical to the English system are necessary imports into a structured class action regime. The following statement of Lord Steyn, writing extra-curially, illustrates the tendency to throw the US "class action baby" out with the entire US "civil litigation bathwater":

> The question is sometimes raised whether this system should be replaced by the far more comprehensive and far-reaching system of class actions as it is known in the United States. There are marked cultural differences. First, the United States tort claims are tried by juries. Subject to narrow exceptions that is not so in England. Secondly, the scale of jury awards in the United States are far higher than awards made by judges in England. Massive awards for injuries, which are not of the most serious kind, would rightly not be tolerated by English public opinion. Thirdly, it is a feature of class actions in the United States that firms of lawyers earn billions of dollars in cases which do not even come to trial and often result in meagre recoveries by individual claimants. This too would be unacceptable in England. Finally, I would say that in England there is a general perception among judges, in this respect reflecting public opinion, that the tort system is becoming too expansive and wasteful. There is also an unarticulated but nevertheless real conviction among judges that we must not allow our social welfare state to become a society bent on litigation. The introduction of United States style class actions cannot but contribute to such unwelcome developments in our legal system. In my view the newly referred '2000' model of Group Litigation Orders is at present adequate for our purposes.[27]

Extensive jury trials, the frequent award of exemplary damages, and the availability of contingency fees by reference to a percentage of the verdict, all of which are adverted to in the above passage, are not, however, requirements nor inevitable outcomes for a class action regime. Neither Australia[28] nor the Canadian provinces[29] share these features. Yet, in their absence, both jurisdic-

[26] In *Final Woolf Report*, ch 17, [5], Lord Woolf noted that experience, most notably in the US, drew attention to the "problems" which should be taken into account in developing the new procedures for the CPR.

[27] "Foreword", C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) iii.

[28] Trial by jury under the FCA is only allowed by court order (s 39), and in practice does not occur. Only limited contingency fees which increase the lawyer's usual fee by way of a previously agreed percentage of professional costs are permitted: eg Legal Profession Act 1987 (NSW) s 187. Exemplary damages are rarely awarded, and in respect of claims under the Trade Practices Act 1974 (Aus) (the main sphere of claims within the jurisdiction of the FCA), have been judicially banned: *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [103], that aspect not overturned on appeal.

[29] Both jury trials and exemplary damages awards are rare: JY Obagi and EA Quigley, "Making a Claim for Punitive Damages" (2001) 24 *Advocates' Q* 4; K Roach and M Trebilcock, "Private Enforcement of Competition Laws" (1996) 34 *Osgoode Hall LJ* 461, [15]; P Jackson, "Abuses described in recent US study unlikely here" *Lawyers' Weekly* (2000) 20(35) ("To date we have virtually no experience with trials of class proceedings in Ontario. The use of juries, which is rare to begin with, is not likely to become more frequent. The courts have yet to address the question of

tions have implemented and developed statutory class actions, with criteria and features far more formalised than the GLO schema contained in CPR 19.III. The "cultural differences" referred to by Lord Steyn do not, under any circumstances, preclude a regulated class action in a jurisdiction which does not share those same features.

The danger of condemning a class action because of "[t]he perceived extremes to which Americans have taken things, with large contingent fees and entrepreneurial plaintiffs' lawyers and punitive damages" has been cautioned against by Rowe.[30] Taruffo agrees,[31] and points out that the perceived evils of exemplary damages and contingency fees (when they are admitted) may apply to individual suits, and to many class actions not at all. Indeed, there may also be an element of skewed perspective, in which, as other English commentators point out,[32] it is the "more daring of American class action experiments which attract attention . . . rather than the run of conventional decisions."[33] The potential for abuse of class actions in the US, manifested particularly by meritless "strike suits" against companies operating in high-technology, high-risk industries, has also involved a type of securities litigation which, as Scott and Black note, is largely unknown elsewhere.[34] Further, as Spender points out,[35] the reform of the interlocutory practices surrounding securities class actions in the US[36] occurred in an environment where a high incidence of abusive litigation in securities suits was perceived, but never proven. Nevertheless, the perception of

whether the principles governing the availability of juries or punitive damages are any different for class proceedings than for other litigation. There is as yet no reason to think that the factors that constrain the use of juries and the availability of punitive damages will differ in a class proceeding"). However, contingency fees are permitted in respect of the conduct of class proceedings: see pp 468–79.

[30] TD Rowe, "Debates Over Group Litigation in Comparative Perspective" (2001) 11 *Duke J of Comp and Intl Law* 157, 159.

[31] M Taruffo, "Some Remarks on Group Litigation in Comparative Perspective" (2001) 11 *Duke J of Comp and Intl Law* 405, 414–15.

[32] C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992) 125. A former president of the ALRC also noted that "Unfortunately, much of the more sensationalised media reporting in relation to United States class actions has merely focussed on the commencement of proceedings rather than their outcome. Many are abandoned or dismissed without media coverage": X Connor, "Class Action" (1987) *Law Society J* 52, 57.

[33] Harlow and Rawlings cite the well-known case of *Daar v Yellow Cab Co*, 63 Cal 2d 695 (1967) (plaintiff sued taxi cab company on grounds of excessive meter charges to passengers; settlement of almost $1.5 million; court ordered prospective reduction in defendant's charges until excess profits had been disgorged, ie, "fluid class recovery").

[34] C Scott and J Black, *Cranston's Consumers and the Law* (3rd edn, London, Butterworths, 2000) 132.

[35] P Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) 31 *Common Law World Rev* 123, 128.

[36] Private Securities Litigation Reform Act 1995. Securities fraud litigation was alleged to be abusive in having "straw" representative plaintiffs, and in 1995, Congress imposed a number of restrictions on eligibility to serve as a class representative. The Act required that the representative plaintiffs did not purchase the security at the direction of counsel or to participate in a securities suit, a preference that shareholders with the largest financial interest serve as lead representative plaintiffs, and a prohibition on plaintiffs receiving more than pro rata recovery.

litigation abuse and extremes is easy to allege, and frequently is. The comments of Cooper must be endorsed in this respect: there is "very little beyond the general idea of group litigation that can be borrowed [from the US] without thorough reconsideration and adaption to local needs and capacities."[37]

Moreover, those focus jurisdictions of Canada and Australia which share marked cultural and civil procedural similarities with England and Wales have implemented variants of the US class action without the extremes to which Lord Steyn has referred. As Luntz notes,[38] the fears that were expressed that Australia would proceed down the American torts path after the enactment of Pt IVA were exaggerated because of the different social and legal backgrounds against which the class action schemas operate. Similarly, Prichard envisaged[39] that concerns in Ontario about the US spectre of mass litigation were most unlikely, for parallel reasons. Even English commentator and practitioner Day considers the concerns about duplication of the US experience to be "unrealistic",[40] given the different features of the US legal system. In any event, the "floodgates of litigation" argument certainly appears misconceived. There were similar concerns in Australia[41] that the introduction of a class action regime under Pt IVA would burden the courts with increased litigation and result in an explosion of sensational and/or unmeritorious claims. However, that is not supported by statistics or volume of case law.[42] Indeed, the ALRC noted in 2000 that none of the dire consequences predicted in that regard had materialised. There had been no flood of class action litigation, but only

> a gradual adoption of the procedure in many appropriate cases with more than adequate restraint and control being exercised by the Court as Judges and the profession seek to come to grips with a procedure which undoubtedly has the potential to contribute significantly to the administration of justice.[43]

[37] EH Cooper, "Class Action Advice in the Form of Questions" (2001) 11 *Duke J of Comp and Intl Law* 215, 247.

[38] H Luntz, "Heart Valves, Class Actions and Remedies: Lessons for Australia?" in NJ Mullany (ed), *Tort in the Nineties* (North Ryde, LBC Information Services, 1997) 73–74 (eg, less need for recourse to tort law because of social security and national health insurance schemes, not as litigious a culture). Also: M Bielecki, *Defending Class Actions* (Law Society Product Liability and Class Actions Seminar Sydney 16 Sep 1992) 3–4; V Culkoff, "Representative Proceedings under Pt IVA" (1996) 7 *Aust Product Liability Reporter* 16, 19.

[39] JRS Prichard, "Class Action Reform: Some General Comments" (1984) 9 *Canadian Business LJ* 309, 312–13 (for example, difference in substantive causes of actions available).

[40] M Day, "Product Liability Actions: Sheep in Wolf's Clothing" (1996) 42 *Legal Times* 10, 10.

[41] See, eg, submissions 26 and 73 referred to in *ALRC Report*, [68]; N Francey, "A Class Act or the Spectre of Class Actions" (1992) 3 *Aust Product Liability Reporter* 52, 54.

[42] P Cerexhe, "Phantom Floodgates of Public Interest Litigation" (1999) 10 *Aust Product Liability Reporter* 42, especially the modest figures cited at 43; A Cornwall, "Representative Proceedings: Supplement" (Sydney, Public Interest Advocacy Centre for Coalition for Class Actions, 1997) 12.

[43] ALRC, *Managing Justice* (Rep No 89, 1999) [7.89], citing N Francey, "Class Actions" (NSW Bar Association CLE Program Sydney 9 Feb 1998) [20]. That is not to say that class actions in Australia are not still perceived to be controversial; see, eg: P Gordon and L Nichols "The Class Struggle" (2001) *Plaintiff* 6.

Early concerns about the Ontario regime[44] (based on suppositions about the US system) have also proven incorrect.[45] This is especially so where such legislation is "closely monitored by the court."[46]

Further, to attribute the class action with an increase in court activity, "a society bent on litigation", actually undermines one of the purposes of any system of multi-party litigation: to increase the ability of numerous parties to seek redress for perceived wrongs which would otherwise be uneconomically feasible to litigate. All multi-party litigious schemas seek to achieve various economies of scale for their participants. The GLO is no different in that regard. To decry a structured class action regime such as that which exists in the US because it allegedly increases the rate of litigation both ignores the potential for GLOs to do exactly the same; and undermines the aim of ensuring greater access to justice which both schemas seek to provide.

In response to the contention that class proceedings achieve, as a downside, overly punitive judgments against defendants, it is noteworthy that, in England and Wales, two factors negate that likelihood. First, civil jury trials—which may be motivated by the laudable, but legally flawed, "sympathetic-plaintiff-deep-pocket-defendant" theory of compensation—are rarely used;[47] and secondly, exemplary damages for tortious conduct are similarly almost never awarded.[48] Against the associated argument[49] that a class action

[44] Eg: SJ Simpson, "Class Action Reform: A New Accountability" (1991) 10 *Advocates' Society J* 19, 19; P Iacono, "Class Actions and Products Liability in Ontario: What Will Happen?" (1992) 3 *Canadian Insurance L Rev* 99 (although without endorsement); R Armstrong, "Litigation" [1994] 3 *Intl Company and Commercial L Rev* C–52 ("the Class Proceedings Act is even more accommodating to plaintiffs than the parallel legislation in the United States"). The same concerns, incidentally, were expressed for the BC schema when it was introduced: DJ Mullan and NJ Tuytel, "The British Columbia Class Proceedings Act: Will It Open the Floodgates?" (1996) 14 *Canadian J of Ins Law* 30. Roman expressed the opposite fear that the proposed Ontario class action regime was so complex that it would be virtually unused—which also proved unfounded: AJ Roman, "Class Actions in Canada: The Path to Reform?" (1988) 7 *Advocates' Society J* 28, 28.

[45] *ManLRC Report*, 33; G McKee, "Class Actions in Canada" (1997) 8 *Aust Product Liability Reporter* 84, 90; the Rules Committee of the Federal Court of Canada stated that "[t]he evidence that is available indicates that expanded class proceedings [in Quebec, BC and Ontario] has not spawned litigation that is excessively burdensome either in terms of the number of suits that have been brought or of their demand on court resources": *FCCRC Paper*, 15.

[46] BA Thomas, "Discussion after the Speeches of Thomas Hermann and Bruce A Thomas" (1995) 21 *Canada–United States LJ* 323, 328. Also see: G Mew and J Servinis, "Class Proceedings in Canada" (13th Commonwealth Law Conference Melbourne 2003) 6 ("The courts have been vigilant gatekeepers of the system. Initial fears that the CPA would unleash an American style litigation bonanza have been largely unfounded").

[47] See *ManLRC Report*, 29–30, and also; Supreme Court Act 1981 (UK) c 54, s 69(1) and (3); County Courts Act 1984 (UK) c 28, s 66; and note the further calls for the restriction on jury trials: Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) ch 5.

[48] Consequent upon the oft-cited view of Lord Devlin in *Rookes v Barnard* [1964] AC 1129 (HL) 1228 that exemplary damages may be properly awarded "if, and only if" the sum that was in mind to award as compensation was inadequate to punish the defendant for his or her conduct. See also: *AltaLRI Report*, [135].

[49] See, eg, *ManLRC Report*, 29, the several submissions to this effect noted in *ALRC Report*, [151], [351], and the support for the view expressed in *OLRC Report*, 313. Some significant US case law has also suggested this view, eg: *Castano v American Tobacco Co*, 84 F 3d 734, 746 (5th Cir

regime unfairly forces a defendant to settle as a blackmail suit because the stakes of going to trial are far too high when confronted with the aggregation of many claims, four counter-arguments can be mounted. First, there is no empirical evidence in either Canada or Australia to support such a contention.[50] Secondly, a willingness to settle rather than litigate because of the prospect of either adverse judgment or non-recoverable legal costs is a frequent occurrence in unitary litigation, and hardly restricted to the circumstances of class litigation.[51] Thirdly, defendants have the options under the CPR of instituting proceedings to strike out[52] or for summary judgment,[53] by which to "test the waters", and in order to avoid what they perceive as blackmail suits. Certain criteria discussed later,[54] such as a comprehensive class definition (that provides to a defendant the benefit of a common binding decision in respect of all potential plaintiffs) and a typicality criterion to dissuade suits which do not have support from the class, further seek to safeguard the defendants of such suits from inequity and the potential for abuse. Fourthly, in circumstances where adverse consequences were visited upon US defendants as a result of class action litigation, the Manitoba Law Reform Commission pointed out that

> the highly publicized class actions where the defendants ultimately faced bankruptcy proceedings, including the asbestos, intrauterine device, and ruptured breast implant cases, were only commenced after various plaintiffs acting individually in different parts of the United States were awarded multi-million dollar judgments. Liability, therefore, in the subsequent class proceedings was clear (at least pursuant to the verdicts of a number of juries), and settlement was the only realistic option for the defendants.[55]

The concern that the adoption of a US-style class action might lead to the potential bankrupting of manufacturers as had been the experience in the US was also adverted to by Lord Woolf.[56] However, as Armstrong and Tucker

1996) ("Certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the numberof unmeritorious claims. Aggregation of claims also makes it more likely that a defendant would be found liable and results in significantly higher damages awards"); *In re Rhone-Poulenc Rorer Inc*, 51 F 3d 1293, 1299 (7th Cir 1995) (noting that class action certification may force defendants to "stake their companies" on the outcome of a single trial and that they "may not wish to roll these dice"); *In re Agent Orange Product Liab Litig MDL No 381*, 818 F 2d 145, 165–66 (2nd Cir 1987). The defendant's position in the face of a threat of certification under FRCP 23 is discussed in: PA Drucker, "Class Certification and Mass Torts: Are "Immature" Tort Claims Appropriate for Class Treatment?" (1998) 29 *Seton Hall L Rev* 213, 219; PH Schuck, "Mass Torts: An Institutional Evolutionist Perspective" (1995) 80 *Cornell L Rev* 941, 958.

[50] Eg: GD Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 285; and the ALRC referred to no such evidence in *Managing Justice* (Rep 89, 1999) ch 7.

[51] Note the similar dismissal of this argument in *ALRC Report*, [337]; *OLRC Report*, 147.

[52] CPR 3.4(2).

[53] CPR 24.2, and also argued in *ManLRC Report*, 29.

[54] See ch 8 and ch 9 respectively.

[55] *ManLRC Report*, 29.

[56] In a meeting of the Multi-Party Actions Special Interest Group of the Association of Personal Injury Lawyers in 1996, Lord Woolf raised this concern: cited in M Day, "Product Liability Actions: Sheep in Wolf's Clothing" (1996) 42 *Legal Times* 10, 10. The importance of ensuring that defendant corporations facing multi-party litigation could continue to trade was also referred to by Lord Woolf in *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996) [2(f)].

note,[57] companies in the US who file for bankruptcy under chapter 11 of the Bankruptcy Code often choose to do so well before they are on the brink of ruin, in order to contain their liability to creditors, and to preserve the business as a going concern—and several companies emerge from the process intact. Chapter 11 bankruptcies have provided the means to rehabilitate firms which were financially strained by class action judgments, rather than impute "corporate death by class action."[58] Moreover, a response to the argument that defendants who have been found liable for wrongful behaviour may be bankrupted is that it is the right to compensation and the obligations to redress which the law already provides, and not the procedures for enforcing those rights and obligations, which impacts upon defendants in such respects—enforcement of the substantive law "should be measured as a benefit rather than as a cost" of a class action regime.[59]

Therefore, two arguments that have manifested in the English literature (judicial and academic) to date—that the class action is too didactic and inflexible to deal with similarly situated victims, and that the US-style class action is not to be emulated—are not substantiated when regard is had to the flexibility permitted under class action regimes and to the experience which has developed under the regimes of Australia and Canada, which have each been in place for over a decade.

C INTERPLAY BETWEEN THE REPRESENTATIVE RULE AND CLASS ACTIONS REGIMES

Attention will now turn to the longstanding pillar of multi-party litigation contained within the English Civil Procedure Rules: the representative rule, CPR 19.6. The jurisprudence surrounding this rule has had a dramatic influence upon the drafting of the Australian and Canadian class action regimes and this, in turn, has ultimately contributed to their utility and flexibility.

The basic tenets of the successive representative rules enacted in England are substantially similar to that introduced in 1873.[60] The English representative rule contains two prerequisites: the very undemanding numerosity requirement of "more than one person",[61] and an overly rigorous "same interest in a claim"

[57] N Armstrong and A Tucker, "Class Struggles" [1996] *J of Personal Injury Litigation* 94, 104.

[58] The authors cite, as a leading example: R Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* (Chicago, Chicago U Press, 1991), and similar sentiment by JC Coffee, "Class Wars: The Dilemma of Mass Tort Class Action" (1995) 95 *Columbia L Rev* 1343, 1458.

[59] See, eg: *ALRC Report*, [348]–[349], and the point is explored in further detail later, when the economic impact upon the defendant is considered under the superiority criterion.

[60] The first representative rule was enacted in r 10 of the Rules of Procedure scheduled to the Supreme Court of Judicature Act 1873 (Eng) 36 and 37 Vict, c 66, and later, was reproduced almost precisely in RSC 1883, Ord 16, r 9. This rule was replaced by RSC 1965 Ord 15, r 12, and CPR 19.6(1) was then inserted in the CPR by the Civil Procedure (Amendment) Rules 2000, SI 2000/221, r 9, sch 2.

[61] Previously the rule required "numerous persons".

requirement.[62] The requirement that the represented persons should have the "same interest" has undoubtedly proven to be the most problematic and least workable aspect of the rule. Much of its controversy relates to the meaning of this phrase.[63]

The jurisprudence under the representative rule has assumed particular importance for class actions in two respects. First, some of the requirements which judges considered mandatory to satisfy the requirement of "same interest" (several of which were so strict as to render the rule almost useless) are significant, as they have prompted the enactment in the post-FRCP 23 regimes of express "no-bar factors", matters which do not preclude a class action. Secondly, in the light of these strictures, and in order to provide the rule with more utility, various English cases have sought to interpret the representative rule as containing elements of the class action, a wider device than the strict representative action, under which (for example) a commonality, rather than identicality, of interest is sufficient. Such judicial interpretations may stretch the boundaries of the representative rule's language, but reflect the more fully-developed and sanctioned features of a class action regime.

1. How the Restrictions Lead to the No-bar Factors

(a) The Markt *effect*

When Ord 16, r 9 arose for consideration in 1901,[64] the possibilities seemed endless: "[t]he principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires."[65] However, as it turned out, that was "the high-water mark" of the judiciary's receptiveness to the representative action.[66] The iconic case of *Markt & Co Ltd v Knight Steamship Co Ltd*[67] was handed down in 1910, and its ongoing effects were

[62] CPR 19.6(1) reads: "Where more than one person has the same interest in a claim (a) the claim may be begun; or (b) the court may order that the claim be continued by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest." The use of the word "claim" rather than "proceedings" had no effect on the interpretation of "same interest".

[63] A similar sentiment was expressed by the OLRC, where it considered an equivalent wording in r 75 of the Supreme Court of Ontario Rules of Practice: *OLRC Report*, 19.

[64] Eg: *Duke of Bedford v Ellis* [1901] AC 1 (HL) (representative action successfully instituted by class members who claimed to be statutorily entitled to preferential rights in respect of the use of Covent Garden Market).

[65] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL) 443 (Lord Lindley).

[66] Also described as such in *OLRC Report*, 11.

[67] [1910] 2 KB 1021 (CA). For excellent detailed discussion of this case and its effects, see, especially: K Uff, "Class, Representative and Shareholders' Derivative Actions in English Law" (1986) 5 *Civil Justice Q* 50: *OLRC Report*, 9–33; J Seymour, "Representative Procedures and the Future of Multi-Party Actions" (1999) 62 *Modern L Rev* 564; *SLC Discussion Paper*, Pt V; N Andrews, *Principles of Civil Procedure* (London, Sweet & Maxwell, 1994) ch 7.

overwhelmingly restrictive. Indeed, the tremendous and widespread impact of this decision was described by Justice Kirby thus:

> [It] set back English court procedures in a way which was singularly ill-timed. The decision coincided almost exactly with the advent of mass production of goods, such as cars. The mass provision of services (such as banking, finance, insurance and government services) was to follow during the course of this century . . . the *Markt* decision narrowed the availability of the representative action in a way congenial to common law procedures but frustrating of the rule of court and of the procedures of Chancery from which that rule had been derived. *Markt* was followed throughout the British Empire . . . Gradually over a period of more than 80 years, the judges of common law countries have been struggling to recover from the set-back of *Markt*.[68]

The class in this case was a group of 45 shippers, each of whom had cargo aboard the defendant's vessel, the ss *Knight Commander*. The ship was sunk by a Russian cruiser in 1904 when it was suspected of carrying contraband during the Russo-Japanese war. The representative plaintiffs sued the defendant under Ord 16, r 9 on behalf of themselves and the other consignors for "damages for breach of contract and duty in and about the carriage of goods by sea". The representative action failed. The Court of Appeal, by majority,[69] held that the shippers did not have the "same interest" as required by the rule.

The most oft-quoted definition of "same interest" was expounded by Lord Macnaghten in *Duke of Bedford v Ellis*: "[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."[70] A decade later, Fletcher Moulton LJ called this definition "most authoritative".[71] It has since been regularly quoted in English decisions,[72] and, as academically noted, "has been accorded almost the status of a statutory formula."[73] However, the test has proven unhelpful and confusing, and many of its elements overlap.[74]

[68] *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382 (CA) 395 (Kirby P).

[69] Vaughan Williams and Fletcher Moulton LLJ, Buckley LJ dissenting.

[70] *Duke of Bedford* [1901] AC 1 (HL) 8.

[71] *Markt* [1910] 2 KB 1021 (CA) 1035. Vaughan Williams LJ also mentioned the terms "common purpose" (at 1027, 1031 and 1032), and claims which had a "common origin" (at 1029).

[72] Eg: *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) 220–21; *John v Rees* [1970] Ch 345, 373; *Bollinger SA v Goldwell Ltd* [1971] FSR 405 (Ch) 408; *Prudential Ass Co Ltd v Newman Industries Ltd* [1981] Ch 229, 245; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1987] RPC 429 (Ch) 444–45, and on appeal: [1988] Ch 61 (CA) 85; *Pan Atlantic Insurance Co Ltd v Pine Top Ins Co Ltd* [1988] 2 Lloyd's Rep 505 (QB) 509, and on appeal: [1989] 1 Lloyd's Rep 568 (CA) 571; *Haarhaus & Co GmbH v Law Debenture Trust Corp* [1988] BCLC 640 (QB) 647. Similarly in Canada: *OLRC Report*, 19.

[73] NJ Williams, *Consumer Class Actions in Canada* (Toronto, Consumers' Association of Canada, 1974) 13; K Uff, "Class, Representative and Shareholders' Derivative Actions in English Law" (1986) 5 *Civil Justice Q* 50, 52.

[74] For discussion of this overlap, see: *OLRC Report*, 19–20; J Seymour, "Representative Procedures and the Future of Multi-Party Actions" (1999) 62 *Modern L Rev* 564, 569–70; Uff, *ibid*, 53.

Application of the "same interest" criterion in *Markt* proved disastrous for the class. Class members had to show that issues of fact and law were identical between them. This required proof of three matters: the same contract between all plaintiff class members and the defendant; the same defences (if any) pleaded by the defendant against the plaintiffs; and the same measure of damages claimed by all class members. These three sub-criteria implicit in the "same interest" criterion severely restricted the use of the procedure. The cargo owners in *Markt* were unable to prove any of them. Many attempted representative actions since, both in England[75] and in other jurisdictions which reproduced the English representative rule,[76] have fallen foul of one or more of the sub-criteria.

Separate contracts not permissible. In *Markt*, each consignor entered into a separate shipping contract with the defendant, each of which was in identical terms, but nevertheless, separate. A representative action could not be founded upon separate contracts between each of the members of the class and the defendant. Even complete "identity of form of contract" (as occurred in this case) or "similarity in the circumstances under which they were to be performed", did not satisfy the language of the representative rule—separate contracts did not mean a "common source of right" and were "in no way connected".[77] In strict legal terms, each contract was separate or personal to each of the parties, although, as Uff notes,[78] there was also an underlying reluctance on the part of the court to consider questions of fact, such as the terms of the different contracts of carriage, which were not then formally in evidence.

Further, as Kell observes, there was an apparent willingness to assume, again in the absence of any direct evidence, that it was likely that the defendant could plead different defences against various class members if each class member had a separate contract, which would not satisfy the "same interest" requirement.[79] Fletcher Moulton LJ also argued that the representative plaintiff could create an estoppel in respect of a contract to which he or she was not a party and in which he or she had no interest, "merely because he is desirous of litigating his own

[75] Eg: *Lord Aberconway v Whetnall* (1918) 87 LJ Ch 524; *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) 220–21; *Pan Atlantic Insurance Co Ltd v Pine Top Ins Co Ltd* [1989] 1 Lloyd's Rep 568 (CA) 571; *Haarhaus & Co GmbH v Law Debenture Trust Corp* [1988] BCLC 640 (QB) 647; *Drozdowski v Watch Tower Bible & Tract Society of Pennsylvania* (CA, 4 Dec 1997).

[76] Eg: *Payne v Young* (1981) 145 CLR 609 (HCA) (Ord 16, r 1 of the High Court Rules); *Naken v General Motors of Canada Ltd* [1983] SCR 72, 144 DLR (3d) 385 (r 75 Supreme Court of Ontario Rules of Practice); *Dillon v Charter Travel Co Ltd* (1988) ATPR ¶40–872 (NSW SC) (FCR Ord 6, r 13(1)); *Kerrigan and Meat Industry Employees Superannuation Fund Pty Ltd v Dawson* (Vic SC, 17 Dec 1992) (Ord 18, r 2 Rules of Supreme Court (Vic)); *Cameron v National Mutual Life Association of Australasia Ltd* [1992] 1 Qd R 133 (Full Ct SC) (Ord 3, r 10 Rules of the Supreme Court (Qld)).

[77] *Markt* [1910] 2 KB 1021 (CA) 1040 (Fletcher Moulton LJ); *OLRC Report*, 13 (a "doctrinal approach").

[78] K Uff, "Class, Representative and Shareholders' Derivative Actions in English Law" (1986) 5 *Civil Justice Q* 50, 55. Also: D Kell, "Representative Actions: Continued Evolution or a Classless Society?" (1993) 15 *Sydney L Rev* 527, 529.

[79] D Kell, "Renewed Life for the Representative Action" (1995) 13 *Aust Bar Rev* 95, 96.

rights under a contract similar in form".[80] That was regarded as an impermissible interference "with another man's contract where he has no common interest", and could not be accommodated by the representative action.

As Harlow and Rawlings note,[81] this strict doctrinal approach meant that the representative action was not available in consumer cases, even where each class member's claim arose out of a "standard form" contract with the same company, and that this severely limited the utility of the action: it was unavailable where it was otherwise likely to have most effect.

Different defences not permissible. Additionally, it was theoretically possible[82] in *Markt* that the shipowner could raise separate and different defences against the various consignors, because of possible variations in factual scenarios under which the consignors shipped their goods. For example, "a shipper who had shipped contraband, or who knew that contraband was being carried on board but elected to run the risk, would be in a very different position from a shipper whose own goods were not contraband and who did not know that the ship was carrying such goods."[83]

The perceived difficulty was that if the defendant did raise separate defences as were potentially available against different plaintiffs, then a number of individual trials might be required, and liability would not be determined in the one proceeding. Alternatively, if the defendant was not permitted to raise them, then it would be unjust to bar a defence which might otherwise have been available to the defendant in a unitary action.[84] The principle has been applied strictly under the representative rule. Even the availability of a defence against *one* member of a plaintiff class has been sufficient to deny the class the "same interest" in the proceedings.[85]

Separate damages and separate relief not permissible. The third reason for the failure of the consignors in *Markt* to sue in a representative capacity was that each of the represented parties had a several measure of damages (ie, the value of their lost cargos), with none having any interest in the damages recoverable by the representative plaintiffs. Fletcher Moulton LJ decreed that no representative action was possible where the relief sought by the representative plaintiff

[80] *Markt* [1910] 2 KB 1021 (CA) 1040; also: Evershed MR in *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) 222.

[81] C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992) 127.

[82] In *Markt*, Fletcher Moulton LJ noted that defences *may* have existed against some of the shippers which did not exist against others: [1910] 2 KB 1021 (CA) 1040.

[83] *Ibid*, 1030 (Vaughan Williams LJ), approving counsel's argument at 1023.

[84] *Prudential Ass Co Ltd v Newman Industries Ltd* [1981] Ch 229, 254. Vinelott J noted (at 255) that injunctive relief also presented the problem of separate defences, in that class members had to establish an apprehension of injury and might be faced individually with defences of laches or acquiescence.

[85] *Consorzio del Prosciutto di Parma v Marks & Spencer plc* [1990] FSR 530 (Ch), aff'd: [1991] RPC 351 (CA) (one named member of the class which the plaintiff consortium purported to represent likely to be met with an arguable defence by defendant). Also see: J Seymour, "Representative Procedures and the Future of Multi-Party Actions" (1999) 62 *Modern L Rev* 564, 572–79.

was damages on behalf of all class members severally.[86] The relief granted would then not be the same for all parties. Proof of damages was personal to each member of the class (and had to be proven individually), and the facts underlying the measure of damages would differ.[87] The fact that the relief must be "beneficial to all" was also susceptible to the interpretation that claims for damages were necessarily restricted to those which would enhance some collective fund for the plaintiffs as a group.[88]

Consequently, there was a long-held view[89] that, under the English representative rule, "if the cause of action of each member of the class whom the plaintiff purported to represent was founded in tort and would, if established, be a separate cause of action and not a joint cause of action belonging to the class as a whole, no representative action could be brought." Proof of damage was a necessary ingredient of a tortious cause of action, and the representative plaintiff could not, by proving his or her own damage, claim to represent the class and obtain relief on behalf of all class members. Instead, equitable relief, such as an injunction or declaration, has "[n]ormally, therefore, if not invariably" been the only form of relief which has been awarded in English representative actions.[90]

This prohibition against an award of damages provided perhaps the main stricture against representative actions in this jurisdiction.[91] Indeed, in tort personal injury litigation, "whilst a large number of plaintiffs may have a tortfeasor and cause of injury in common, they will almost always have suffered differently," severely compromising the device.[92] The restrictiveness caused by the same relief requirement has also lead to difficulties where some class members did not have a claim for relief identical to those of all other members, even though their claims had the same factual basis (for example, where, following the sinking of a ship, passengers could claim personal injury or property damage or both[93]). In such cases, a representative proceeding could not be used to claim damages.

[86] *Markt* [1910] 2 KB 1021 (CA) 1040.

[87] *Ibid*, 1040–41.[88] See, especially, Buckley LJ at *ibid*, 1045 ("the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself"), and similar comments in K Uff, "Class, Representative and Shareholders' Derivative Actions in English Law"(1986) 5 *Civil Justice Q* 50, 53, also M Mildred and R Pannone, "Group Actions" in M Powers and N Harris (eds), *Medical Negligence* (2nd edn, London, Butterworths, 1994) 343.

[89] Eg: *Temperton v Russell* [1893] 1 QB 435 (CA); *Lord Aberconway v Whetnall* (1918) 87 LJ Ch 524 (CA).

[90] Quotes and prasy from: *Prudential Ass Co Ltd v Newman Industries Ltd* [1981] Ch 229, 244, 255.

[91] See comments by Ryan J, writing extra-curially, in "Development of Representative Proceedings in the Federal Court" (1994) 11 *Aust Bar Rev* 131, 132.

[92] JG Fleming, "Mass Torts" (1994) 42 *American J of Comp Law* 507, 523; N Armstrong and A Tucker, "Class Struggles" (1996) *J of Personal Injury Litigation* 94, 96.

[93] *Dillon v Charter Travel Co Ltd* (1988) ATPR ¶40-872 (SC NSW). Also: *ALRC Report*, [64].

(b) Relaxations upon the Markt *effect*

It is hardly unsurprising that the requisite commonality that the *Markt* decision imputed to Lord Macnaghten's test in *Duke of Bedford* rendered the representative procedure almost useless. Prior to the developments described in this section, some lamented that very few actions "are or can be brought" under the rule or that *Markt* "turn[ed] on its facts".[94] However, there have since been several judicial relaxations upon the strictness of the rule, which have enabled a representative action to progress where once it would not have been likely.[95]

The "common ingredient" test. Whilst trying to save a representative action instituted in tort, an innovative judge sought to devise a way to avoid the action foundering on the requirement of "same interest". In *Prudential Assurance Co Ltd v Newman Industries Ltd*, Vinelott J espoused the liberal view that "there must be a *common ingredient* in the cause of action of each member of the class",[96] or "some element common to the claims of all members of the class"[97] which the representative plaintiff purported to represent. Then, if the common element was proven, his Lordship considered that any member of the class would be entitled to rely on the judgment as *res judicata*, and prove the remainder of the elements of the cause of action in separate proceedings.[98] In this case, the representative plaintiff sued the defendant company officers, on behalf of company shareholders, for the tort of conspiracy. Given separate damages claims, and that the cause of action required proof of damage on the part of each class member, a strict application of the decision in *Markt* would have prevented representative proceedings in this scenario. However, Vinelott J upheld the action as validly commenced, rejected the defendants' contention that the court had no jurisdiction to entertain a representative action where each member of the class alleged a separate cause of action founded in tort, and pointed to the "common ingredients" in an action for conspiracy—namely, whether misleading statements were contained in the challenged circular, and whether the defendants could honestly have believed them—which could be decided in the representative proceedings.[99]

The change of test—from "same interest" to "common ingredient"—seemingly provided the representative action with far greater flexibility and utility.

[94] Respectively: IJ Jacob, "Access to Justice in England" in M Cappelletti and B Garth (eds), *Access to Justice: A World Survey* (London, Siftoff and Noordoft, 1978) vol 1, 470; GG Howells, "Mass Tort Litigation in the English Legal System" in J Bridge *et al* (eds), *UK Law in the Mid 1990s* (London, UK National Committe of Comparative Law, 1994) 607.

[95] For other literature which assesses various key features of the representative rule, see, eg: N Andrews, "Multi-Party Proceedings in England: Representative and Group Actions" (2001) 11 *Duke J of Comp and Intl Law* 249, Pt II; *OLRC Report*, ch 3(1)(d), 3(2); *SLC Paper*, Pt V.

[96] [1981] Ch 229, 255 (emphasis added).

[97] *Ibid*, 252.

[98] *Ibid*, 255. He also cited *Jones v Cory Brothers & Co Ltd* (1921) 56 L Jo 302 (CA), another action in tort, to support his contention that a common ingredient was sufficient.

[99] *Ibid*, 255. Also: *OLRC Report*, 14–16, 21, 89–90.

It certainly moves the action closer to a class action, which typically requires "a common issue of fact or law". As the High Court of Australia subsequently stated,[100] when considering a schema[101] which also required proof of the "same interest", the *Prudential* view that this expression was to be equated with a common ingredient in the cause of action by each member of the class does not actually reflect the content of the statutory expression. Nevertheless, the High Court considered that *Prudential* could be said to stand for the proposition that the representative rule "extends to a significant common interest in the resolution of any question of law or fact arising in the relevant proceedings."[102] It is ironic, then, that whilst Vinelott J's wider interpretation of "same interest" was adopted and used in other jurisdictions,[103] the *Prudential* view was not developed in English jurisprudence as much as may have been expected. Perhaps this was due to the fact that the precedential value of the case has occasionally been doubted.[104] In any event, it is this reluctance to expand the interpretation of "same interest" which has undercut most the utility of the representative rule in England.

Separate contracts. The 1990s witnessed a gradual and cautious undermining of the requirement that each member of the representative class must have the same contract with the other party in order to share the "same interest" (although not in the context of plaintiff representative actions).

The leading English case, subsequent to *Markt*, on the appropriateness of a representative action in circumstances involving separate and individual contracts, was *Irish Shipping Ltd v Commercial Union Assurance Co plc (The Irish Rowan)*,[105] a defendant representative action. The plaintiff shipowners issued a writ pursuant to Ord 15, r 12 against the representative defendants, who were sued "on their own behalf and on behalf of all other liability insurers", of whom there were 77. Each of these was bound by a separate contract of insurance, under which each insurer was liable for its share of the loss and none was liable for the share of any other. Nevertheless, it was held that the defendant class

[100] *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 (HCA) 404. The High Court overruled the NSWCA's narrow interpretation of "same interest": *Esanda Finance Corp Ltd v Carnie* (1992) 29 NSWLR 382. The wide *Carnie* view of "same interest" has since also been endorsed in the FCA: *National Mutual Life Assn of Australasia Ltd v Reynolds* [2000] FCA 267, [123]–[125].

[101] Federal Court Rules, Ord 6, r 13(1).

[102] *Carnie* (1995) 182 CLR 398 (HCA) 404.

[103] Eg: *Shepherd v ANZ Banking Group Ltd* (1996) 20 ACSR 81 (NSW SC); *BT Australasia Pty Ltd v State of NSW* (FCA, 24 Dec 1997); *Taspac Oysters Ltd v James Hardie Pty Ltd* [1990] 1 NZLR 442 (HC).

[104] The case was partly overruled on the question of the appropriateness of claims by minority shareholders for damages, but not on the scope of the representative proceeding: *Prudential Ass Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 (CA). However, the stature of the earlier Vinelott J decision has been academically questioned: *OLRC Report*, 15–16; M Cappelletti and B Garth, "Finding an Appropriate Compromise" (1983) 2 *Civil Justice Q* 111, 135; K Uff, "Class, Representative and Shareholders Derivative Actions in English Law" (1986) 5 *Civil Justice Q* 50, 57.

[105] [1991] 2 QB 206 (CA). For detailed discussion, see: Note, "Representative Actions Against Insurers" (1989) 1 *Insurance L Monthly* 5.

members did have the "same interest". In light of a common contractual provision inserted into each contract of insurance (a leading underwriter clause, which provided that all settlements of claims undertaken by the representative defendant would be binding upon all other class members), it was held that "[f]or all practical purposes this is one claim upon one contract, which . . . the insurers all have the same interest in resisting".[106] Thus, despite separate contracts, the action was validly commenced. The issue of separate contracts was again revisited, but this time in the absence of a leading underwriter clause, in *Bank of America National Trust and Savings Association v Taylor (The Kyriaki)*.[107] Again, the defendant representative action was upheld.[108] Waller J based his decision upon the convenience of the representative procedure,[109] and aligned his views with *The Irish Rowan* where it was noted how inconvenient it would be to have to sue the separate underwriters.[110] This has been subsequently endorsed.[111]

Thus, in the light of these cases,[112] both of which were defendant representative actions, it may be said that the strictness of the "same interest" requirement has been relaxed in England, but in fairly infrequent circumstances,[113] such that the existence of separate contracts does not preclude a finding of "same interest". Undoubtedly, if *Markt* were to be specifically overruled (especially in the context of a plaintiff representative action) so as to make it clear that separate contracts do not preclude a representative action, then many of the benefits of a class action would follow[114]—which the drafters of the Australian and Canadian focus jurisdiction regimes were keen to ensure by inclusion of an express provision that the existence of separate contracts does not preclude a class action.

Separate defences. It has been judicially suggested under the English representative rule that, notwithstanding the possibility of the class members in a defendant class raising separate defences in proceedings brought by the plaintiff,

[106] *Ibid*, 227 (Staughton LJ).

[107] [1992] 1 Lloyd's Rep 484 (QB).

[108] Note that, in *The Irish Rowan*, the proceedings had been commenced as a representative action under Ord 15, r 12(1), whereas in *The Kyriaki*, the bank applied for an order under Ord 15, r 12(2) that the existing proceedings against the defendant be converted into representative proceedings. However, the reasoning in both applies to representative proceedings generally: Note, "Representative Actions" (1991) 3 *Insurance L Monthly* 10, 13.

[109] *The Kyriaki* [1992] 1 Lloyd's Rep 484 (QB) 493.

[110] *The Irish Rowan* [1991] 2 QB 206 (CA) 231–326 (Sir John Megaw).

[111] *National Bank of Greece SA v RM Outhwaite 317 Syndicate at Lloyds* (QB, 16 Jan 2001) [31].

[112] Waller J also relied upon *Pan Atlantic Ins Co Ltd v Pine Top Ins Co Ltd* [1989] 1 Lloyd's Rep 568 (CA), although this authority does not tend to be supportive of the "separate contracts—same interest" hypothesis. As Kell points out, the interests of a pool of syndicate members was treated there as arising out of the very same contract, not from individual contracts: D Kell, "Evolution of Representative Actions" (1993) 3 *Lloyds Maritime and Commercial LQ* 306, 308.

[113] There has indeed not been a marked relaxation in this criterion under the English representative rule, as Wilkin notes: J Wilkin, "Representative Proceedings in Victoria: No Change in Contract Cases?" (1996) 70 *Law Institute J* 36, 39.

[114] RHS Tur, "Litigation and the Consumer Interest: The Class Action and Beyond" (1982) 2 *Legal Studies* 135, 160.

the "same interest" criterion can be satisfied. In *The Irish Rowan*, Staughton LJ accepted that it was "theoretically possible"[115] that any one of the 77 defendant insurers could seek to defend the action on several bases,[116] but considered the possibility of separate defences to be more theoretical than real, and that none of the possible separate defences appeared likely to arise.[117] As a result, there has been a shift from the hypothetical or abstract possibility for class members to raise separate defences to examining whether there is a realistic possibility that such defences would be raised[118] (something which, as noted previously, the court in *Markt* was unwilling to undertake). The decisions have certainly diluted the "same interest" requirement under Ord 15, r 12.[119]

As Kell points out,[120] the possibility of separate defences in a plaintiff representative action has been adequately and competently handled in other jurisdictions on the basis that, in any judicial proceeding, the court has the power to manage its own procedures. For example, in *RJ Flowers Ltd v Burns*,[121] a representative suit was allowed, where separate defences were alleged by the defendant against different members of the plaintiff class of kiwifruit growers. McGechan J noted that, if separate defences did become apparent at a later stage, further growers could be added as representative plaintiffs so as to articulate the defences properly, and/or the original action could be split into two or more smaller representative proceedings to deal with individual defences separately.[122] Consistent with these views, and as examined later, it is the judicially-held position with plaintiff class action regimes that separate defences available to the defendant against different class members do not necessarily preclude a commonality of interest amongst class members or prevent the commencement of a viable class action. Indeed, much as McGechan J per-

[115] *The Irish Rowan* [1991] 2 QB 206 (CA) 222.

[116] That is, that the cover note was subscribed to without its authority, or that its percentage was not that written down, or that it was a victim of misrepresentation or non-disclosure.

[117] *The Irish Rowan* [1991] 2 QB 206 (CA) 222–23; also 232 (Sir John Megaw) (in actuality, all defendants were seeking to rely on an identical defence, namely, no transfer of benefit of policy from original policy-holders to plaintiffs; thus, common nature of the defence does not make this a particularly strong case for "separate defences"). Similarly in *The Kyriaki* [1992] 1 Lloyd's Rep 484 (QB), all defendant insurers had common defence of want of due diligence on part of owners of insured vessel, with some insurers possibly pleading a different defence relating to assignment of the insurances: Note, "Representative Actions" (1991) 3 *Insurance L Monthly* 10, 12.

[118] J Seymour, "Substantive Problems for the Representative Procedure" (1997) 16 *Civil Justice Q* 196, 202. Further support is to be found in: *Monsanto plc v Tilly* [2000] Env LR 313 (CA) where separate defences unlikely, no conflict between class members of the type evident was evident, and a representative action against defendant association permitted. Cf *UK Nirex v Barton* (QB, 13 Oct 1986).

[119] B Hough, "'Standing' for Pressure Groups and the Representative Plaintiff" [1991] *Denning LJ* 86, 88.

[120] D Kell, "Representative Actions: Continued Evolution or a Classless Society?" (1993) 15 *Sydney L Rev* 527, 529, 532, 534–35. See also: P Radich and R Best, "Class Actions" [1997] *New Zealand LJ* 265, 266, who reiterate that case management could provide the representative rule with real utility.

[121] [1987] 1 NZLR 260 (HC), cited by Kell, *ibid*. The case also involved separate contracts of bailment between class member growers and the defendant.

[122] *Ibid*, 273.

mitted under the representative rule, sub-classing is a common and effective technique to facilitate a class action where different defences are pleaded.

Representative actions for damages. Despite the rigours of *Markt*, three exceptions emerged in English law by which innovative attempts were made to overcome adherence to the view that damages are not an appropriate remedy in a representative action.

First, as the previously mentioned ground-breaking case of *Prudential Assurance Co Ltd v Newman Industries Ltd*[123] demonstrated, the relief sought on behalf of the class was not damages, but rather, a declaration of the class members' entitlement to damages as a result of the alleged conspiracy by the company officers. Each of the class members could then base a claim for damages on that declaration. On that basis, the action was permitted to proceed in a representative capacity.[124] Ironically, this very approach had been suggested 70 years previously by Buckley LJ (dissenting) in *Markt*.[125] Whilst the *Prudential* approach was considered a promising development,[126] it must be acknowledged that there has been both judicial refusal[127] to allow actions for damages to proceed in representative form where the entitlement of the individual class members to damages would necessitate individual assessment in subsequent proceedings, and judicial[128] (and academic[129]) support for that very proposition since.

[123] [1981] Ch 229.

[124] *Ibid*, 256. Also: *OLRC Report*, 15.

[125] *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) 1047 ("It is not accurate to say that they have a similar interest. They have exactly the same interest although it will result in the case of each of them in a different measure of relief"), and see also: N Andrews, *Principles of Civil Procedure* (London, Sweet & Maxwell, 1994) 140.

[126] At the time of the *Prudential* decision, academic comment considered it to be highly significant towards developing the representative procedure. Eg: JA Jolowicz, "Representative Actions, Class Actions and Damages—A Compromise Solution?" (1980) 39 *Cambridge LJ* 237, 238–39; RI Barrett "Representative Action for Damages: Towards a Judge-made Class Action System?" (1980) 54 *Aust LJ* 688, 688; RHS Tur, "Litigation and the Consumer Interest: The Class Action and Beyond" (1982) 2 *Legal Studies* 135, 153–56.

[127] *Chrzanowska v Glaxo Laboratories Ltd* (QB, 12 Mar 1990) 3 ("That procedure [in Ord 15, r 12] is no doubt capable of development but its present limitations are such that it cannot be used where damages have to be separately assessed in respect of different cases. It seems that representative actions for damages are not permitted"); *Drozdowski v Watch Tower Bible & Tract Society of Pennsylvania* (CA, 4 Dec 1997) (claim by Jehovah's witnesses for damages for, inter alia, defamation, pitched at £300 million; disallowed on both grounds of no "same interest" as required by Ord 15, r 12(1), and that statement of claim disclosed no reasonable cause of action). Also: *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd* [1980] QB 585 (delivered only six months after *Prudential*) where O'Connor J held that different assessments of damages amongst class members would make a representative action "quite unworkable and impossible": at 601.

[128] *The Irish Rowan* [1991] 2 QB 206 (CA), citing earlier decisions permitting pecuniary recovery: *Wood v McCarthy* [1893] 1 QB 775 (Div Ct); *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426 (HL); *Moon v Atherton* [1972] 2 QB 435 (CA).

[129] N Andrews, "Representative Actions Against Numerous Defendants" (1990) 49 *Cambridge LJ* 230, 231 ("the Court of Appeal firmly endorsed the proposition that a pecuniary action can be framed as a representative action. It seems safe to conclude therefore that the comments of Fletcher Moulton LJ [in *Markt*] can now be ignored"); C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992) 128 ("clearly there is material here for development, which previously

Secondly, apart from the tactic of seeking a declaration for damages, certain decisions have confirmed[130] that, where the full liability of the defendant (if established) would be owed to the class as a lump sum, or at least "recovered for the collective fund"[131] without resort to individual proceedings, that equates to the same relief, and complies with the *Markt* sub-criteria. In this way, the split procedure for the award of damages can be avoided.[132] The device has been particularly successful where it was procedurally simpler and more convenient to determine a global figure for the class rather than to inquire into each member's exact interest, and where the class members consented to the payment of all damages to a body representing them,[133] or the representative was obliged to distribute the fund pro rata.[134]

Finally, it was suggested in *CBS Songs Ltd v Amstrad Consumer Electronics plc*[135] that an action was properly brought as a representative action, because the relief which was *primarily* sought was injunctive, to protect all from the risk of infringements by the defendant, and the pursuit of damages in different measure by class members was an adjunct to the major injunctive relief common to all plaintiffs.[136] Sir Denys Buckley likened the case before him to the much earlier decision of *Duke of Bedford v Ellis*,[137] where the plaintiffs had sought a declaration as to the construction of the Covent Garden Market Act 1828, injunctive relief restraining breaches of the Act, and an account of the amounts by which growers had allegedly been overcharged. His Lordship held[138] that the action in *Amstrad* was properly brought as a representative action, because the relief which was *primarily* sought was injunctive, to protect all from the risk of infringements by the defendant. The claim to an account in *Duke of Bedford*,

was thought not to be the case"). Also: M Day, P Baker and G McCool, *Multi-Party Actions: Practitioners' Guide to Pursuing Group Claims* (London, Legal Action Group, 1995) 12.

[130] *Walker v Murphy* [1915] 1 Ch 71 (CA) 85 (Kennedy LJ), 90 (Swinfen Eady LJ); *EMI Records Ltd v Riley* [1981] 1 WLR 923 (Ch) 926 (Dillon J).

[131] A Lockley, "Regulating Group Actions" [1989] *New LJ* 798, 799; M Mildred and R Pannone, "Group Actions" in M Powers and N Harris (eds), *Medical Negligence* (2nd edn, London, Butterworths, 1994) 343.

[132] Thus, not as significant a scenario as that in *Prudential Assurance Co Ltd v Newman Industries Ltd*: RHS Tur, "Litigation and the Consumer Interest: The Class Action and Beyond" (1982) 2 *Legal Studies* 135, 155.

[133] *EMI Records* [1981] 1 WLR 923 (Ch) 926 (representative plaintiffs sued pirate record manufacturer on their own behalf and on behalf of all members of British Phonographic Industry (BPI) for injunction to prevent infringement of copyright, and for damages from sales of pirate cassettes; damages resulting from pirating belonged to class because copyright in nearly all tapes sold by defendant belonged to BPI members; subsequent individual damages assessments unnecessary). Also: *ALRC Report*, [42].

[134] *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265 (HL), *sub nom Owners of Cargo Lately Laden on Board The Greystoke Castle v Owners of The Cheldale* [1945] 1 All ER 177 (CA) 179, discussed further in N Andrews, *Principles of Civil Procedure* (London, Sweet & Maxwell, 1994) 142–43.

[135] [1988] Ch 61 (CA) (Sir Denys Buckley).

[136] *Ibid*, 86.

[137] [1901] AC 1 (HL).

[138] Whilst ultimately a dissenting judgment, Sir Denys Buckley was the only member of the court to consider the validity of the constitution of the representative action.

said Sir Denys Buckley, was no greater bar to a representative action than the pursuit of damages in *Amstrad*. Both were quite "*subsidiary* forms of relief", merely an adjunct to the major injunctive relief common to all plaintiffs.[139] This case raised the possibility that identical relief was not necessary as between all class members, a no-bar factor which has subsequently been invoked in some mature class action regimes.

In its report *Class Proceedings*, the Manitoba Law Reform Commission advocated that "[i]t must be kept in mind that there is little point in adopting class proceedings law which appears to permit such actions but which, practically speaking, precludes them."[140] Such a statement could have been written with the English representative rule in mind, to the extent that it has been restrictively interpreted in *Markt* and by other decisions since. Nevertheless, various more liberal interpretations and relaxations of previously restrictive criteria under which such actions could be brought reflects considerable efforts by the judiciary to develop a more useful procedure for the protection of collective interests (and a more workable access to justice) by means of the representative action. Table 4.1 summarises this section by illustrating how several of those judicially-developed criteria pertinent to a representative action are now expressly included in class action regimes in the focus jurisdictions.

Table 4.1 Relaxations of the representative rule reflected in class action regimes

Restrictive interpretation of *Markt*	Relaxation evident in subsequent English case law	Class action provision which expressly reflects that relaxation
separate contracts between class members and opponent disallowed	the relief claimed can relate to separate contracts involving different class members	FCA s 33C(2)(b)(i) CPA (Ont), s 6(2) CPA (BC), s 7(b)
different measure of damages amongst class members disallowed	actions for damages (and subsequent and individual assessment for each class member) allowed	FCA s 33C(2)(a)(ii) CPA (Ont), s 6(1) CPA (BC), s 7(a)
entirety of proceedings to be disposed of in representative action (one consequence: if different defences available against different class members, action disallowed)	individual issues can be determined and assessed subsequently by other means (one consequence: separate defences against some class members and not others permissible)	FCA ss 33Q, 33R, 33S CPA (Ont), s 25 CPA (BC), s 27 FRCP 23(c)(4)(A)

[139] *Amstrad* [1988] Ch 61 (CA) 86. It was also improbable that any damages claims would be pursued—such damages were likely to be unascertainable: see the first instance decision of Whitford J in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1987] RPC 429 (Ch) 445.

[140] *ManLRC Report*, 37, and see too: *SLC Paper*, [5.11(ii)].

Table 4.1 (***cont.***)

Restrictive interpretation of *Markt*	Relaxation evident in subsequent English case law	Class action provision which expressly reflects that relaxation
entirely the same issues of law and fact required among class members	claims of class members may raise "common ingredients", instead of identical issues, of fact or law	FCA s 33C(1)(c) CPA (Ont), s 5(1)(c) CPA (BC), s 4(1)(c) FRCP 23(a)(2)
the relief claimed by all class members must be identical, the *same* relief	complete identity of relief between class members is not a prerequisite to maintaining a representative action	FCA s 33C(2)(a)(iv) CPA (Ont), s 6(3) CPA (BC), s 7(c)

2. Other Similarities With Class Actions

Quite apart from the judicial relaxations which have clothed the previously restrictive representative rule with class action-style attributes, many features have emerged in the context of the English representative rule which have subsequently been adopted by, and form important components of, the class action regimes considered later. These will be briefly discussed in this section (and the class action provisions relevant to each point are noted in Table 4.2 at the end of the section).

One of the similarities between the representative rule and a class action is the formation of sub-classes in circumstances where groups of two or more class members have a particular question in common which is not common to other class members. Such a course has been permitted under the representative rule—both in respect of defendant classes[141] and plaintiff classes[142]—although in other instances where the creation of sub-classes may possibly have assisted to save the representative action,[143] the action failed as invalidly commenced. Notwithstanding, the ability to divide a class into sub-classes for which some of the common issues are different is a striking resemblance between the representative rule and the class action, and as will be evident later,[144] has saved the commencement of many a class action in the focus jurisdictions.

[141] *The Kyriaki* [1992] 1 Lloyd's Rep 484 (QB) (if sub-classes of insurers pleaded different defence relating to assignment of the insurances, necessary to appoint representative from each sub-class with that defence).

[142] *Duke of Bedford* [1901] AC 1 (HL) (3 classes of growers represented in action against defendant).

[143] Eg, it is suggested that the voters in *Haarhaus & Co GmbH v Law Debenture Trust Corp* [1988] BCLC 640 (QB) may have been capable of proceeding in a representative action as two separate sub-classes, given that they had a common interest in preserving confidentiality of the voting procedures.

[144] See pp 184–88.

Similarly, the treatment of class numerosity and identity under both representative and class action regimes has been particularly flexible. Incarnations of the representative rule in England prior to CPR 19.6 required that "numerous persons" have the same interest. This has now been amended to "more than one person" in CPR 19.6(1).[145] The amendment has effectively removed a minimum numerosity requirement, which accords with certain class action statutes elsewhere. Of course, a class action may not be preferable or appropriate if there are too few within the represented class, although in England, having too few for a representative action has not been a particular matter for judicial concern.[146] The English representative rule is silent about whether the identities of the represented persons are required to be known or capable of ascertainment at commencement of the litigation. Although it has been academically suggested[147] that it is a procedural requirement that "in cases of doubt the names of members of a class should be annexed to the writ", a defendant class in which the members were not identified but merely described has been permitted under the representative rule where injunctive relief was sought against that class.[148] These particular features—minimal numerosity and possible class description rather than identification—are hallmarks of a mature class action regime.

Further, certain tests of superiority have emerged under the representative rule which are similarly applied in the class action regimes of the focus jurisdictions considered later.[149] The original English representative rule which was applied in the courts of Chancery was invoked for the sake of convenience and judicial economy—"when the parties were so numerous that you never could 'come at justice' ", as Lord Macnaghten explained in *Duke of Bedford v Ellis*.[150] Although the inconvenience of having the 45 consignors sue the defendant separately seemed not to influence or sway the view of the majority of the Court of Appeal in *Markt*, there have been more recent judicial statements to the effect that the court should have regard to judicial economy and convenience when deciding whether a representative action should proceed.[151] For example, in *The Irish Rowan*,[152] a representative action enabled the plaintiff to by-pass the procedural difficulty of serving 77 different insurers in different parts of the world. Purchas LJ held:

[145] One person is not sufficient because he or she "cannot be a representative without a constituency": *Wilson v Church* (1878) 9 Ch D 552, 559. Also noted: *OLRC Report*, 18, 326.

[146] Although in *Re Braybrook* [1916] WN 74, Sol Jo 307 (Ch D), five persons was not regarded as "numerous". See discussion in: *OLRC Report*, 18, 326, fn 3; and *SLC Paper*, [5.11(i)].

[147] GG Howells, "Mass Tort Litigation in the English Legal System" in J Bridge *et al* (eds), *United Kingdom Law in the Mid 1990s* (London, UK National Committee of Comparative Law, 1994) 609.

[148] *EMI Records Ltd v Kudhail* [1985] FSR 36 (CA) (activities of defendant class so secret that plaintiffs unable to find out identity of all members; however, representative action against defendant successfully commenced).

[149] See ch 7.

[150] [1901] AC 1 (HL) 8.

[151] *M Michaels (Furriers) Ltd v Askew* (CA, 23 Jun 1983) 16–17 (Purchas LJ), also cited in K Uff, "Class, Representative and Sareholders' Derivative Actions in English Law" (1986) 5 *Civil Justice Q* 50, 58; *National Bank of Greece SA v RM Outhwaite 317 Syndicate at Lloyds* (QB, 16 Jan 2001) [31].

[152] [1991] 2 QB 206 (CA).

> The benefits of a representative action, of course, in a multiple contractual arrangement of this kind are too obvious to require statement and on balance the convenience and expedition of litigation is far better served with a wide interpretation of the rule.[153]

A comparison between the burdens and benefits of representative and unitary proceedings is also relevant under the representative rule (just as it is under class action regimes). In *Bollinger SA v Goldwell Ltd*,[154] Megarry J noted that if a representative procedure was no more suitable for the litigants than unitary proceedings, then none should be ordered. Nowhere was the application of this preferability test better illustrated than in *Smith v Cardiff Corporation*,[155] where the court observed that it made little practical difference that a representative action was refused when one plaintiff's personal action against the defendant was allowed to proceed. If successful (which it was not[156]), then that would mean that the defendant's differential rent scheme would not be implemented. The outcome would then enure to the benefit of the entire plaintiff class.[157]

An additional caveat under the representative rule is that, although it is silent about the capacity of the representative,[158] it is a judicially stated[159] requirement of the English rule (and is a feature of the class action regimes considered later) that the representative will adequately protect the interests of absent class members. This particularly means that the representative must have no conflict of interest with those whom he or she purports to represent. It will be recalled that Lord Macnaghten stipulated in *Duke of Bedford v Ellis*[160] that the relief claimed must be "beneficial to all whom the plaintiff proposed to represent" in order for the representative rule to apply. Therefore, where there are divided views between members of the representative class as to what outcome they are hoping to achieve, then a representative action cannot be maintained.[161]

A final convergence between the representative rule and the class action is that express consent of the class members would appear to be unnecessary for

[153] [1991] 2 QB 206 (CA) 241, and also see: N Andrews, *Principles of Civil Procedure* (London, Sweet & Maxwell, 1994) 148.

[154] [1971] FSR 405 (Ch) 411–12 (defence of estoppel raised, "an individual type of issue"; representative proceedings inappropriate). Also: *Mercantile Marine Service Association v Toms* [1916] 2 KB 243 (CA) 248.

[155] [1954] 1 QB 210 (CA).

[156] *Smith v Cardiff Corp (No 2)* [1955] Ch 159.

[157] Also noted in JA Jolowicz, "Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law" (1983) 42 *Cambridge LJ* 222, 234; C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992) 128.

[158] Except to provide, in CPR 19.6(2), that the court may direct that a person not act as a representative.

[159] Eg: *The Irish Rowan* [1991] 2 QB 206 (CA) 223; *M Michaels (Furriers) Ltd v Askew* (CA, 23 Jun 1983) 16–17; and much earlier: *Taff Vale Rwy Co v Amalgamated Soc of Rwy Servants* [1901] AC 426 (HL) 443.

[160] [1901] 1 AC 1 (HL) 8.

[161] *Smith v Cardiff Corp* [1954] 1 QB 210 (CA) 221, 226–27, 227 (representative action that council's rent control schema be declared *ultra vires*; was in the interests of one part of the tenancy class for the action to fail because they would not then sustain rental increases to subsidise the remainder of the class, which naturally enough, wished the action to succeed to obtain the said subsidy).

the validity of the action. In *Gaspet Ltd v Elliss (Inspector of Taxes)*,[162] it was considered that the phrase which no longer appears in the rule, that the representative sued "for the benefit of" the other persons, carried no great significance, because the nature of representative proceedings is such that others with like interests may not know, or approve, of the actions taken by the representative plaintiff. Just as with the class action schemas operative in the focus jurisdictions, express consent by co-members is not ordinarily required for the representative plaintiff to pursue the representative action.[163]

Table 4.2 summarises the way in which the express provisions of class action regimes mirror the features and requirements of the English representative rule, as it has been interpreted by courts in this jurisdiction.

Table 4.2 Further reflections of the representative rule in class action regimes

Miscellaneous features of representative rule (evident in case law)	**Class action provision which reflects that feature**
class may include the formation of sub-classes for which the common issues are different	FCA s 33Q(2) CPA (Ont), s 6(5); CPA (BC), s 6 FRCP 23(c)(4)(B)
minimum numerosity requirement: "more than one person"	CPA (Ont), s 5(1)(b); CPA (BC), s 4(1)(b)
names, number, and identity of class members need not be ascertainable at commencement of litigation	FCA s 33H(2) CPA (Ont), s 6(4); CPA (BC), s 7(d) FRCP 23(c)(3)
representative proceeding should be preferable to individual proceedings or to other available methods for resolution of the dispute	FCA s 33N CPA (Ont), s 5(1)(d); CPA (BC), s 4(1)(d) FRCP 23(b)(3)
representative plaintiff must adequately represent the class or sub-class (one consequence: no conflict between representative and class as to outcome desired)	FCA s 33T CPA (Ont), s 5(1)(e); CPA (BC), s 4(1)(e) FRCP 23(a)(4)
express consent and mandate (or some positive step) by the class members is not required	FCA s 33E(1), s 33J CPA (Ont), s 9; CPA (BC), s 16(1) FRCP 23(c)(2)(B)

[162] [1985] 1 WLR 1214 (Ch) 1220–21, and discussed by J Winter, "Acting for Classes: Strategies for Representing Group Interests" (1993) 44 *Northern Ireland Legal Q* 276, 286–87.

[163] *John v Rees* [1970] Ch 345, 371–72. Also noted by D Kell, "Renewed Life for the Representative Action" (1995) 13 *Aust Bar Rev* 95, 97.

3. Concluding Observations About the Representative Rule

The previous version of the representative rule[164] (the predecessor to CPR 19.6) was described by the Scottish Law Commission as "brief and unhelpful", with "[a] number of matters left unprovided for and open to judicial interpretation."[165] The possibility of extending the representative rule, however, by incorporation of some of the liberal interpretations which have been valiantly attempted by the English judiciary was not canvassed at all by Lord Woolf in the *Access to Justice* reports. The rule was briefly dismissed as "difficult to use",[166] and that "there are definite limits to the weight the rule can bear."[167] Quite apart from the restrictive interpretations accorded to it since early last century, and its ongoing brevity of expression, such comments are undoubtedly also reflective of the aforementioned limitations upon the rule-making powers of the CPR Committee.

Of class actions, it has been judicially said: "Much of the conventional wisdom that traditionally is associated with civil litigation has been turned on its head and brought into the twentieth century, and hopefully beyond."[168] Yet, would such an overturn be necessary within the English jurisdiction? Arguably not, on the basis of the case law canvassed in this section. The development of the English representative rule into a true "class action" could seemingly be accomplished "without anything like the revolutionary change commonly supposed to be necessary to that end, and indeed there would have been no need for it to be separately established at all but for the shaky authority of *Markt*".[169] The statutory embodiment of a class action in England would (if it occurred) simply reflect judicial developments that have already occurred, sporadically, within the English jurisdiction to combat the restrictions of *Markt*.[170]

However, instead of a formal class action regime, the group litigation orders of CPR 19.III were implemented in May 2000, and it is to these that attention will now turn.

D GROUP LITIGATION ORDERS

Prior to the enactment of the GLO schema, and given the lack of utility of the little-used representative procedure described in the previous section, group

[164] RSC 1965 Ord 15, r 12.
[165] *SLC Paper*, [5.10].
[166] *Final Woolf Report*, ch 17, [2].
[167] *Final Woolf Report*, ch 17, [7].
[168] *Lopez v Star World Enterprises Pty Ltd* (FCA, 18 Apr 1997) 1.
[169] Note, "Class Actions and Access to Justice" [1979] *New LJ* 870, 870.
[170] D Kell, "Representative Actions: Continued Evolution or a Classless Society?" (1993) 15 *Sydney L Rev* 527, 534. Also: BM Debelle, "Class Actions for Australia? Do They Already Exist?" (1980) 54 *Aust LJ* 508, 508–11.

actions in the United Kingdom emerged in several scenarios from the early 1980s.[171] Due to the complete absence of court rules or legislation (except for the occasional government compensation packages in cases of widespread injury[172]), group actions were generally each managed by a single judge, working "pragmatically, making decisions on a creative and improvised basis."[173] Much of the development occurred simply by agreement between the parties and the judge.[174] As Hodges, a leading English practitioner and commentator of multi-party litigation, explains of the pre-GLO scenario, "particular management techniques were used in the circumstances of a particular case . . . with no expectation that they would work for another"; and it was accepted that "an understanding of the techniques was developing as time progressed."[175] In 1992, Harlow and Rawlings stated that

> in the pragmatic spirit of the common law, here taken to extremes, the actors make up the rules as they go along. On a case-by-case basis, or more accurately on the basis of preliminary or interlocutory hearings and practice notes, the new procedure is built up, virtually from nothing.[176]

[171] For an excellent discussion of many of the most prominent cases, see the individual case studies by various authors in C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) chh 17–32. Some examples include: *Loveday v Renton* [1990] 1 Med LR 117 (QB) (whether the Pertussis Vaccine could cause permanent brain damage); *Davies (Joseph Owen) v Eli Lilly* [1987] 1 WLR 1136 (CA) (the *Opren* litigation, concerning whether arthritis drug Benoxaprofen could cause hepatic damage and other adverse effects); *Reay v British Nuclear Fuels plc* [1994] 5 Med LR 1 (QB) (allegations of higher than expected incidence of childhood leukeamia near Sellafield nuclear reprocessing plant); *Foster v Roussel Laboratories Ltd* (QB, 30 Jun 1997) (subdermal contraceptive implant, Norplant; extraction alleged to cause health consequences); *Re HIV Haemophiliac Litig* (1998) 41 BMLR 171 (CA) (HIV infection of blood products used for treatment of haemophilia); *Creutzfeldt-Jakob Litig, Plaintiffs v UK Medical Research Council* [1996] 7 Med LR 309 (QB) (alleged viral contamination of human growth hormone derived from pituitaries harvested at post-mortem from cadavers); *Re British Coal Respiratory Disease Litig* (QB, 23 Jan 1998) (re workplace health and safety provided to coal miners); *Hodgson v Imperial Tobacco Ltd* (QB, 9 Feb 1999) (tobacco litigation). Also discussed in: M Day, P Baker and G McCool, *Multi-Party Actions: A Practitioners' Guide to Pursuing Group Claims* (London, Legal Action Group, 1995) 15–37; M Mildred, 'Group Actions Present and Future' [1994] *J of Personal Injury Litigation* 276.

[172] Eg: the Vaccine Damage Payments Act 1979 (UK) c 17, in respect of designated diseases purportedly caused by the pertussis vaccination of the plaintiff or his or her pregnant mother. The Act provided for a fixed payment in circumstances of 80% disability, later updated to raise payment to the statutory sum of £100,000 (Vaccine Damage Payments Act 1979 Statutory Sum Order 2000, SI 2000/1983) and to lower the minimum disability to 60% (Regulatory Reform (Vaccine Damage Payments Act 1979) Order 2002, SI 2002/1592).

[173] *Final Woolf Report*, ch 17, [13]; *Ross v Owners of Bowbelle* [1997] 2 Lloyd's Rep 196 (QB) 196, 217 (Clarke J) ("methods developed ad hoc and by experience"); R Cranston, 'Social Research and Access to Justice' in R Cranston and A Zuckerman (eds), *Reform of Civil Procedure* (Oxford, Clarendon Press, 1995) 38.

[174] M Mildred and R Pannone, "Class Actions" in M Powers and N Harris (eds), *Medical Negligence* (London, Butterworths, 1990) 236.

[175] See C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [1.07], also: [2.01]–[2.13], [2.21], [16.01].

[176] C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992) 129.

Academically within England, there were, during this period, various calls for the implementation of the more formal arrangement of a class action regime.[177] Of the only group action to go to trial prior to the introduction of CPR 19.10,[178] Mildred states:

> [S]uch little attention was paid to the procedural framework at the formative stage that the main judgment in the action raised as many questions as it answered, thus setting in train the need for extensive subsequent hearings to determine outstanding issues.[179]

Mildred also proffers the view that the extent of the court's power, under its inherent jurisdiction, to make directions in the absence of consent by all parties remained unexplored in pre-GLO litigation, and that this uncertainty was undoubtedly an impetus for the group litigation orders enacted in CPR 19.III.[180]

Importantly, there were also some suggestions by some English judiciary in pre-GLO days that detailed rules of court might be drafted. For example, in the *Norplant* litigation, May J stated:

> Group actions, where a large number of individual plaintiffs seek to bring broadly similar claims usually against one or more large organisations, are notoriously problematic. They are problematic for the parties; they are problematic for the court. . . . The court does not *as yet* have detailed Rules of Court describing how actions of this kind should be managed.[181] (emphasis added)

Similarly, in the *Opren* litigation, Lord Donaldson MR expressed interest in the possible introduction of the class action in some form:

> In some jurisdictions, notably in the United States, where large numbers of plaintiffs are making related claims against the same defendants, there are special procedures laid down enabling all the claims to be disposed of in a single action. Clearly this is something which should be looked at by the appropriate authorities with a view to seeing whether it has anything to offer and, if so, introducing the necessary procedural rules.[182]

In fact, there have been several proposals in England over the years to introduce a reasonably detailed multi-party schema.[183] However, there was a lack of

[177] Note, "Class Actions and Access to Justice" [1979] *New LJ* 870; G Bates, "A Case for the Introduction of Class Actions into English Law" [1980] *New LJ* 560; J Jacob, "Safeguarding the Public Interest in English Civil Proceedings" (1982) 1 *Civil Justice Q* 312, 346; M Mildred and R Pannone, "Group Actions" in M Powers and N Harris (eds), *Medical Negligence* (2nd edn, London, Butterworths, 1994) 342.

[178] *Creutzfeldt-Jakob Litig, Plaintiffs v UK Medical Research Council* [1996] 7 Med LR 309 (QB).

[179] M Mildred, "Group Actions" in G Howells, *The Law of Product Liability* (London, Butterworths, 2001) 375, 378.

[180] *Ibid*, 402, fn 1.[181] *Foster v Roussel Laboratories Ltd* (QB, 30 Jun 1997) 5.

[182] *Davies (Joseph Owen) v Eli Lilly & Co* [1987] 1 WLR 1136 (CA) 1139. See also later comments in the same litigation that there might be a strong case for legislation to provide a jurisdictional structure for collation and resolution of mass product liability claims: *Nash v Eli Lilly & Co* [1993] 1 WLR 782 (CA) 810 (Purchas LJ).

[183] See: *Report of the Review Body on Civil Justice (Hodgson Report)* (Cm 394, 1988) [270]; National Consumer Council, *Group Actions: Learning from Opren* (1989); Supreme Court Practice Committee, *Guide for Use in Group Actions* (1991); Law Society Civil Litigation Committee, *Group*

interest in taking up these various invitations for detailed legislative reform.[184] The 2001 proposals by the LCD[185] for the inclusion of a generic representative action in the CPR (with capacity for an ideological plaintiff) has already been noted.[186] Interestingly, a reasonably detailed regime for multi-party actions was also initially mooted by Lord Woolf (taking as a basis an earlier Law Society proposal/draft rule).[187] However, as Hodges notes, he ultimately considered that the court should be allowed a "wide discretion in selecting management techniques appropriate to the particular case"[188] and that was followed by the CPR Committee, which "ended up with the Rule on multi-party procedure which was short and generalised, hence permitting maximum flexibility."[189] As the White Book observed shortly thereafter,[190] it is evident (from implication rather than from any particular rule) that the loose and flexible framework provided in CPR 19.III for the management of multi-party actions is reflective of the *ad hoc* group litigation which preceded its implementation. It is appropriate to now turn to some of the more significant of the procedural aspects of group litigation orders.

1. Procedures Governing Group Litigation

Under the GLO schema, once GLO issues are identified, then a register of group claims must be established; and a court must be specified which will manage the claims (the "management court").[191] That court's powers of case management

Actions Made Easier (1995), which proposed a rule of 14 parts; LCD, *Proposed New Procedures for Multi-Party Situations: Consultation Paper* (1997), proposing a regime for "multi-party situations" (MPSs) which Lord Woolf had envisaged in *Final Woolf Report*, ch 17, [15(a)]. In the *Access to Justice: Draft Civil Procedure Rules* (1996), Lord Woolf did not propose a schema of rules for group litigation, but indicated that these would be forthcoming from the LCD after appropriate consultation.

[184] Noted by R Campbell and W Morrison, "Class Actions" (1987) 84 *Law Society Gaz* 2585, 2586; and JG Fleming, "Mass Torts" (1994) 42 *American J of Comp Law* 507, 522.

[185] *Representative Claims: Proposed New Procedures: Consultation Paper* (Feb 2001) and *Consultation Response* (Apr 2002).

[186] See pp 18–19.

[187] Lord Woolf, *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996) [1], referring to the 14-part rule in *Group Actions Made Easier* (1995).

[188] That was also the view of the LCD in *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction)* (1999) at [3], whose draft rule loosely comprised the basis of CPR 19.III. This draft, similarly to the *Final Woolf Report*, ch 17, [15], refers to MPSs; however, the MPS framework was altered late in the process in favour of the GLO. Discussed further by M Mildred, "Group Actions" in GG Howells (ed), *The Law of Product Liability* (London, Butterworths, 2001) 375, 410–11.

[189] C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [1.07]; I Grainger and M Fealy, *The Civil Procedure Rules in Action* (2nd edn, London, Cavendish, 2000) 69.

[190] *Supreme Court Practice* (*White Book Service 2001*) (digital edn, London, Sweet & Maxwell, 2001) [19.13.1]; M Mildred (n 188 above) 410, who also states in respect of the GLO schema: "The provisions of the Part are . . . certainly less detailed than those of the Australian Federal Rule . . . and the Ontario Class Proceedings Act"). This chapter contains an excellent discussion of the procedural and wider issues pertaining to Pt 19.III.

[191] CPR 19.11(2)(a), PD 19B, [6]; CPR 19.11(2)(c).

are wide-ranging. For example, it may vary the GLO issues, or direct that one or more claims proceed to trial as test cases.[192] Additionally, any judgment or order given on a GLO issue is binding upon other parties on the group register, and the court can also give directions as to the extent to which a judgment will bind parties to claims which are subsequently entered onto the register.[193] The practice direction supplementing CPR 19.III contains some practical guidelines about applying for a GLO, setting cut-off dates, publicising the GLO, and so on. The management court may give directions for the trial of common issues and for the trial of individual issues, the latter of which may be heard away from the management court.[194]

It is apparent from both CPR 19.III and its supporting practice direction that there are very few stipulated criteria for the commencement of a GLO. In fact, there are only six express criteria which must be met. First, there must be "a number of claims",[195] which serves as the numerosity requirement.[196] Secondly, these must give rise to common or related issues of fact or law.[197] This serves as the commonality requirement. Thirdly, managing the litigation by means of a GLO must be consistent with the overriding objective of the CPR, which is to enable the court "to deal with cases justly".[198] In that respect, CPR 19.III is not a free-standing code, but must be read as complementary to the remainder of the CPR.[199] Fourthly, as a screening mechanism, the consent of the Lord Chief

[192] CPR 19.13 (a), (b).

[193] CPR 19.12(1).

[194] PD 19B, [15.1], [15.2].

[195] CPR 19.11(1).

[196] The Draft Practice Direction published by the LCD in *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction)* (1999), [1.2], and the Law Society's draft rule 1.1 in *Group Actions Made Easier* (1995), both referred to a minimum of 10 claims raising common issues, but Lord Woolf declined to nominate a minimum, indicating that a lesser number (such as five) may sometimes be appropriate in some circumstances: *Final Woolf Report*, ch 17, [20]. The LCD also indicated that it would be preferable for the court to have maximum flexibility in that regard, rather than to impose a minimum numerosity requirement: [8]. Thus, the penultimate draft of CPR 19.III required (in X.2(1)(a)) "one or more claimants", but that also disappeared from the final version.

[197] CPR 19.10 and 19.11(1).

[198] CPR 1.1(1). What is meant by "justly" is elucidated in CPR 1.1(2) as follows:

> Dealing with a case justly includes, so far as is practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate—
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[199] M Mildred, "Group Actions" in G Howells (ed), *The Law of Product Liability* (London, Butterworths, 2001) 375, 410; I Grainger and M Fealy, *The Civil Procedure Rules in Action* (2nd edn, London, Cavendish, 2000) 15–16.

Justice or the Vice- Chancellor is required before a GLO is possible.[200] Fifthly, as a superiority criterion, a GLO will not be commenced if consolidation of the claims, or a representative proceeding under CPR 19.6, would be more appropriate.[201] Sixthly, the class needs to be defined by the number of claims already issued and the number of parties likely to be involved, with the provision of subclasses if necessary.[202]

The GLO schema is an opt-in regime (in contrast to the opt-out regimes of the class action statutes in the focus jurisdictions), in which litigants have to choose affirmatively to litigate by entering their names on the group register,[203] or having their claims adjoined by judicial consolidation to the group action.[204] In that regard, critical comment[205] that the English multi-party schemas in CPR Pt 19 are still too faint-hearted to permit recovery of damages for an unknown mass of plaintiffs appears true, given the opt-in requirement of the GLO and the usual identification of all litigants under the representative rule. These countenance an individual approach which class action regimes do not.[206]

However, quite apart from general criticisms that may be made of an opt-in regime, the reality is that several aspects of commencing and conducting a group litigation order under CPR 19.III are unclear and imprecise. It is also apparent that the GLO schema does not respond to some of the particular concerns about the procedures which should govern commencement of group litigation which were expressed by the judiciary prior to its enactment.

First, having regard to the explicit opt-in nature of the schema, there was initially an unfortunate and marked lack of particularity about whether and when individual claims were required to be pleaded, and what procedure should be followed by those wishing to participate in group litigation. As Andrews notes, group actions are different from class actions because, in the former, each group litigant is a member of the procedural class as a party, rather than as a represented non-party.[207] However, what effect this had upon the mode of commencement was unclear.

There were essentially two options open to the drafters. One option would require that each group member issue individual proceedings and then be registered on the group register. This option was favoured by the LCD, which

[200] PD 19B, [3.3].

[201] PD 19B, [2.3]. Consolidation is permitted by CPR 3.1(2)(g).

[202] PD 19B, [3.2(2), (3)]; [3.2(5)].

[203] CPR 19.11(2)(a), PD 19B, [6.2].

[204] CPR 19.11(3)(a). However, plaintiffs can apply for their claims to be removed from the register: CPR 19.14(1).

[205] Noted in N Andrews, "Multi-Party Proceedings in England" (2001) 11 *Duke J of Comp and Intl Law* 249, 262.

[206] Indeed, the need to distinguish between the classic representative rule and a regime where unnamed plaintiffs are represented is one reason for the adoption in this book of the terminology "class action".

[207] N Andrews, "Multi-Party Proceedings in England" (2001) 11 *Duke J of Comp and Intl Law* 249, 249.

considered in its 1999 report[208] which preceded the GLO schema that, where a person wished to bring a claim within the scope of the group, a claim form should be issued in the normal way, followed by registration on the group register. Then, after the particulars of claim had been served, the claim would normally be stayed. However, whilst this was specifically provided for in the draft rules released at that time,[209] it was omitted from CPR 19.III. In any event, this option did not meet with judicial favour. In *AB v Liverpool City Council*,[210] May LJ lamented the need for every individual plaintiff in a group to issue proceedings to secure commencement within the limitation period, noting that "[i]t may well be that once the [first] writ is issued the individual proceedings will be stayed while other things happen, but that does not detract from the need for proceedings at least to be issued for each plaintiff. I acknowledge that this is a relatively expensive requirement".[211] The other option (favoured by the LCD in its 1997 report[212] and by Lord Woolf[213]) was that entering a name on the group register could amount to "bringing a claim" for the purposes of limitation statutes. However, that possibility was not initially incorporated within CPR 19.III either.

The resultant uncertainty about GLO commencement procedures was academically noted,[214] although (as Mildred notes) use of the word "claim" in the commencement provisions[215] probably contemplated the formal issue of a claim as a precursor to entry onto the group register. In the end, however, the GLO schema was clarified[216] to require that "a claim must be issued before it can be entered on a Group Register" (arguably an unnecessary and expensive exercise if the class fails on the common issues). Although the redrafting and changes of opinion between earlier versions and the final GLO schema were by no means limited to commencement procedures,[217] it demonstrates an evolving but inconsistent and perhaps uncertain attitude toward this vital aspect of multi-party litigation. If an opt-in arrangement is to be adopted, then how class members validly opt in must be clear and unambiguous.

[208] LCD, *Multi-Party Situations: Consultation Paper (including Draft Rules and Practice Direction)* (1999) [31].

[209] Draft rule X.2(2)(b)(iii).

[210] CA, 15 Jun 1998.

[211] *Ibid*, 3.

[212] LCD, *Proposed New Procedures for Multi-Party Situations: Consultation Paper* (1997) [34].

[213] Lord Woolf proposed for the MPS the simpler option of entry of names on a group register rather than issue of a separate application for each possible action: *Final Woolf Report*, ch 17, [23].

[214] *Supreme Court Practice* (*White Book Service 2001*) (digital edn, London, Sweet & Maxwell, 2001) [19.11.1]; C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [4.32], [4.35]; S Burn, "Woolf Reforms: CPR Revolution Rolls On" [2000] *Legal Action* 27; M Mildred, "Group Actions" in G Howells (ed), *The Law of Product Liability* (London, Butterworths, 2001) 375, 415–16. See also the comments by Irwin Mitchell solicitors in LCD, *Consultation Response* (Apr 2002) [4].

[215] CPR 19.12(1) and PD 19B, [3.2(2)], although note the confusing change of nomenclature to "cases" in PD19B, [6.1]–[6.5], thereafter. Noted by Mildred, *ibid*, 416.

[216] See PD 19B, [6.1A]. The change took effect on 2 December 2002, more than 18 months after the schema was implemented.

[217] See, eg, similar comments in relation to the costs provisions by M Mildred, "Procedure: Afrika v Cape plc" [2002] *J of Personal Injury Litigation* 215, 217.

Secondly, whilst the management court will undoubtedly establish commonality criteria through the GLO issues,[218] an earlier draft of the rule specifically required[219] the court to give directions about the criteria for entry of group members onto the group register. Whilst this seemed to parallel the requirement of class definition required under the class action regimes of the focus jurisdictions, it also disappeared from the final rule, an omission which troubles some commentators.[220]

Thirdly, apart from the possibility of fully pleading and arguing a test case, the schema in CPR 19.III also provides for the options of a group particulars of claim with or without a schedule of individual claims of all those on the group register,[221] which may or may not be verified by statement/s of truth,[222] or with the option of questionnaires completed by each group member as an alternative to the schedule.[223] The appropriate commencement procedures depend solely upon the discretion of the management court. All of this resembles the pre-GLO *ad hoc* case management. It also calls to mind the criticisms voiced by McLachlin CJ about relying heavily on individual case management in multi-party litigation (his Honour was referring to the Alberta representative rule, and was particularly bemoaning the absence of any certification process and clear commencement criteria in the rule): "[it] taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights."[224]

Fourthly, the screening mechanism of requiring either the consent of the Lord Chief Justice or the Vice-Chancellor[225] has been criticised by Mildred in the following terms:

> The Rule provides no further details of this requirement and there are no criteria in either the Rule or the Practice Direction to guide the giver or refuser of consent over and above the overriding objective itself. If the criteria are to include proportionality and public interest, it is unclear why the judge to whom the application is made should be unable to exercise an adequate judgment.[226]

Fifthly, what purpose the requirement[227] of "related" issues of fact or law serves, over and above a "common" issue, is unclear. Presumably the former

[218] Under CPR 19.11(2)(b).

[219] Draft rule X.5(2)(a). See also the accompanying Draft Practice Direction, [6.2].

[220] C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [4.18]–[4.22]; M Mildred, "Group Actions" in G Howells, *The Law of Product Liability* (London, Butterworths, 2001) 375, 418.

[221] PD 19B, [14.1(2)].

[222] Optional under PD 19B, [14.2].

[223] PD 19B, [14.3].

[224] *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534 (SCC) [33].

[225] PD19B, [3.3], [3.4], which consent is required, even where the court orders a GLO of its own volition.

[226] M Mildred, "Group Actions" in GG Howells (ed), *The Law of Product Liability* (London, Butterworths, 2001) 375, 413. Also: C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [3.17] notes absence of criteria.

[227] CPR 19.10 (which "widens the jurisdictional criteria": Hodges, *ibid*, [3.21]); also noted by Mildred, *ibid*, 412.

implies a lesser standard, but the difference is not transparent. Indeed, as will be evident later,[228] the same criticism may be directed toward a somewhat similar requirement of "related circumstances" in the Australian class action regime.

Sixthly, the preferability criterion in CPR 19.III appears rather purposeless, given that the other two options to which attention is directed[229]—consolidation and the representative action—are less than useful in all but a few cases of multi-party litigation. Moreover, the incorporation of a cost–benefit analysis which Lord Woolf advocated for multi-party litigation,[230] and which would undoubtedly have provided strictures which the broad preferability criterion does not, makes no appearance in CPR 19.III.

Finally, various issues associated with conduct of the group litigation are not covered by the terms of the GLO schema, in comparison with class action regimes of the focus jurisdictions where such matters have received explicit attention by the drafters. Two notable omissions under the GLO schema are the absence of any requirement that settlement offers in group litigation be judicially approved, and the absence of any capacity on the part of the court to either assess damages on an aggregate basis or award damages on the basis of an average, pro rata or proportional, basis. As Mildred notes,[231] not only do such omissions in the governance of group litigation contrast to the somewhat more exacting requirements associated with making the GLO order in the first place, but it also emphasises that the development of group actions in England has been "of an entirely practical rather than doctrinal nature."

2. How Group Litigation Orders Coalesce with Other Civil Procedure Rules

The implementation of the GLO schema within the English Civil Procedure Rules has also wrought two important instances of uncomfortable fit with other aspects of English civil litigation.

(a) The use of test/lead actions

The test or lead action approach, so favoured prior to the implementation of CPR 19.III, is again permitted (indeed, encouraged?) under that regime.[232] Whilst the use of test/lead actions has been advocated as a compromise device,[233] and it can certainly be very successful where used to decide a single

[228] See pp 188–90.

[229] PD 19B, [2.3]. Cf: Mildred, *ibid*, 414.

[230] *Final Woolf Report*, ch 17, [34] and recommendation 3.

[231] M Mildred, "Group Actions" in G Howells (ed), *The Law of Product Liability* (London, Butterworths, 2001) 375, 462, and see, further, the very useful comparative table listing further distinctions.

[232] CPR 19.13(b), 19.15.

[233] C Harlow and R Rawlings, *Pressure Through Law* (London, Routledge, 1992) 129.

issue which is common and dispositive of the claims of all group members,[234] it has several drawbacks in multi-party litigation. The numerous problems associated with the use of the test or lead action as a procedural device have been noted academically,[235] and manifested judicially,[236] and will not be repeated. The specific concern of this section is to note how that approach, when incorporated as part of the Civil Procedure Rules for the English jurisdiction, has several potential associated difficulties.

First, the procedure requires that the determination of other cases be stayed until the outcome of the test cases. From 2 October 2000, article 6(1) of the Convention on Human Rights[237] applies to litigation under the CPR, and provides that individuals have the right to have their cases determined within a reasonable time.[238] Thus, as Hodges points out,[239] the indefinite postponement of the investigation or progress of a case which is not treated as a test case might breach that principle. Stein has also observed[240] that "any new representative

[234] Eg: *Mulcahy v Hydro-Electric Comm* (Full FCA, 10 Dec 1998) (interpretational issue of whether 194 plaintiffs were employed "in a permanent capacity"); *Equitable Life Ass Soc v Hyman* [2002] 1 AC 408 (HL) (single issue about legality of insurance company's policy on guaranteed annuity rates resolved 90,000 policyholders' claims).

[235] See, eg: *ALRC Report*, [54]–[56]; *OLRC Report*, 86–88; *ManLRC Report*, 10; *AltaLRI Memorandum*, [26]; 19 separate drawbacks of test/lead actions are listed by the authors, PH Lindblom and GD Watson, "Complex Litigation—A Comparative Perspective" (1993) 12 *Civil Justice Q* 33, 80; C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [29.17], [29.18]; D Nelthorpe, "Class Actions: The Real Solution" (1988) 13 *Legal Services Bulletin* 26, 28; R Widdison, "Class Actions: A Survey" [1983] *New LJ* 778, 780; *Newberg* (3rd) § 4.111 and *Newberg* (4th) § 4.27 pp 251–54; G Howells, "Mass Tort Litigation in the English Legal System" in J Bridge *et al* (eds), *UK Law in the Mid 1990s* (London, UK National Committee of Comparative Law, 1994) 610; SJ Simpson, "Class Action Reform: A New Accountability" (1991) 10 *Advocates' Society J* 19, 20; P O'Donahoo and S Young, "Product Liability Claims Explosion" (1995) 5 *Aust Product Liability Reporter* 121, 128; C Scott and J Black, *Cranston's Consumers and the Law* (3rd edn, London, Butterworths, 2000) 129; J Kellam and S Stuart-Clark, "Multi-Party Actions in Australia" in Hodges, *ibid*, [15.15]; DA Crerar, "The Restitutionary Class Action" (1998) 56 *U of Toronto Faculty of L Rev* 47, 90.

[236] Eg: in the pertussis litigation, *Kinnear v Renton* (Stuart-Smith J, trial in Spring 1986, lasting 23 days), the individual claim put forward as a lead action (that of Johnie Kinnear) collapsed due to inconsistencies between the mother's evidence and the medical records, bringing down with it all the evidence on the general issue of whether the vaccine could cause brain damage. Another action, previously stayed, had to be substituted as the test case: *Loveday v Renton* [1990] 1 Med LR 117 (QB). Also: *Bank of Credit and Commerce International SA v Ali & Khan* [2001] EWCA Civ 1438 (court would not order all appeal findings in respect of test cases to be binding on all employees); In the *Opren* litigation, Hirst J held that each lead plaintiff had to be advised on the merits of a settlement offer in his or her own interests, regardless of its effects on other plaintiffs: *Davies (Joseph Owen) v Eli Lilly & Co* (QB, 8 May 1987); *Creutzfeldt-Jakob Litig v UK Medical Research Council* [1996] 7 Med LR 309 (QB) (other issues left undetermined); *Chace v Crane Canada Inc* (1996), 26 BCLR (3d) 339 (SC [in Chambers]) [24] (no automatic suspension of limitation periods for other group members).

[237] The Convention on Human Rights is contained in sch 1, part 1, of the Human Rights Act 1998 (UK) c 42.

[238] Article 6(1) provides, in part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[239] C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [2.31].

[240] J Stein (Submission to the LCD), cited in *Representative Claims: Proposed New Procedures: Consultation Response* (2002) [4].

claims rules need to be tested by compliance with access to court guarantees" in art 6. In comparison, it is strongly arguable that the advancement of every class member's case by the determination of "common issues of law or fact" which is facilitated by a class action opt-out regime would obviate any such concerns. The effect of article 6(1) on test case litigation is yet to be judicially considered, although the test case approach is steadily used.[241]

Secondly, the pre-action protocols[242] which usually apply under the CPR require that *all* plaintiffs investigate and fully disclose their cases before commencing proceedings. The selection of test or lead cases is contrary to that approach, and indeed, in the first multi-party action[243] to be litigated after the introduction of the CPR,[244] the court adopted the protocol requirement that all plaintiffs serve relevant details of their cases (except for details of financial losses[245]) when issuing claims. Master Ungley approached the case "in the spirit of the new Civil Procedure Rules" and noted that he was keen to ensure that "the nature of the claims is made sufficiently clear to the Defendants, and the Defendants are put in the position which they would be under the protocols were all these cases commenced [as individual actions]."[246] However, as Oliphant notes, this does tend to propound an "individual case" approach to group litigation.[247] In contrast, it is suggested that, were a class action schema to be introduced, either the pre-action protocol approach should be abandoned altogether,[248] or only the representative plaintiffs would sensibly need to comply with the protocol requirements.

Thirdly, the significance of referring to the possible use of a test case in CPR 19.III is somewhat uncertain, in circumstances where, prior to the GLO schema,

[241] See, eg, the ACT (Advance Corporation Tax) GLO (at <http://www.courtservice.gov.uk/notices/queens/ GLO.htm>), in which two test cases are proposed: "Group Litigation Orders" [2002] *In-House Lawyer* 71.

[242] PD—Protocols, [1.4]. See, particularly, the requirements of the letters of claim referred to in each of the protocols for Personal Injury (Dec 1996), Clinical Disputes (Dec 1998), Construction and Engineering Disputes (Oct 2000), Defamation (Oct 2000), Judicial Review (Mar 2002) and Professional Negligence (Jul 2001). Only the last of these refers to multi-party disputes, at [C4], but without guidance or instruction—other than that the parties are expected to "act reasonably" in complying with the protocol. The author acknowledges, however, the comments of an anonymous referee who has noted that the protocols are not always mandated, depending upon the circumstances.

[243] *In the Matter of MMR and MR Vaccine Litig* (Master Turner, 14 Apr 1999).

[244] However, it preceded the enactment of CPR 19.III in May 2000.

[245] As Hodges notes, the claims were by children, many involving issues of long-term care which would have been difficult to quantify at that early stage: C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [4.07], and for further discussion of the use of pre-action protocols in this case, see: [2.30], [4.04]–[4.08].

[246] *Sayers v SmithKline Beecham plc* (Master Ungley, 3 Sep 1999), extracted in Hodges, *ibid*, [4.05].

[247] K Oliphant, "Book Review" (2002) 65 *Modern L Rev* 304, 305, critiquing use of such protocols.

[248] In response to the LCD's *Representative Claims: Proposed New Procedures: Consultation Paper* (2001), 5 of the 8 judicial responses were against the use of a pre-action protocol for a representative claim (see *Consultation Response* (2002) "Responses to Specific Questions").

it had been judicially stated in the *Norplant* litigation that a choice had usually to be made between a generic issues approach, use of test case/s, or trial of selected individual cases.[249] In these circumstances, Mildred notes quizzically:

> Test cases are, however, only one of the three case management vehicles identified by May J in the Norplant case. Does its identification in CPR 1998, r 19.13(b) imply that it is the only vehicle open to the court under the rule? This would seem unlikely and undesirable, but the sense of making only one mode of management explicit is not clear.[250]

In the absence of further explicit management powers, and in light of the aforementioned "gaps" in the GLO's commencement provisions, it is plain that, as Mildred laments, the predictability which it was hoped that the schema would produce is not forthcoming.[251]

(b) Discouragement of appeals

There was a strong indication prior to the implementation of CPR 19.III that, in group litigation in which the trial judge's case management is to be regarded as all-important, appellate activity is to be discouraged. In the pre-GLO benzodiazepine litigation, members of the Court of Appeal delivered two strong statements:

> in my view the Court of Appeal ought to be particularly reluctant in group actions to interfere with a trial judge's procedural directions. The judge invariably has a much better perspective of the interests of all the parties and of the needs of efficient case management than the Court of Appeal can ever achieve. Moreover, interference by the Court of Appeal with the trial judge's directions on one aspect will often upset the coherence of the entire structure of the litigation. In my judgment such appeals ought to be discouraged.[252]

and:

> [The trial judge] will need to be inventive and firm if the trial and interlocutory proceedings are not to be unmanageable. In such litigation this court will be especially reluctant to interfere with the judge's exercise of his discretion, since he knows far more about the litigation than we do.[253]

Although these sentiments were expressed prior to the GLO schema, it has been noted earlier herein that it is implicit that the *ad hoc* nature of such litigation is

[249] *Foster v Roussel Laboratories Ltd* (QB, 30 Jun 1997) 7–8.

[250] M Mildred, "Group Actions" in G Howells (ed), *The Law of Product Liability* (London, Butterworths, 2001) 375, 435, and for further discussion of the use of test cases in multi-party litigation, see: 432–42.

[251] *Ibid*, 437.

[252] *AB v John Wyeth & Brother Ltd* [1993] 4 Med LR 1 (CA) 6 (Steyn LJ), and cited in *Ward v Guinness Mahon plc* [1996] 1 WLR 895 (CA) 899, although the refusal to make a pre-emptive costs order there *was* reversed.

[253] *AB v John Wyeth & Brother Ltd* [1994] 5 Med LR 149 (CA) 153 (Stuart-Smith LJ). Cf: *Davies (Joy Leslie) v Eli Lilly & Co* [1987] 1 WLR 428 (CA) 430 (appellate review permitted because common to all actions).

to continue under CPR 19.III, and it is to be expected that the discouragement of appeals may endure.

In this context, it is noteworthy that, since 2 May 2000, permission to appeal has been restricted under the CPR to circumstances in which the court considers that the appeal would have real prospects of success, or where there is some other compelling reason that the appeal be heard.[254] A refusal of appeal has already occurred in the group litigation context,[255] in circumstances in which it was purely a case management decision which was being challenged (whether the common issue about the running of limitation periods should be hived off as a preliminary issue or conducted as part of the trial of liability). On the other hand, an appeal has been allowed (and upheld)[256] in respect of a general order as to cost-sharing under CPR 19.III, in which the Court of Appeal justified its intervention on the basis that the issues went beyond mere case management and raised general matters of principle.[257]

However, three reasons weigh heavily against the placement of judicially-espoused restrictions upon the use of appellate jurisdiction in group litigation where a lower court is deciding, at the outset, whether a particular dispute *is suited to* a multi-party litigation device under the CPR.

First, it is undoubtedly the case that multi-party disputes are one of those categories of case in which the judge of first instance who has specialist knowledge of the type of procedure, is thought to have an advantage over an appellate tribunal.[258] This much has been expressly acknowledged in the focus jurisdictions.[259] In Ontario, for example, McCarthy JA, writing for the Court of Appeal, noted in *Anderson v Wilson*:

> I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The Act provides for flexibility and adjustment at all stages of the proceeding and any intervention by this court at the certification level should be restricted to matters of general principle.[260]

However, it is that caveat—"matters of general principle"—that has proved particularly important in class litigation in each of the focus jurisdictions of the

[254] CPR 52.3(6).

[255] *Ablett v Devon County Council* (CA, 4 Dec 2000) (permission to appeal refused: "I would add that a perfectly rational case management decision such as this, taken by an experienced Queen's Bench judge, is not the kind of decision with which, in the absence of a stark error, this court expects to be concerned under the Civil Procedure Rules": Sedley LJ at 4).

[256] *Afrika v Cape plc; X, Y, Z v Schering Health Care Ltd; Sayers v Merek and Smithkline Beecham plc* [2001] EWCA Civ 2017.

[257] *Ibid*, [23].

[258] Noted by SM Waddams, "Judicial Discretion" (2001) 1 *Oxford U Commonwealth LJ* 59, 68.

[259] *Rumley v BC* (2000) 180 DLR (4th) 639, 72 BCLR (3d) 1 (CA) [25]; *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) [25]; *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) [7] (Somers J, Thomson J concurring); *Nendy Enterprises Pty Ltd v New Holland Aust Pty Ltd* [2002] FCA 550, [12]; *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [2], [119].

[260] (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) [12].

US,[261] Australia[262] and Canada[263] when justifying the intervention of an appellate court in class action litigation. Certainly, their experience cautions against blanket discouragement of appeals.

Secondly, the discomfort about a management court's exercising extensive discretion in group litigation under the CPR which is largely unfettered by appellate control is that the type of litigation, by its very impact upon numerous parties, lends itself to, indeed requires, close judicial scrutiny. Multi-party litigation is a particular instance of the general dogma which Ipp J described extracurially: "the existence of appropriate appellate procedures render managerial judges accountable."[264] Under the Ontario class action regime, it has been noted in *909787 Ontario Ltd v Bulk Barn Foods Ltd*[265] that the commencement of multi-party litigation has immense importance to the parties. It permits a class of plaintiffs to litigate claims which otherwise probably would not have been aired. At commencement, the court is also meant to screen out unsuitable actions that are not appropriate for class treatment so as to "(at least in part) protect the defendant from being unjustifiably embroiled in complex and costly litigation." Thus (held the court), an appeal involved the level and degree of scrutiny that was appropriate when deciding whether a class action had been appropriately certified by a motions judge. The US *Manual of Complex Litigation, Third*, also reiterates the need for judicial oversight in class litigation conducted under FRCP 23:

> Particularly because such litigation imposes unique responsibilities on the court, as well as on counsel, it calls for closer judicial oversight than other types of litigation. The potential for actions, by counsel or parties, that will deliberately or inadvertently result in prejudice to many litigants is great.[266]

A third reason which decrees that appellate supervision is an important component of multi-party litigation is that some circumstances and criteria which should govern its appropriateness are not matters in which the judge of first instance necessarily has an actual advantage over the appellate tribunal. For

[261] *Eisen v Carlisle and Jacquelin*, 417 US 156, 94 S Ct 2140 (1974) (meaning and application of class action notice provisions).

[262] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) (meaning of a "substantial" common issue).

[263] Eg: *Carom v Bre-X Minerals Ltd* (1999), 44 OR (3d) 173 (SCJ, Winkler J), whose decision was upheld by the Div Ct: (2000), 46 OR (3d) 315, but was ultimately reversed by Ont CA: (2001), 196 DLR (4th) 344, 51 OR (3d) 236, [37] ("Bearing in mind this admonishment, I have reached the reluctant conclusion that the Divisional Court and the motions judge have erred on a matter of general principle"). The right of appellate intervention on matters of principle was also reiterated in *VitaPharm Canada Ltd v F Hoffmann-LaRoche Ltd* (2002), 212 DLR (4th) 563 (Div Ct) [7]; *Moyes v Fortune Financial Corp* (Div Ct, 31 Oct 2003) [14]; *Fehringer v Sun Media Corp* (Div Ct, 30 Sep 2003) [7].

[264] DI Ipp (the Hon), "Reforms to the Adversarial Process in Civil Litigation—Part 1" (1995) 69 *Aust LJ* 705, 720.

[265] Div Ct, 15 Oct 1999, [29].

[266] Federal Judicial Center, *Manual for Complex Litigation,* (3rd, St Paul, Minn, West Publishing, 1995) 211, cited *ibid*, [30].

example, whatever the style of drafting of the schema, the permission granted by the court to commence multi-party litigation will depend upon certain explicitly stated criteria and a number of legislatively unspoken factors: for example, whether advanced individual proceedings are on foot; or whether the number of individual issues that would need to be determined for each class member outweighs the benefit of any determination of the common issue/s. The rules governing commencement of multi-party litigation fall within that category which Waddams describes[267] as "open-ended", where the rules contain elements of uncertainty because they cannot, however detailed, describe or foresee in advance every possible future case. Waddams contends (and the author concurs) that "the open-ended nature of a legal rule does not, of itself, present any particular reason to defer to a judge of first instance; on the contrary, the open-ended nature of a rule may be very good reason for the appellate court to give guidance, [define and develop the law] and to settle uncertainties."[268]

Similarly, where judges have discretion in the sense that they are required to exercise powers deriving from statute in the relative absence of binding standards, then, in general terms: "the higher courts consider that it is proper for them to settle questions as to what standards are to apply and any questions of interpretation that may occur, but then leave a degree of autonomy to the lower judicial body in deciding how those standards apply in the particular case."[269] Indeed, appellate decisions have performed *precisely* that function in the class action regimes of the focus jurisdictions. For example, appellate courts have defined the standards that are to apply when determining whether the common issues are "substantial", or whether class proceedings are "preferable", or whether the class representative is adequate.

Hearteningly, the Court of Appeal has recently justified its intervention under CPR 19.III—although in the different context of cost-sharing orders—where it also did not consider that the lower court had any particular advantage:

> If it can be shown that some different order from that which the judge has made would be more appropriate, it would not be right for this court to attach any particular sanctity to the judge's order. That is all the more the case in a jurisdiction which is still a developing jurisdiction, as group litigation is.[270]

Thus, to the extent that appeals are permitted under the CPR since 2 May 2000, appellate vigilance should be particularly apposite to the commencement and conduct of group litigation. As the case law of the focus jurisdictions demonstrates, it would be entirely inappropriate to continue to perpetuate the "benzodiazepine philosophy" that appeals are to be discouraged.

[267] SM Waddams, "Judicial Discretion" (2001) 1 *Oxford U Commonwealth LJ* 59, 60.
[268] *Ibid*, 60.
[269] DJ Galligan, *Discretionary Powers* (Oxford, Clarendon Press, 1986) 45.
[270] *Afrika v Cape plc; X, Y, Z v Schering Health Care Ltd; Sayers v Merek and Smithkline Beecham plc* [2001] EWCA Civ 2017, [8].

In summary, several difficulties accompany the implementation of the GLO as a multi-party litigation device. Certain matters pertaining to commencement and conduct of such litigation are not provided for in the schema itself, or where they do, lack clarity and definition. The discouragement of appeals is unattractive in an area of civil procedure which is far from settled. The test/lead action advocated again under CPR 19.III may give rise to difficulties, both general and CPR-specific.

3. Reception to Group Litigation Orders

To date, the GLO schema has been used on a fairly modest scale.[271] It remains virtually untested by appellate judicial consideration[272] or by governmental review,[273] although one judiciary member has been minded to state with confidence that the conduct of group actions in England is now governed by "a tried and established framework of rules, practice directions and subordinate legislation."[274] Significant academic opinion has also supported the adequacy of the GLO schema.[275]

Whether the implementation of the GLO schema is sufficient for the English jurisdiction is, however, still a matter upon which judicial opinion appears divided. In the 2002 *Consultation Response* published by the LCD,[276] eight judiciary responses were received in reply to proposal 3, which read: "Representative Claims could be made on behalf of a group whose individuals may or may not be named but where a situation exists in which an individual would have a direct cause of action." Of course, a claim on behalf of unnamed individuals is a characteristic of an opt-out class action regime, rather than the presently operative opt-in GLO schema. Of the judicial respondents, the Vice-Chancellor, Sir Andrew Morritt, was strongly opposed to proposal 3 (and also to the concept of pressure groups being used as representative plaintiffs under

[271] There have been 35 GLOs ordered from the inception of the schema to date: see *List of Current Group Litigation Orders* (Court Service 2000, as updated), available at <http://www.courtservice.gov.uk/cms/3570.htm>.

[272] The most significant challenge has arisen in relation to cost-sharing orders in actions being run in accordance with CPR 19.III: *Afrika v Cape plc; X, Y, Z v Schering Health Care Ltd; Sayers v Merek and Smithkline Beecham plc* [2001] EWCA Civ 2017.

[273] Eg: the LCD's report, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (Mar 2001) does not devote any discussion to the GLO schema, nor does the follow-up report: *Further Findings: A Continuing Evaluation of the Civil Justice Reforms* (Aug 2002).

[274] *Lubbe v Cape plc* [2000] 2 Lloyd's Rep 383 (HL) 393 (Lord Bingham). See also the positive comments contained in the response given by Sir Andrew Morritt to the LCD, reproduced in: *Representative Claims: Proposed New Procedures: Consultation Response* (Apr 2002) [4].

[275] Notably, N Andrews, "Multi-Party Proceedings in England" (2001) 11 *Duke J of Comp and Intl Law* 249, 265 ("group litigation is a more beneficial style of litigation [than class proceedings]"); and in the same volume, C Hodges, "Multi-Party Actions: A European Approach", 321, 346 ("[a]n enabling and generalized rule of procedure . . . is all that is required").

[276] *Representative Claims: Proposed New Procedures: Consultation Response* (Apr 2002).

rules of court);[277] three responses did not show antipathy to the concept but considered (in accordance with the Vice-Chancellor's view) that the nature of such fundamental reforms would require primary legislation rather than amendment by rules of court;[278] and four indicated agreement with either all proposals in the Consultation Paper or with proposal 3 specifically (without comment upon the need for primary legislation to effect the proposals).[279] Thus, notwithstanding the important and previously-canvassed issue as to whether the CPR Committee does have the requisite rule-making powers to encompass all aspects of a class action, it is clear from the judicial responses in the *Consultation Response* that there is continuing judicial interest in the exploration of a class action regime for England and Wales. In respect of *all* the responses from judiciary, law firms, academics, government departments, and business and organisations, the LCD noted that this proposal was "one of the most evenly balanced".[280]

Academically, it has also been suggested that the GLO schema would benefit from greater specificity. The following comments by Hodges are most instructive:

> It can be seen that the English criterion of claims having common or related issues of fact or law is essentially similar to the US Federal criterion of 'commonality'. However, it is striking that the US Rule includes a number of criteria which are absent from the English Rule: namely, typicality; avoidance of inconsistent decisions and adversely affecting non-parties' rights; adequate representation; predominance; and superiority. It would seem that these extra criteria would be of assistance in determining the English issue of discretion: the extra criteria certainly seem similar to the overriding English criteria of just resolution, economy, and proportionality contained in CPR Rule 1.1 which certainly apply. It can also be asked whether the English and Welsh courts will encounter difficulties if some of the US criteria are not applied in this jurisdiction.[281]

Further academic support is provided by Mildred, who states of the GLO schema:

> The lack of a numerosity requirement or of the need for common issues to predominate over individual issues and the uncertain status of the test claim raise the question how far the new, long-debated but finally anodyne Rules will go towards subjecting group action procedure to a regime which is both principled and predictable, rather than investing more and more power in the discretion of the judiciary.[282]

[277] "The extension of the right to bring or defend representative proceedings beyond what is now permitted by CPR Part 19 and the EC Directives . . . is not justified; and if such an extension is to be considered then it is a matter for parliament."

[278] Lord Phillips MR; May LJ; Association of District Judges.

[279] Judge Hurst; Judge Evans QC; Judge Coningsby QC; District Judge Dabezies.

[280] *Consultation Response*, "Responses to Specific Questions", 3. There were 80 responses in all to this proposal.

[281] C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [3.28].

[282] M Mildred, "Group Actions" in G Howells (ed), *The Law of Product Liability* (London, Butterworths, 2001) 375, 463.

4. Conclusion

In response to the contention that the GLO schema should be allowed five years in which to prove itself before considering the possible introduction of a class action,[283] perhaps two counterpoints can be made. First, it is never too early to consider other devices which seek to achieve the same goals as the CPR's overriding objective. The time-frame is quite immaterial: this is an area of litigation which must and can be particularly responsive to the demands of those who use the legal system. The clamouring for change can be swift and abrupt, and an ongoing awareness by law reformers of other options is essential. Secondly, Lord Woolf himself stated:

> In this area of litigation more than any other my examination of the problems does not pretend to present the final answer but merely to try to be the next step forward in a lively debate within which parties and judges are hammering out better ways of managing the unmanageable.[284]

Thus, even the architect of the revised English civil justice system contemplated that the consideration of this area would be ongoing, and in circumstances in which reasonable differences of opinion would arise.

Notwithstanding the *ad hoc* nature of English group litigation, there has certainly been a willingness to embrace the concept of multi-party litigation in this jurisdiction. The Court of Appeal has reaffirmed, "it is the policy of the courts to facilitate such actions in appropriate cases and adapt traditional procedures accordingly."[285] However, it is arguable that a class action warrants greater attention, and less reactionary negativity to the US-style class action, than has sometimes occurred to date within the English jurisdiction; and that, in any event, the language of the representative rule has been strained to such an extent that it is mirrored in several important respects in the mature class action regimes that exist throughout the focus jurisdictions. It has also been suggested that, given the lack of clarity provided by the GLO schema on several significant issues associated with the commencement and conduct of group litigation, a regime by which to "facilitate" the actions, and to identify "appropriate cases", requires a more explicit drafting than the GLO schema presently contains.

[283] N Andrews, "Multi-Party Proceedings in England" (2001) 11 *Duke J of Comp and Intl Law* 249, 266.

[284] *Final Woolf Report*, ch 17, [6].

[285] *Afrika v Cape plc; X, Y, Z v Schering Health Care Ltd; Sayers v Merek and Smithkline Beecham plc* [2001] EWCA Civ 2017, [2].

Part II

Commencement of the Class Action

5

Suitability for Class Action Treatment

A INTRODUCTION

THERE ARE CERTAIN criteria which inform whether proceedings are *suitable* to proceed by way of class action. These factors are not intended to comment upon whether class proceedings would be preferable to other forms of dispute determination—superiority criteria,[1] with the accompanying infusion of judicial discretion, determines that. By contrast, the suitability criteria, the subject of this chapter, are intended to address those aspects of class actions jurisprudence which do not necessarily (depending upon the manner in which the governing enactment is drafted) turn upon the exercise of discretion at all. These matters consist of the minimum[2] size of the class (numerosity) (section B); the preliminary merits of the class claim (section C); and commencing a class action against multiple defendants (section D).

On the first criterion, there is a decided lack of unanimity in legislative drafting between the regimes of Australia, Ontario and the US, which provides a useful basis for comparison. On the second, the incorporation of a criterion which requires the court to examine the merits of a class action claim in some respect (whether by evaluating its merits or by a minimum financial threshold of claim or by a cost–benefit analysis) has been the subject of much academic and judicial discussion, giving rise to widely divergent views across the focus jurisdictions. On the third, differences in legislative drafting and judicial interpretation have wrought a profound effect upon the ease with which multiple defendants (not all of whom had dealings with each class member) may be sued, and these differences are significant for class action design and implementation.

B MINIMUM NUMEROSITY

The OLRC contended[3] that the numerosity requirement is a method of ensuring that dual objectives of class actions are served, viz, avoiding the inconvenience of many unitary actions, and providing access to justice for a group of persons with small claims. However, from the experience of the focus jurisdictions, it appears that attempts to imbue the numerosity criterion with a screening function have met with legislative difficulty and judicial uncertainty.

[1] See ch 7.
[2] The maximum class size may give rise to different concerns of manageability: See pp 259–60.
[3] *OLRC Report*, 326.

Instead, several of the criteria discussed in later chapters provide preferable and more competent screening mechanisms.

Essentially, there are four options by which a minimum numerosity requirement may be specified:

- descriptively (for example, "numerous persons"[4]);
- by a minimum specified number of plaintiffs;[5]
- by circumstances in which joinder would be difficult or impracticable;[6] or
- by a bare threshold of "two or more persons".[7]

The focus jurisdictions have chosen different options for their class action schemas. The Australian class action regime contained in Pt IVA follows the second abovementioned option,[8] by stipulating a minimum number of seven persons.[9] Ontario's statute provides for a minimum threshold of "two or more persons".[10] The US regime[11] is different again, preferring that joinder would be impracticable. All three of these options will be considered, as their diversity is of marked interest.

As will be shown, a specified minimum number has caused interpretational problems in Australia, and for a number of reasons, is definitely best avoided. The US formula has not been free of dispute either.[12] The alternative bare requirement of as few as two persons has been criticised on the basis that it probably renders a numerosity requirement "largely irrelevant",[13] but in contrast to its counterparts, the formula has enjoyed relative freedom from undesirable litigation.

[4] Recommended by *OLRC Report*, 331, but not incorporated within CPA (Ont); also used under the GLO schema: CPR 19.11(1)—"a number of claims".

[5] See, eg: Supreme Court Act 1986 (Vic), s 34(a) ("three or more people"), but since replaced by Pt 4A in similar terms to FCA (Aus): Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic) s 13.

[6] Recommended by: *SLC Report*, [4.32] and *SLC Paper*, [7.20]; also encompassed in CCP (Que), art 1003(c).

[7] Recommended by *AltaLRI Report*, [158], [170]; *ManLRC Report*, 50; and *SALC Paper*, [6.20]. Also contained in CPA (BC), s 4(1)(b).

[8] FCA (Aus), s 33C(1)(a).

[9] The *ALRC Report*, upon which the class action schema in Pt IVA is substantially but far from entirely based, actually envisaged (in [140]) eight in all (seven class members plus the representative plaintiff). However, seven, including the representative, is sufficient under s 33C(1)(a).

[10] CPA (Ont), s 5(1)(b). Similarly, CPA (BC), s 4(1)(b).

[11] FRCP 23(a)(1).

[12] The Manitoba Law Reform Commission referred to the US provision as "the subject of constant litigation": *ManLRC Report*, 49. Cf: *SLC Report*, which advocated this criterion for numerosity in the context of the opt-in schema which it recommended: [4.32].

[13] Eg: DJ Mullan and NJ Tuytel, "The British Columbia Class Proceedings Act: Will It Open the Floodgates?" (1996) 14 *Canadian J of Ins Law* 30, 31.

1. A Minimum Specified Number

(a) How the test operates

Under Australia's Pt IVA federal regime, s 33C(1)(a) provides that a class action may be commenced only where it is shown that "7 or more persons have claims against the same person". This was one of the provisions which was introduced by the Australian Government into Pt IVA in the absence of a corresponding recommendation by the ALRC.[14] The difficulties caused by the numerosity requirement under Pt IVA are worth analysing. Whilst it has been recently observed extra-curially[15] that the numerosity requirement has proved to be the "least strict" of any of the threshold commencement requirements for Australian class actions to negotiate, proving the requisite numerosity has not been trouble-free.

As was judicially and academically pointed out early in the life of Pt IVA, there is an internal conflict within the Australian legislation. On the one hand, s 33C(1)(a) requires at least seven persons as a "threshold requirement"[16] for the commencement of a class action. On the other hand, s 33H, also important to the numerosity question, provides (in s 33H(1)(a)) that the application must "describe or otherwise identify the group members to whom the proceeding relates", but then states (in s 33H(2)) that "[i]n describing or otherwise identifying group members . . ., it is not necessary to name, or specify the number of, the group members." The tension is immediately apparent. How can a court be entirely satisfied of seven class members if the class description is sufficient without individual class members having to be named or numbered? The conundrum arose for analysis in *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd*.[17]

The defendant was a furniture importer and retailer which held "liquidation sales" at temporary venues such as showgrounds. The class of plaintiffs was described as—

> all those persons who have suffered or are likely to suffer loss or damage . . . who bought furniture at the sales advertised, promoted and conducted by [Federation Furniture Company] as set out below [68 sales were listed].

[14] The ALRC actually did not recommend a threshold number of class members as s 33C(1)(a) suggests. Rather, it proposed that the court be allowed to stop the proceedings if, at any stage, it found that there were fewer than seven class members plus the applicant: *ALRC Report*, [140] and cll 10, 13 of the Draft Bill, and pointed out by Wilcox J in *Tropical Shine* (n 17 below).

[15] M Wilcox (the Hon), "Class Actions in Australia" (Commonwealth Law Conference, Melbourne, 2003) 1.

[16] The terminology used in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) [29] to describe the three commencement requirements outlined in s 33C(1), the other two of which pertain to commonality.

[17] (1993) 45 FCR 457. See, for academic commentary at the time: P Lynch, "Representative Actions in the Federal Court of Australia" (1994) 12 *Aust Bar Rev* 159; V Morabito, "Class Actions: The Right to Opt Out" (1994) 19 *Melbourne U L Rev* 615, fn 41.

The representative plaintiff, also an importer/ retailer, sought to restrain Federation Furniture Company from advertising its furniture (especially in newspapers) in a way—"all our furniture is handmade, quality, solid teak and mahogany"—which rendered the descriptions of the quality of the pieces misleading and deceptive. However, the defendant argued that the applicant had not shown in the present case that there were seven purchasers who had suffered loss and damage so as to satisfy the numerosity requirement.

Wilcox J, who was critical of the failure of the drafters of the rule to explain "how the clause that became s 33C was to be reconciled with the clause that became s 33H",[18] resolved the problem by applying probabilities and assumptions. Given the number of sales, the widely published and long- running advertisements, and the media in which they were placed, his Honour concluded that "it seems likely that their number exceeds seven", and that "the material presently before the court justifies the assumption" of seven purchasers having a potential claim against the defendant.[19] Therefore, it follows that the minimum that is required to satisfy this numerosity requirement is sufficient evidence which circumstantially shows that it is probable or likely that the requisite number of persons would exist.[20] The particularity contemplated in s 33C(1)(a) can be satisfied by speculation exercised under s 33H.

The presence of a specified minimum number has given rise to another interpretational difficulty under the Australian schema. In *Tropical Shine*, Wilcox J briefly considered, but rejected, the argument that s 33C(1)(a) was intended to require automatic termination of a class action where there were found to be fewer than seven persons with claims. Instead, he held[21] that such an interpretation of the threshold specified minimum number would be "often productive of injustice and inconvenience"; would conflict with the statutory policy[22] that proceedings are not invalidated by a formal defect or irregularity unless the court thinks substantial and irremediable injustice has occurred; and would be directly inconsistent with s 33L, which gives the Federal Court a wide discretion to continue the proceedings with fewer than seven class members. In contrast, in *Falfire Pty Ltd v Roger David Stores Pty Ltd*,[23] Kiefel J considered that, in

[18] *Ibid*, 461–62. "As s 33C was a governmental innovation departing from the recommendations of the Law Reform Commission, it might have been expected that these documents [Explanatory Memorandum and second reading speech] would explain what the Government had in mind".

[19] *Ibid*, 462–63.

[20] For similar and subsequent sentiments by the same judge, see *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, 166–67 (doubts about sufficient graziers to form a class); *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [61] (sufficient smokers to form a class; eventually disallowed as a class action on appeal for other reasons).

[21] *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 462.

[22] Contained in FCA (Aus), s 51.

[23] FCA, 25 Sep 1996, 3. Her Honour declined to exercise such a discretion. For further notation of the contrast in the strictness with which s 33L has been judicially viewed, see: Australian High Court and Federal Court Practice, ¶21-686; and for contention that the discretion under s 33L should be exercised broadly, see: K Fowlie, "Identifying Class Actions" (Class Actions Seminar, Sydney, 1998) 9.

exercising judicial discretion under s 33L and as a general rule, that section should be taken as indicating that continuation of the action may not be appropriate for classes of fewer than seven members. No discontinuation has yet expressly occurred under s 33L for a class of fewer than seven participants. To the contrary, where the court has not been satisfied that there were seven potential class members, there has been a willingness to exercise the power under s 33L and allow the action to continue in class action form.[24]

(b) Comments upon the test

The Australian experience of determining minimum numerosity by means of a specified minimum number has been unfortunate. The test is unsatisfactory for a number of reasons.

First, in any class action regime in which the class members do not have to be identified with any precision, the numerosity of that group will ordinarily depend upon the probabilities of how many people may have a potential claim. As Glenn has succinctly stated, "[c]lasses are thus subject to entropy. Their existence is a leap of faith".[25] In that case, it seems somewhat ludicrous to choose a number such as seven at all. Any of the other three options for determining numerosity would be preferable to such artificiality of construction. As the Law Society of England and Wales noted, the number chosen by that body as a minimum for multi-party litigation was ten, "but with no pretence of scientific reasoning".[26] Such a figure can only be arbitrary at best.[27]

Secondly, the legislative drafting in Pt IVA is incohesive. The interplay between a specified minimum number, the sufficiency of a class description rather than enumeration of class member identities, and the discretion of the court to discontinue proceedings if the number of class members falls below the specified minimum number, has given rise to previously mentioned inconsistent judicial approaches. The decision in *Tropical Shine*, given "early in the life of Pt IVA",[28] has been mentioned with approval since,[29] and has been cited at

[24] *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304, 315; *Connell v Nevada Financial Group Pty Ltd* (1996) ALR 723 (FCA) 733, noted extra-curially in M Wilcox (the Hon), "Class Actions in Australia" (Commonwealth Law Conference, Melbourne, 2003) fn 10. Also see: *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) [48].

[25] HP Glenn, "Class Proceedings Act, 1992, SO 1992, c 6" (1993) 72 *Canadian Bar Rev* 568, 570.

[26] Civil Litigation Committee, *Group Actions Made Easier* (1995) [6.9.2]. "ten or more assisted persons" was noted in the earlier definition of "multi-party action" in the Civil Legal Aid (General) Regulations 1989, reg 152(3). It was subsequently adopted by Lord Woolf, who also recommended against a specified minimum number for that jurisdiction: *Final Woolf Report*, ch 17, [20]. His Lordship noted that a minimum number of 10 should be "regarded simply as a guide", and that five claims may be sufficient in a given scenario, but no number was incorporated into CPR Pt 19 or PD 19B.

[27] For similar admissions, see: *ALRC Report*, [140]; *ManLRC Report*, 50.

[28] *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [58] (Wilcox J, commenting upon his own decision).

[29] Eg: *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304, 324 (Einfeld J); *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 (Full FCA) 165–66 (O'Loughlin and Drummond JJ); *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) ATPR ¶41-679 (FCA) [60] (Merkel J).

appellate level.[30] The High Court has also commented[31] upon an equivalent schema[32] without adverse comment. Nevertheless, the inconsistency in drafting remains. The interplay between the sections was not that which the ALRC recommended.[33]

Thirdly, the nature of the test has, by virtue of the *Tropical Shine* approach, changed from that which is embodied in Pt IVA. The crux under s 33C(1)(a) is not whether there are seven persons, but whether the court is satisfied that there is circumstantial evidence of numerous persons. Further, in light of Wilcox J's approach to s 33L (which has been academically questioned,[34] but never overruled), judicial discretion may be exercised to permit a class action to continue, even should there be just a few members. Thus, the test of "7 or more persons" is a test in name only. This is further borne out by the fact that, even where defendants have argued that it is extremely doubtful whether seven class members exist, Australian courts have been reluctant to hold that the class action was invalidly commenced because of lack of the prescribed minimum number. Various reasons have been cited: that the court has a limited amount of material before it upon which to judge the substantiality of the class;[35] that further time for the gathering of material or for personal recollections should be allowed;[36] that it does not strictly matter whether there are seven named persons at the very commencement, provided that seven become apparent thereafter;[37] that it can be difficult for a representative plaintiff to substantiate the class size or identity until after disclosure, where only the defendant has the capacity to identify class members from its records;[38] that the class definition can be amended to overcome any lack of seven class members;[39] that the action has

[30] *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) [87], leave to appeal refused: *Nixon v Philip Morris (Aust) Ltd* (2000) 21(12) Leg Rep SL4b (HCA).

[31] *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1 (HCA) [35].

[32] Supreme Court Act (Vic), Pt 4A, s 33C(1)(a), which is in the same terms as the federal legislation.

[33] See cll 10, 13 of the Draft Bill, and the explanations of those clauses in *ALRC Report*, pp 172, 174.

[34] P Lynch, "Representative Actions in the Federal Court of Australia" (1994) 12 *Aust Bar Rev* 159, 168, who argues that s 33L refers to a "representative proceeding", which is defined in s 33A as a proceeding commenced under s 33C–which requires seven class members, so that a precondition to the exercise of discretion conferred by s 33L is proper commencement. Cf: V Morabito, 'Dinning v Federal Commissioner of Taxation—The Dawn of a New Era in Tax Litigation in Australia?" (2000) 7 *Canterbury L Rev* 487, 498–99.

[35] Eg: *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [57]–[58] (Wilcox J at first instance).

[36] Eg: *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, 166 (re class member graziers).

[37] *Bright v Femcare Ltd* [2000] FCA 1179, [14] ("I am not convinced that it is clear that a failure to comply with s 33C(1)(a), at the time a proceeding is commenced, is necessarily fatal to its continuance as a proceeding under Pt IVA": Lehane J, specifically discussing the minimum numerosity requirement).

[38] Eg: see Drummond J in *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (FCA, 9 Jul 1997) 11.

[39] *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [25].

many problems of which a small class size is only one;[40] that no substantive objection has been taken by the defendant to the apparent lack of seven class members at various hearings before the court;[41] and that some other bar to a class action is preferable to drawing an inference from the evidence of lack of sufficient class members, however strong that evidence may be.[42] In light of such judicial unwillingness to bar a class action on the grounds of numerosity, it seems rather pointless to set a prescribed minimum number at all.

2. Impracticability of Joinder

(a) How the test operates

The test under FRCP 23(a)(1) provides that a class action is maintainable only if "the class is so numerous that joinder of all members is impracticable". As Newberg explains, this is not a test of numerosity exclusively: the words "the class is so numerous", are followed by the narrower phrase and proviso, "that joinder of all members is impracticable". Thus, it is not necessary that the joining of all class members as named parties in a single action should be impossible in order to satisfy this pre-requisite, only that it be extremely difficult or inconvenient.[43] Any finding that numerosity was lacking because the plaintiffs had not shown the class to be so large that joinder was impossible will have applied the incorrect test under FRCP 23(a)(1).[44]

[40] Eg: *Dinning v Federal Commissioner of Taxation* (1999) 99 ATC 4621 (FCA) (Ryan J suggested that the action could not be constituted as a class action because "Counsel for the applicant has resiled from the contention that the proposed group should comprise all 62 airline pilots (the proposal was to nominate 7 other pilots as the class). When that consideration is added to the circumstances which I have already outlined, it becomes manifest . . . that it would not be an appropriate exercise of the Court's discretion to reconstitute the present action as a representative action"). Several bases for this decision are critiqued in V Morabito, "Dinning v Federal Commissioner of Taxation–The Dawn of a New Era in Tax Litigation in Australia?" (2000) 7 *Canterbury L Rev* 487.

[41] *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304, 314–15.

[42] *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (FCA, 9 Jul 1997) 10 ("But, notwithstanding the state of the evidence which strongly suggests that there may not exist at least seven group members, I am not prepared to go further and draw that inference"). Many difficulties beset the commencement of this class action, and it was discontinued under s 33N(1).

[43] *Newberg* (4th) § 3.3 p 218, § 3.4 p 230; *Federal Litigation Guide* "Class Actions" ch 42 (Charlottesville, Va, Matthew Bender & Co Inc, 2001, as updated) [Lexis CD-ROM] [42.51]. Eg, see: *Boggs v Divested Atomic Corp*, 141 FRD 58, 63 (SD Ohio 1991) ("Satisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiff will suffer a strong litigational hardship or inconvenience if joinder is required"); *Harris v Palm Springs Alpine Estates Inc*, 329 F 2d 909, 913–14 (9th Cir 1964).

[44] As occurred in *Robidoux v Celani*, 987 F 2d 931, 935 (2d Cir 1993), overruling the earlier District Court's application of the wrong test.

Although the US rule does not (unlike the regimes of Australia[45] and Ontario[46]) contain a provision to the effect that it is irrelevant that the number of class members cannot be specified at the outset, that is plainly the judicial position. In order to satisfy the numerosity prong, the Fifth Circuit has indicated that "a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members".[47] As Newberg further notes, '[w]here the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied",[48] and any argument by the defendant that certification is inappropriate because the number of class members is unknown will be rejected out of hand.[49] Common sense, general knowledge, drawing inferences from facts—all are permissible. As numerous authorities have pointed out, much class litigation would be unfairly prevented if the identities of the class members were required to be known for certification, but that information was only available easily from the defendant's own records, thus creating an "information monopoly" in the defendant's hands.[50]

In *Paxton v Union National Bank*,[51] the Eighth Circuit Court of Appeals stated that when a district court addresses the numerosity requirement, it should examine "the number of persons in a proposed class . . . the nature of the action, the size of the individual claims, the inconvenience of trying the individual suits, the nature of the relief sought, and any other factor relevant to the practicability of joinder." Reflective of this instruction, some courts have not regarded impracticability of joinder as "a strict numerical test but dependent upon all the circumstances surrounding the case."[52] Inconsistencies have arisen, however, which are impossible to reconcile. For example, the numerosity requirement was met in one case because a wide geographic distribution of class members

[45] See FCA (Aus), s 33H(2).

[46] CPA (Ont), s 6(4). Also CPA (BC), s 7(d).

[47] *Pederson v Louisiana State University*, 213 F 3d 858, 868 (5th Cir 2000), citing *Zeidman v J Ray McDermott & Co*, 651 F 2d 1030, 1038 (5th Cir 1981).

[48] *Newberg* (4th) § 3.3 pp 224–25; R A Givens, *Manual of Federal Practice* (5th edn, Newark, Matthew Bender, as updated) [3.140].

[49] Eg: *Barlow v Marion County Hospital District*, 88 FRD 619, 625 (MD Fla1980); *Olden v LaFarge Corp*, 203 FRD 254, 269 (ED Mich 2001).

[50] Eg: *Israel v Avis Rent-A-Car Systems Inc*, 185 FRD 372, 377 (SD Fla 1999); *Orantes-Hernandez v Smith*, 541 F Supp 351, 370 (CD Cal 1982); *Jackson v Foley*, 156 FRD 538, 542 (ED NY 1994) ("The Plaintiffs' estimate of potential class members is reasonable based on the limited information available to them. Only the State Defendants know the exact number of borrowers who were denied participation in the REFA program due to a default judgment or inability to make the monthly payments set by HESC. Such an information monopoly will not stand in the way of persons seeking relief").

[51] 688 F 2d 552, 559 (8th Cir 1982), citing C Wright and A Miller, *Federal Practice and Procedure* § 1762.

[52] *Senter v General Motors Corp*, 532 F 2d 511, 523 fn 24 (6th Cir 1976) ("There is no specific number below which class action relief is automatically precluded. Impracticality of joinder is not determined according to a strict numerical test, but upon the circumstances surrounding the case"); *General Telephone Co of the Northwest Inc v EEOC*, 446 US 318, 330, 100 S Ct 1698 (1980).

made joinder impracticable,[53] but in another case in which the class of 59 were all located in a relatively small geographic area, numerosity was still satisfied.[54] As a further example, where it was easy to communicate with each person in the class, it has been held in case law that joinder was both practicable[55] (thereby defeating numerosity) and impracticable.[56]

There is also the suggestion that different-sized classes are treated differently under FRCP 23(a)(1). When the number of putative class members is large, sheer numbers alone usually disposes of the requirement of joinder being impracticable.[57] Although there is, judicially-stated, "no magic number" derived by FRCP 23(a)(1)'s formula,[58] it appears that classes greater than 30 will usually satisfy the numerosity requirement without consideration of other factors which may make joinder practicable.[59] Sherman, for example, states that the "rule of thumb is about twenty-five", an assessment with which Gallacher agrees.[60] Even so, it is difficult to draw any lines: Newberg notes that a class containing over

[53] *Israel v Avis Rent-A-Car Systems Inc*, 185 FRD 372, 377 (SD Fla 1999). Also: *Kernan v Holiday Universal Inc*, 1990 WL 289505 (D Md 1990) (numerosity met where alleged national discrimination policy); *Allen v Isaac*, 99 FRD 45 (ND Ill 1983) (class of 17 black employees not large, but geographical dispersion across US rendered joinder impracticable); *In re Copley Pharm Inc*, 158 FRD 485, 489 (D Wyo 1994) (defendant distributed Albuterol throughout US, and litigants in almost every state).

[54] *Reeb v Ohio Dept of Rehabilitation*, 203 FRD 315, 321 (SD Ohio 2001) (59 correction officer employees all located in a relatively small geographical area).

[55] *Block v First Blood Associates*, 691 F Supp 685, 695 (SDNY 1988) ("solicitation to join Block as plaintiff demonstrates that the names and addresses of each . . . [was] known . . . and that it was practicable to communicate personally with each limited partner and to arrange for his or her joinder"); *Spectrum Financial Companies v Marconsult Inc*, 608 F 2d 377, 382 (9th Cir 1979).

[56] *Polich v Burlington Northern Inc*, 116 FRD 258, 261 (D Mont 1987).

[57] Noted and illustrated by *Newberg* (4th) § 3.5 pp 233–42; and *Federal Litigation Guide* "Class Actions" ch 42 (Matthew Bender & Co Inc 2001, as updated) [Lexis CD-ROM] [42.51]. In particular, see *In re American Med Systems Inc*, 75 F 3d 1069, 1079 (6th Cir 1996) (holding that the numerosity requirement was met where the class size was determined to be in the range of 15,000 to 120,000 persons).

[58] *Hum v Dericks*, 162 FRD 628, 634 (D Haw 1995) ("There is no magic number for determining when joinder is impracticable"); *Boggs v Divested Atomic Corp*, 141 FRD 58, 63 (SD Ohio 1991) ("There is no bright line numerical test by which the district court can determine when the numerosity requirement is satisfied"); *Andrews v Bechtel Power Corp*, 780 F 2d 124, 131 (1st Cir 1985). That the exact number that will satisfy the US numerosity requirement under FRCP 23(a)(1) is not clear and involves great disparity is an oft-recurring view in US academic literature: eg: LJ Hines, "Challenging the Issue Class Action End-Run" (2003) 52 *Emory LJ* 709, fn 38; *Newberg* (4th) § 3.3 p 221.

[59] Eg: 25 to 30 mentioned in *Rodger v Electronic Data Systems Corp*, 160 FRD 532, 535 (ED NC 1995); and see, for mention of 40: *Newberg* (4th) § 3.5 pp 243–47, and *Federal Litigation Guide* "Class Actions" ch 42 (Matthew Bender & Co Inc 2001, as updated) [Lexis CD-ROM] [42.51] fn 4.

[60] EF Sherman, "Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions" (2002) 52 *DePaul L Rev* 401, fn 40. The author cites the following examples to demonstrate the variation: *Swanson v American Consumer Industries Inc*, 415 F 2d 1326, 1330, n 3 (7th Cir 1969) (joinder of 40 impracticable); *Arkansas Education Assn v Board of Education*, 446 F 2d 763, 765 (8th Cir 1971) (class of 17 black teachers sufficiently numerous because of their "natural fear or reluctance" to bring separate actions). Also: I Gallacher, "Representative Litigation in Maryland: The Past, Present and Future of the Class Action Rule in State Court" (1999) 58 *Maryland L Rev* 1510, 1558.

300 members has been denied certification:[61] whereas a class of 18 satisfied the numerosity requirement.[62]

However, when the class is small, the situation is even less clear. On the one hand, it appears that the test has been treated as merely one of numerosity *per se*. As Newberg remarks, in *General Telephone Co of the Northwest Inc v EEOC*,[63] the Supreme Court noted several cases in which classes of 18–37 had been denied certification, and concluded that a class with as few as 15 employees would be too small to warrant a class action. However, the *Federal Litigation Guide* observes that, in reality, classes of between 20 and 40 members receive varying treatment.[64] Newberg further notes[65] that when the class size is small, other factors can and should be relevant and significant (for example, judicial efficiencies, geographic location of class members, financial ability of class members to institute individual actions, quantum of individual claims, characteristics of the class members and whether they are likely to institute individual actions), and that "[c]ourts and commentators have found it easy to slip into the pattern of referring to FRCP 23(a)(1) simply as a test of numerosity." Even if the class is small and its members can be identified and named at the commencement of litigation, all of the aforementioned commentary agrees that the presence of these factors could make joinder of all parties difficult.

(b) Comments upon the test

The inquiry into the impracticability of joining the necessary parties under FRCP 23 is obviously very fact-dependent, and no line in the sand has been judicially established. It is notable that each of the factors which US jurisprudence cites by which the practicability of joinder must be evaluated has been considered as part of the superiority criteria in the schemas operative in Australia[66] and Ontario.[67] In these other focus jurisdictions, such matters have not been

[61] *Newberg*, *ibid*, p 223, citing: *Minersville Coal Co v Anthracite Export Assn*, 55 FRD 426, 428 (MD Pa 1971) (330 anthracite producers, joinder held to be practicable). Also: *Utah v American Pipe & Construction Co*, 49 FRD 17 (CD Cal 1969) (joinder of 350 public entities not impracticable).

[62] *Cypress v Newport News General and Nonsectarian Hospital Assn*, 375 F 2d 648, 653 (4th Cir 1967); *Gaspar v Linvatec Corp*, 167 FRD 51, 56 (ND Ill 1996).

[63] 446 US 318, 330, 100 S Ct 1698, 1706 (1980) and *Newberg*, *ibid*, 247. Also: *Jones v Firestone Tire & Rubber Co Inc*, 977 F 2d 527, 534 (11th Cir 1992), in which a class of 21 members was described to be "generally inadequate"; 10 members insufficient in: *Assn for the Preservation of Freedom of Choice Inc v Wadmond*, 215 F Supp 648 (SD NY 1963).

[64] *Federal Litigation Guide* "Class Actions" ch 42 (Matthew Bender & Co Inc 2001, as updated) [Lexis CD-ROM] [42.51], and the cases cited in fn 5.

[65] *Newberg* (4th) § 3.6 pp 250–52, quote at 250. For similar views and discussion: RH Klonoff, *Class Actions and Other Multi-Party Litigation* (St Pauls Minn, West Group, 1999) §3.2, §3.4; TA Dickerson (the Hon), *Class Actions: The Law of 50 States* (New York, Law Journal Press, 2001) [looseleaf] §3.06.

[66] Such matters are considered under FCA (Aus), s 33N(1), separate and distinct from the numerosity requirement in s 33C(1)(a).

[67] Preferability under CPA (Ont), s 5(1)(d) is separate and distinct from numerosity in s 5(1)(b).

considered either legislatively or judicially as part of the numerosity requirement, and have remained conceptually distinct.

Newberg laments that the numerosity requirement has been complicated under FRCP 23 by the facts that neither the Rule nor the original Advisory Committee Notes[68] provides a clear formula as to when joinder of all members is impracticable; the rule is supposedly by its terms not to be a mere test of numbers, but no other guidance is offered by the Rule itself; the "broad discretion of trial courts" has lead to inconsistent decisions under the Rule; and there is "an absence of Supreme Court guidelines."[69] Indeed, the lack of assistance provided by the Notes is reflective of Wilcox J's criticisms in *Tropical Shine*[70] that the explanatory material of Australia's Pt IVA federal regime was, by paraphrasing the relevant sections, quite unhelpful.

One of the reasons that the wording of a joinder impracticability test has probably been avoided under the post-FRCP regimes is that the terminology has the potential to give rise to confusion. The concept of "joinder" has been narrowly construed under English law[71] (as it has been in both Australia[72] and Ontario[73])—the relief claimed must arise from the same transaction or series of transactions, and contain commonality of law or fact.[74] The stringency of the commonality required for joinder, as it is applied in these other jurisdictions, has prompted one commentator to question "whether there is ever a common question of fact",[75] whilst Lord Woolf decried the utility of the procedure in England "where the interests of claimants differ."[76] Thus, "so numerous that joinder is impracticable" could be taken in jurisdictions elsewhere to connote that the claims did not possess sufficient commonality to justify the strictures of joinder, which would be a distinct hinderance to the class action procedure.

[68] Rules Advisory Committee, "Notes to 1966 Amendments to Rule 23" (1966) 39 FRD 69, 109.

[69] See, generally: *Newberg* (4th) § 3.3 pp 218, 220–225.

[70] *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 461–62.

[71] Eg: *Bendir v Anson* [1936] 3 All ER 326 (CA) (action for interruption of light caused by new building; plaintiffs at Nos 6 and 8 applied to have actions joined; refused because each building would be affected by light at different times of day and to differing degrees).

[72] Eg, in Australia: *Payne v Young* (1980) 145 CLR 609 (HCA) 618 (Mason J) ("joinder is not authorised when . . . the participation of each individual plaintiff is limited to participation in one series of transactions, the other plaintiff not participating in that series"). See further: *ALRC Report*, [46].

[73] Eg, in Ontario: *Thames Steel Construction Ltd v Portman* (1980), 111 DLR (3d) 460 (Div Ct). Joinder was dismissed by the *OLRC Report*, 85, 331, for different reasons to those stated in text, viz, otherwise joinder would have "inordinate prominence", and it was practically infeasible for those individually nonrecoverable claims.

[74] Previously contained in RSC 1965, Ord 15, r 4(1): "two or more persons may be joined together in one action as plaintiffs . . .where (a) if separate actions were brought by . . . each of them, some common question of law or fact would arise in all the actions, and (b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions."

[75] R Alkadamani, "The Beginnings of 'Class Actions'?" (1992) 8 *Aust Bar Rev* 271, 272. Also: J Kellam and S Stuart-Clark, "Multi-Party Actions in Australia" in C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) 269 [15.11].

[76] *Final Woolf Report*, ch 17, [7].

The more likely reason that the post-FRCP focus jurisdictions have not employed the joinder impracticability test is that, as Newberg[77] and other academics[78] have noted, there is "enormous disparity among the decisions as to the size of the class that will satisfy the FRCP 23(a)(1) prerequisite . . . because the impracticability of joinder is not simply a test of the likely number of class members." Thus, it is difficult to obtain any measure of consistency about the class size that is likely to satisfy the rule. Although it has been judicially stated that a "common sense" approach toward numerosity is contemplated by FRCP 23,[79] common sense is seemingly as individual as it is unpredictable where the numbers of class members are around 40 or so.

3. The Bare Threshold Test

(a) How the test operates

The Canadian provincial regimes provide that the representative plaintiff merely has to show that there is "an identifiable class of two or more persons";[80] and the legislatures were keen to assure that the fact that the identity or number of class members is not known is no bar to certification.

In contrast to the difficulties which the tests of a specified minimum number of class members and impracticability of joinder have generated in Australia and the US respectively, the simpler and "more facilitative"[81] requirement of "two or more persons" in the Ontario legislation has not given rise to any notable defendants' challenges or judicial debate in the case law decided to date under that Act, as to whether the bare threshold was met. In no cases in a decade has there been judicial discussion as to whether the class before the court was too small to justify class proceedings. That of itself is a desirable outcome.[82] Perhaps it also manifests the reality that small class sizes are not so common as to be problematic and deserving of a minimum specified number of litigants.[83]

[77] *Newberg* (4th) § 3.3 p 221, 223.

[78] See, eg, A Borrell and WK Branch, "Power in Numbers: BC's Proposed *Class Proceedings Act*" (1995) 53 *Advocate* 515, 517; *Federal Litigation Guide* "Class Actions" ch 42 (Matthew Bender & Co Inc 2001, as updated) [Lexis CD-ROM] [42.50]; TA Dickerson (the Hon), *Class Actions: The Law of 50 States* (New York, Law Journal Press, 2001) [looseleaf] §3.05.

[79] *Civic Assn of Deaf of New York City Inc v Giuliani*, 915 F Supp 622, 632 (SD NY 1996); *Peil v Speiser*, 97 FRD 657, 659 (ED Pa 1983); *In re Data Access System Securities Litig*, 103 FRD 130, 137 (DNJ 1984).

[80] CPA (BC), ss 4(1)(b), 7(d); CPA (Ont), ss 5(1)(b), 6(4).

[81] M Evans, "Products Liability in Ontario" (1998) 8 *Windsor Rev of Legal and Social Issues* 113, 134.

[82] Similarly, the lack of litigious problems which had accompanied the "numerous persons" requirement of r 75 of the Supreme Court of Ontario Rules of Practice (the predecessor to the CPA (Ont)) influenced the OLRC's decision to recommend its retention: *OLRC Report*, 330.

[83] Indeed, the smallest class to date under the Ontario legislation has been 26: *Schweyer v Laidlaw Carriers Inc* (2000), 44 CPC (4th) 236 (SCJ): D Lennox, "Building a Class" (2001) 24 *Advocates' Q* 377, 378.

There have occasionally been submissions by the defendant under the equivalent British Columbia provision[84] that the class size was too small to warrant certification, but this contention has been dismissed on the basis that the legislature explicitly establishes a threshold of "an identifiable class of 2 or more persons".[85] Incidentally, a numerosity requirement of "two or more persons" would also avoid possible argument that any sub-class does not independently satisfy the numerosity requirement.[86]

Instead of attacking the bare threshold, defendants have had more success in alleging that a putative class of members was unworkable and that the proposed definition covering the class members failed to meet the criteria of a class definition: "certain, objective and readily ascertainable by lay persons".[87] This dual challenge arises from the view under the Canadian provincial regimes that "an identifiable class" as required by the respective statutes must satisfy both "subrequirements" of numerosity and definition.[88] These problems of class definition are explored later.[89]

The bare threshold of two or more persons in the Ontario regime has been buttressed by the requirement[90] that each party must put in evidence its best information as to the size of the proposed classes. This seeks to prevent the "information monopoly" which was adverted to in previously-mentioned US authorities, by making it incumbent on both the plaintiff and the defendant to adduce evidence of the estimated class size that shares the cause of action. However, as one court has noted in Ontario,[91] it is not clear what consequences flow from breach of the obligation, although evidence that the defendants have such information and have not disclosed it could presumably form the basis of an order to compel such production.[92] The provision has not been widely recommended[93] or enacted elsewhere in Canada,[94] and does not exist within the Australian regime, yet its purpose appears laudable.

[84] CPA (BC), s 4(1)(b).

[85] *Griffith v Winter* (2002), 23 CPC (5th) 336 (BCSC) [33], aff'd: (2003), 15 BCLR (4th) 390 (CA).

[86] For successful examples of this argument under FRCP 23, where carving out a sub-class of relatively few class members rendered it practicable for all those members to be joined to the proceedings, and thus opened up the sub-class to de-certification, see: *Officers for Justice v Civil Service Comm*, 688 F 2d 615, 630 (9th Cir 1982), and the cases cited in *Newberg* (4th) § 3.9 pp 267–69.

[87] *Cotter v Levy* (2000) (Gen Div, 4 Dec 1998) [19]; *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 360 (SCJ) [48]–[50].

[88] *Koo v Canadian Airlines Intl Ltd* [2000] BCSC 281, [24] (148 sufficient, but certification denied on other grounds); *Givogue v Burke* (2003), 25 CCEL (3d) 91 (SCJ) [15].

[89] See pp 323–37.

[90] CPA (Ont), s 5(3).

[91] *Caputo v Imperial Tobacco Ltd* (2002), 25 CPC (5th) 78 (Ont Master) [64], aff'd: *Caputo v Imperial Tobacco Ltd* (2003), 33 CPC (5th) 214 (SCJ).

[92] As in *Wilson v Re/Max Metro-City Realty Ltd* (2003), 63 OR (3d) 131 (SCJ) [36], where the defendant failed to comply with s 5(3), and was ordered "to release to the plaintiffs, within fifteen (15) days, all the information concerning the identity and coordinates of the class members".

[93] It was not referred to in *ManLRC Report*, *OLRC Report*, *AltaLRI Report*, or the *FCCRC Paper*.

[94] The provision does not appear in any other of the Canadian provincial regimes of British Columbia, St John's and Labrador, Saskatchewan, Manitoba or Alberta.

(b) Comments upon the test

The most significant criticism of the bare threshold test is that, whilst avoiding litigious debate, it "all but remove[s] a numerosity requirement".[95] The gateway for entry to the class action schema is consequently very wide. However, it could be said that such criticisms are ill-founded for three reasons.

First, it has been academically[96] and judicially recognised, in those jurisdictions where the test applies, that a class that *just* satisfies the test would be unlikely to satisfy the further requirement that a class proceeding be the preferable procedure for resolving the common issues. The Ontario Superior Court of Justice has noted the interrelationship between class size and the other certification requirements in the following manner: "The class definition, and thus the class size, also has pertinence to other considerations on certification, such as whether a class proceeding would be the preferable procedure. Although s 5(1)(b) only requires that there be a minimum of two members in the class, it is readily apparent that whether a proposed class includes a handful of plaintiffs or conversely, a multitude of members, will have an impact on the disposition of the certification motion."[97] Similarly, it has been recognised in British Columbia that a tiny, or even modest, class size would certainly constitute a factor to be considered under the preferability test.[98] Therefore, the adoption of a threshold of "two or more persons" is not likely to open the floodgates of class litigation, given the many other stringent commencement criteria which the class must satisfy. It is strongly arguable that a higher numerosity threshold is not necessary to achieve that which the superiority criterion already delivers. As Borrell and Branch emphasise, it certainly does not follow from a bare threshold test that a class of three will necessarily be certified.[99]

Secondly, the size of the likely class of litigants is not necessarily related to the complexity of the litigation and whether it justifies the multi-party procedure.[100] As the ALRC noted, "[e]fficiency may be achieved by grouping as few as two

[95] *ManLRC Report*, 49, although that Commission ultimately endorsed the criterion, without detailed discussion: 50. Also J Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Toronto, Butterworths, 1997) 46; also cited in: *AltaLRI Memorandum*, [45]–[46], and *AltaLRI Report*, [158]; G McKee, "Class Actions in Canada" (1997) 8 *Aust Product Liability Reporter* 84, 87.

[96] Eg: *AltaLRI Report*, [158] fn 195, citing J Sullivan, *ibid*, 46; JA Prestage and S McKee, "Class Actions in the Common Law Provinces of Canada" in C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [14.09].

[97] *Lau v Bayview Landmark Inc* (1999), 40 CPC (4th) 301 (SCJ) [26].

[98] *Griffith v Winter* (2002), 23 CPC (5th) 336 (BCSC) [33]–[34], aff'd: (2003), 15 BCLR (4th) 390 (CA) [17] (class of 15 certified; preferable procedure to individual claims); *Bouchanskaia v Bayer Inc* [2003] BCSC 1306, [150]–[154] (class of 46 certified; "The size of the class is likely to be modest, but not minor. Joinder of a few common claims may be the appropriate procedure for a very small class, such as one involving two or three claimants. Here, the potential class size is more significant").

[99] A Borrell and WK Branch, "Power in Numbers: BC's Proposed *Class Proceedings Act*" (1995) 53 *Advocate* 515, 517.

[100] *SLC Report*, [4.32]; *SALC Report*, [5.6.5].

claims".[101] Finally, as will be discussed in a later chapter,[102] it is arguable that a typicality criterion, in the sense that the class representative must be able to prove that there is a *common desire* amongst the class to prosecute the action, has been judicially implemented across the focus jurisdictions as a means of "narrowing the gate".

4. Conclusion

The wide gate that a numerosity threshold of "two or more persons" has presented is a workable solution in those jurisdictions in which it has been implemented, when viewed within the context of the class action regime as a whole. The express superiority criterion and an arguably judicially implied typicality criterion which are discussed in later chapters appear capable of screening out unsuitable actions and narrowing the gate for class litigation. Whether a *further* screening mechanism, in the guise of a preliminary merits assessment, should be included within a class action regime will be considered in the next section.

In comparison with the bare threshold test, defendants under the Australian class action regime who seek to argue that applicants are, by virtue of s 33C(1)(a), required to prove at the commencement of the proceedings that there are seven class members have been confronted by a judicial willingness (in light of the express power in s 33L) to allow the class action to proceed where there may not be seven class members at all. Morever, the Australian legislative numerosity threshold requirement sits uncomfortably with the additional requirement to describe or otherwise identify the class members. The US federal regime, by its impracticability of joinder test, intertwines a minimum numerosity requirement with factors that truly pertain to the superiority assessment in other jurisdictions. As previously noted, US commentators acknowledge that confusion arises when some courts treat the requirement as a simple test of numerosity, whereas other courts consider a much wider range of factors. Under the latter approach, joinder of a larger class may be practicable, and on the other hand, joinder of a smaller class may be impracticable because of geographical spread, for example. In light of these various options, the simplicity of the Canadian approach, with a wide gate numerosity threshold, narrowed by the preferability assessment, is attractive.

As a point, the focus jurisdictions are unanimous about the lack of effect, as a threshold concern, that prospective opt-outs may have upon class size. The prospect that the class may shrink from a low maximum number of putative class members as a result of opt-outs has not refuted certification on the grounds of

[101] *ALRC Report*, [140].
[102] See pp 309–18.

numerosity in either Ontario[103] or the US[104] (although, if it should turn out after certification that, after the number of opt-outs are known, the size of the class has been significantly reduced, the defendants have the right to move to decertify the proceeding). To hold otherwise (according to these authorities) would require the court to speculate on which class members would opt-out of the class, which would seem to undermine the purpose of the opt-out approach and involve the court in subjective analysis. Alternatively, in Australia, where certification is not a prerequisite, if at any stage the number of class members falls below the designated minimum of seven, then as noted above, the court has the power to either continue or discontinue the action,[105] but prospective opt-outs has not affected the commencement threshold of seven class members.

C PRELIMINARY MERITS OF THE CLASS CLAIM

Should class actions be required to undergo more onerous judicial scrutiny at the outset, given that they will impose administrative burdens on the courts quite different from those which are imposed by even the most complex unitary action?[106] The incorporation of some preliminary merits assessment at the commencement of the class action is, as Hensler and Rowe note,[107] appealing for two reasons. First, it promises the possibility "of diverting "bad" cases from the legal system before significant costs have been incurred." Secondly, discarding such cases early would also reduce the oft-cited "*in terrorem* effect of class actions, which defendants explain as the threat posed by even a modest potential for huge class-wide damages that class counsel can threaten once a case has been certified."[108] Notwithstanding, the answer to the postulated question in all focus jurisdictions has been statutorily negative so far. However, rumblings to the contrary persist, both by the judiciary and by law reformers.

[103] Eg: *Ward-Price v Mariners Haven Inc* (2002), 36 CPC (5th) 189 (SCJ) [40]; *Brimner v Via Rail Canada Inc* (2000), 50 OR (3d) 114 (SCJ) [29], leave to appeal allowed: (SCJ, 31 Jan 2001), certification aff'd: (2001), 15 CPC (5th) 27 (Div Ct).

[104] *Republic National Bank of Dallas v Denton & Anderson Co*, 68 FRD 208, 213 (ND Tex 1975); *Cox v American Cast Iron Pipe Co*, 784 F 2d 1546, 1553–54 (11th Cir 1986).

[105] By order under s 33L.

[106] Eg: notice requirements, opting in or out, protection of absent class members, individual issues to be addressed subsequently such as damages assessments: *OLRC Report*, 313, fn 29 and posing similar question at 411.

[107] DR Hensler and TD Rowe, "Complex Litigation at the Millennium: Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform" (2001) 64 *Law and Contemporary Problems* 137, 143.

[108] The authors cite the following as examples of secondary literature: "Developments in the Law–The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000) 113 *Harvard L Rev* 1752, 1811("For defendants, the potential liability that attaches to damages class actions is so great that often the most sensible solution is to settle as early and as cheaply as possible"); JB Weinstein, "Some Reflections on United States Group Actions" (1997) 45 *American J of Comparative Law* 833, 834 ("Among [the class action's] disadvantages are the enormous power and threat of large aggregations that may induce defendants to settle claims that have little merit").

1. An Assessment Based upon Chance of Success

It has been stated by the US Supreme Court that, under FRCP 23, the representative plaintiff need not demonstrate a probability of success on the merits. In *Eisen v Carlisle and Jacquelin*,[109] the court stated:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it.

Should *Eisen* be reconsidered, so as to allow a preliminary enquiry into the merits of the claims at certification? Towns argues cogently that it should be, and provides the following useful fact summary of this iconic case:[110] "Eisen sought to bring a class action on behalf of himself and other odd-lot traders against various brokerage firms and stock exchanges for alleged violations of antitrust and securities laws. The district court estimated that providing individual notice to the 2.25 million identifiable traders would cost over $315,000, and instead proposed a publication notification scheme that would reach a cross-section of the proposed class at a cost of $21,720. In addition, the court shifted the notice cost, ordering the defendants to pay if the plaintiffs could show a strong likelihood of success on the merits. After a preliminary hearing, the district court found that the plaintiff was "more than likely" to prevail and ordered the defendant to bear 90 per cent of the cost of notice. However, the Second Circuit held that the district court had no authority to inquire into the merits of the case solely to shift the cost of notice to the defendants.[111] The Supreme Court affirmed this decision, and rejected the district court's preliminary hearing, noting that the court lacked authority for such a procedure.[112] Most significantly, the Supreme Court considered that a preliminary inquiry into the merits of the case might harm the defendant because the "traditional rules and procedures applicable to civil trials" would be absent.[113] Towns critically observes that the result in *Eisen* was "somewhat surprising, because the Court explicitly declined to reach any issue other than notice. Nevertheless, lower courts have consistently interpreted *Eisen* as absolutely barring merit-based inquiries in the class certification process."[114]

Despite the Supreme Court's prohibition, however, examples of merit-based enquiry under FRCP 23 do emerge. For example, in *In re Rhone-Poulenc Rorer*

[109] 417 US 156, 177–78, 94 S Ct 2140 (1974).

[110] DM Towns, "Merit-Based Class Action Certification: Old Wine in a New Bottle" (1992) 78 *Virginia L Rev* 1001 (the neat summary is reproduced but abbreviated from that appearing at 1016–19).

[111] 479 F 2d 1005, 1015–16 (2nd Cir 1973).

[112] 417 US 156, 177, 94 S Ct 2140 (1974).

[113] *Ibid*, 178.

[114] Towns, n 110 above, 1018.

Inc,[115] Judge Posner voiced disquiet that certification of a class action would subject the defendants to "intense settlement pressure" and possible bankruptcy, which was of especial concern because he doubted the merit of the plaintiffs' claim. It has since been contended by Johnson that this may have amounted to a premature decision about the merits of the case.[116] Moreover, some courts have indicated that a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action, and whether the certification requirements that pertain to merits have been made out.[117] Under the US federal rule, it has been academically suggested by Bone and Evans[118] that "commonality, typicality, and (b)(3) predominance and superiority most clearly invite a merits-related inquiry." However, on this issue, other courts[119] have endorsed the *Eisen* view, disallowing evidence concerning merits-related information. Certain US commentators observe that, in light of these conflicting authorities and academic criticisms, a re-examination of the *Eisen* prohibition on preliminary merits assessment is timely.[120]

On the question of preliminary merits, the Ontario statute is drafted directly contrary to the prior recommendation of the OLRC. That Commission recommended that, at certification, the court should be satisfied that "the action has been brought in good faith and that there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the class",[121] but this recommendation was not adopted by the legislature. It is statutorily expressed[122] (and has been judicially reiterated[123]) that

[115] 51 F 3d 1293, 1298–99 (7th Cir 1995).

[116] HM Johnson, "Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Action" (1996) 64 *Fordham L Rev* 2329, 2360.

[117] Eg: *Szabo v Bridgeport Machines Inc*, 249 F 3d 672, 675–76 (7th Cir 2001); *Johnston v HBO Film Management Inc*, 265 F 3d 178, 189 (3rd Cir 2001); *Newton v Merrill Lynch, Pierce, Fenner & Smith Inc*, 259 F 3d 154, 167–69 (3rd Cir 2001) (observing a "sea change" in the way in which class action litigation is now litigated since *Eisen*).

[118] RG Bone and DS Evans, "Class Certification and the Substantive Merits" (2002) 51 *Duke LJ* 1251, fn 6, also noting cases *ibid* at fnn 8, 9.

[119] Eg: *In re Kulicke and Soffa Industries Inc Securities Litigat*, 1990 WL 1478, 2 (ED Pa 1990); *In re Copley Pharmaceutical Inc* 161 FRD 456, 460 (D Wyo 1995); *Cook v Rockwell Intl Corp*, 151 FRD 378, 380 (D Colo 1993); *Redditt v Mississippi Extended Care Centers Inc*, 718 F 2d 1381, 1387–88 (5th Cir 1983); *In re Ribozyme Pharmaceuticals Inc Securities Litig*, 205 FRD 572, 576–77 (D Colo 2001); *Caridad v Metro-North Commuter Railroad*, 191 F 3d 283, 293 (2nd Cir 1999).

[120] For recent comment to that effect: RG Bone and DS Evans, "Class Certification and the Substantive Merits" (2002) 51 *Duke LJ* 1251, 1256; and also citing at fn 13: LG Schofield and JS Jacobson, "Circuits Split on Factual Disputes in Class Actions" (2001) *New York LJ* 1.

[121] *OLRC Report*, 323, and the particularly careful consideration from 313–23. Cf: Ontario Attorney-General's Department, *Report of the A G's Advisory Committee on Class Action Reform* (1990) 30–33.

[122] CPA (Ont), s 5(5).

[123] Eg: *Caputo v Imperial Tobacco Ltd* (1997), 148 DLR (4th) 566, 34 OR (3d) 314 (Gen Div) [20]; *Mangan v Inco Ltd* (1997), 30 OR (3d) 90 (Gen Div) [11]; *Fehringer v Sun Media Corp* (2002), 27 CPC (5th) 155 (SCJ) [9] (certification denied, and decision aff'd: Div Ct, 30 Sep 2003); *Joanisse v Barker* (SCJ, 5Aug 2003) [28]. Principle also reiterated in respect of what information should

any inquiry into the merits of the class action will not be relevant in that jurisdiction. Instead, s 5(1)(a) requires that the notice of application "disclose a cause of action". This has been held to mean that the threshold for a plaintiff class to meet is extremely low,[124] to protect access to justice.[125] As the Supreme Court of Canada has remarked[126] in respect of the Ontario statute (the British Columbia position is the same[127]), "the certification stage is decidedly not meant to be a test of the merits of the action . . . The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action". Novelty of the claim is not a bar, nor is the potential for the defendant to present a strong case;[128] it does not matter if the law has not been fully settled;[129] and the court will seek to set out controversial facts or serious allegations as stated by the respective parties without treating them as proved one way or the other.[130] Courts should only refuse to certify where the representative plaintiff "plainly and obviously cannot succeed."[131]

However, a similar problem has arisen in Ontario as was alluded to under FRCP 23. There will often exist an overlap between questions going to the merits of the class's claims, and questions relating to certification. "Most of the focus in the certification motion will be the preferable procedure. The problem is that arguably it is necessary to talk about the nature of the evidence which will be required to prosecute or defend against the action. Such a discussion tends to

support a certification motion, and whether it is being impermissibly sought or relied upon for "merits": *Price v Panasonic Canada Inc* (SCJ, 21 Dec 2001) [9]; *Moyes v Fortune Financial Corp* (2002), 22 CPC (5th) 154 (SCJ) [17] (certification denied, and decision aff'd: Div Ct, 31 Oct 2003); *Pearson v Inco Ltd* (2002), 22 CPC (5th) 167 (SCJ) [4], [12]; *Macleod v Viacom Entertainment Canada Inc* (2003), 28 CPC (5th) 160 (SCJ) [18].

[124] Eg: *Jean-Marie v Green* (2000), 13 CPC (5th) 173 (SCJ) [3], citing *Hunt v Carey Canada Inc* [1990] 2 SCR 959, 74 DLR (4th) 321; *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [37].

[125] Eg: *Edwards v Law Society of Upper Canada* (1996), 40 CPC (3d) 316 (Gen Div) [3], [22], cited with approval in *Chippewas of Sarnia Band v Canada (A G)* (1996), 137 DLR (4th) 239, 29 OR (3d) 549 (Gen Div) [29]; *Peppiatt v Nicol* (1994), 16 OR (3d) 133 (Gen Div)[31] ("if the court should err it should do so on the side of protecting people who have a right of access to the courts": Chilcott J).

[126] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [16].

[127] *Elms v Laurentian Bank of Canada* (2001), 90 BCLR (3d) 195 (CA) [20], [39]; *Bouchanskaia v Bayer Inc* [2003] BCSC 1306, [93]; *Brogaard v Canada (A G)* (2002), 7 BCLR (4th) 358 (SC [in Chambers]) [30], [66]; *Scott v TD Waterhouse Investor Services (Canada) Inc* (2001), 94 BCLR (3d) 320 (SC) [52].

[128] Eg: *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [105] (Moldaver J); *McLaughlin v Falconbridge Ltd* (2000), 36 CPC (4th) 40 (SCJ) [27]; *Ormrod v Hydro-Electric Comm of the City of Etobicoke* (2001), 53 OR (3d) 285 (SCJ) [30].

[129] Eg: *Anderson v Wilson* (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) [18]; *Ragoonanan Estate v Imperial Tobacco Canada Ltd* (2001), 51 OR (3d) 603 (SCJ) [11]; *Samos Investments Inc v Pattison* [2001] BCSC 1790, [68], denial of certification aff'd: (2003), 20 BCLR (4th) 234 (CA).

[130] *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [7]; *Samos Investments Inc v Pattison* (2000), 3 BLR (3d) 296 (BC SC) [17].

[131] *Kimpton v Canada (A G)* (2002), 9 BCLR (4th) 139 (SC) [6].

sound like a discussion of the merits."[132] Therefore, as a matter of practice, it is not so easy to divorce a consideration of merits from the certification hearing. The Ontario court considered that a merits-type enquiry was bound up with the preferability criterion in that province's statute.

In the absence of any certification hearing, there is no express requirement in Australia's Pt IVA federal regime that the representative plaintiff be able to demonstrate that the action appears to have probable or reasonable prospects of success. Where applications to strike out for non-compliance with s 33C are brought, the court's underlying doubts as to the likelihood of success of the action are not relevant.[133] Additionally, where the court has satisfied itself that a class action under Pt IVA is not the most efficient and effective way of dealing with the claims of class members and that, in the interests of justice, the proceeding should not continue as a class action, that outcome does not entail any decision being rendered on the merits of the claims made by any of the class members.[134]

Thus, the focus jurisdictions are unanimous in their views—none of them expressly permits the merits of the claim, the probability of its success, to be considered at the commencement stage of class litigation. Nevertheless, and again as a common feature, there do already exist numerous safeguards against unmeritorious actions which apply equally to class as to unitary litigation. These include (allowing for differences in terminology across the focus jurisdictions): strike-out applications on the bases that the representative plaintiff's statement of case discloses no reasonable grounds or constitutes an abuse of the court's process; allowance for summary judgment; and the extensive case management powers of the court which can be used to bring obviously meritless, frivolous or vexatious claims to a hastened end.

In the post-FRCP regimes, where fear of a cascade of US-style litigation was notable when the regimes were introduced,[135] these safeguards appear to be functioning as intended. Whilst certain class actions have been struck out in those jurisdictions for either failing to disclose a reasonable cause of action[136] or

[132] *Caputo v Imperial Tobacco Ltd* (2002), 25 CPC (5th) 78 (Ont Master) [60], and also: *Caputo v Imperial Tobacco Ltd* (2002), 148 DLR (4th) 566, 34 OR (3d) 314 (Gen Div) [20]. The latter cited *Doctor v Seaboard Coast Line Railway Co*, 540 F 2d 699, 707 (4th Cir 1976) ("a preliminary hearing, addressed not to the merits of plaintiff's individual claim, but to whether he is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23, has never been regarded as violative of the rule stated in *Eisen*").

[133] *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [57] (Wilcox J).

[134] Eg: *Bright v Femcare Ltd* (2001) 188 ALR 633 (FCA) [77]–[78], plus see summary to accompany judgment. The order for discontinuance was ultimately reversed on appeal: (2002) 195 ALR 574 (Full FCA).

[135] See pp 72–77.

[136] Eg, in Ontario: *McCann v The Ottawa Sun* (1994), 16 OR (3d) 672 (Gen Div); *Edwards v Law Society of Upper Canada* (1998), 156 DLR (4th) 348, 37 OR (3d) 279 (Gen Div), aff'd: (2000), 188 DLR (4th) 613 (Ont CA), leave to appeal refused: (2001), 192 DLR (4th) vii; *Haskett v Trans Union of Canada Inc* (SCJ, 13 Dec 2001), rev'd: (2003), 224 DLR (4th) 419, 63 OR (3d) 577 (CA), leave to appeal refused: SCC, 27 Nov 2003; *Ritchie v Canadian Airlines Intl Ltd* (2001), 13 CPC (5th) 368 (SCJ). Eg, in Aust: *Harrison v Lidoform Pty Ltd* (FCA, 24 Nov 1998); the tobacco litigation, *Philip*

for summary judgment because of no genuine issue for trial,[137] there has been no empirical evidence that class action regimes have fostered frivolous or vexatious litigation. Only rarely has there been judicial criticism of unmerited litigation under the schemas in Ontario[138] or Australia,[139] accompanied by judicial warnings that costs may be awarded against legal representatives if the regimes are abused.[140] Moreover, the successful use by defendants of strike-out and summary judgment applications in both jurisdictions to bring class litigation to an end, plus their willingness to challenge whether the court has jurisdiction to deal with the class action claims at all,[141] rather negates the OLRC's concern that such devices would be ineffective and little used.[142] A study of class action practice in four US federal district courts[143] also indicates that motions to

Morris (Aust) Ltd v Nixon (2000) 170 ALR 487 (Full FCA); the *Johnson Tiles Pty Ltd v Esso Australia Ltd* litigation (in which strike-out applications have been numerous: M Durrant, "Statutory Liability: The Nightmare of Failure to Supply Claims" [1999] *AMPLA Ybk* 294, 305–6, updated by B McCabe, "Class Action against a Monopoly" (2001) 9 *Trade Practices LJ* 43); and the testing of the court's patience in *Sereika v Cardinal Financial Securities Ltd* [2001] FCA 208, [28] ("it is unacceptable to require the Court to deal on numerous occasions with manifestly inadequate pleadings. In this case I am coming to the point where further inadequacies may require a striking out of the representative proceedings"), and later: *Sereika v Cardinal Financial Securities Ltd* [2001] FCA 1715; also, the standard of requisite pleadings postulated in: *Williams v FAI Home Security Pty Ltd* [1999] FCA 1771, [16]–[17].

[137] Eg: *Smith v Canadian Tire Acceptance Ltd* (1995), 118 DLR (4th) 238, 19 OR (3d) 610 (Gen Div), aff'd (1996), 26 OR (3d) 95 (CA), leave to appeal refused: (1996), 29 OR (3d) xv (SCC); *Ciano v York University* (2000), 94 ACWS (3d) 489 (SCJ), aff'd (2000), 99 ACWS (3d) 606 (Ont CA); although the question of summary judgment in class proceedings can be controversial: *Garland v Consumers' Gas Co* (1995), 122 DLR (4th) 377, 22 OR (3d) 451 (Gen Div), aff'd (1997), 30 OR (3d) 414 (CA), rev'd (summary judgment set aside): [1998] 3 SCR 112, (1999), 165 DLR (4th) 385.

[138] See, eg, Winkler J's concerns about the improper commencement and conduct of the class litigation in *Smith v Canadian Tire Acceptance Ltd* (Gen Div), previously dismissed on a motion for summary judgment, *ibid*, and the consequent solicitor and client costs order against two non-parties, on the basis they were the true plaintiffs of the class action lawsuit but were not named—"[t]he purpose of the legislation is to facilitate the litigation of causes of action and not to generate them for financial gain": (1995), 22 OR (3d) 433 (Gen Div) [64]. Also: *ManLRC Report*, 24, 33–35.

[139] *Soverina Pty Ltd v Natwest Aust Bank Ltd* (1993) 40 FCR 452 (FCA) in which Hill J considered the action "misconceived", as an attempt to bring disparate actions together as a single action, and on its face, probably an abuse of process: at 456.

[140] Eg, this is suggested in: *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 (Gen Div) [63] ("It must be recognized that, in a class proceeding, there is a real vulnerability that an impecunious representative plaintiff will be put forward . . . Such a plaintiff is, strictly speaking, a real plaintiff in the sense of having an interest the same as others in the class, while at the same time being immune from costs sanctions. In such circumstances, the Court must exercise its supervisory jurisdiction with vigilance and, where circumstances dictate, apply the appropriate principles of law. In a proper case, a court may examine the role of counsel"). See also *Lowe v Mack Trucks Aust Pty Ltd* [2001] FCA 388, [31], in which indemnity costs were awarded against the plaintiff's solicitors in circumstances where a tenable statement of claim pleading an interest common to the class could not be framed.

[141] Eg: partially successful in *Cloud v Canada (A G)* (SCJ, 9 Oct 2001), aff'd: (2003), 65 OR (3d) 492 (Div Ct); successful in *Johnson Tiles Pty Ltd v Esso Aust Ltd* (2001) 113 FCR 42.

[142] *OLRC Report*, 311–12, one reason for that Commission's proposal for a preliminary merits assessment.

[143] T Willging *et al*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Washington CD, Federal Judicial Center, 1996), Tables 23, 24, further discussed in DR Hensler and TD Rowe, "Complex Litigation at the Millenium: Beyond 'It Just Aint't Worth It'" (2001) 64 *Law and Contemporary Problems* 137, fn 13.

dismiss and summary judgment motions were reasonably frequently brought by defendants (approximately 50% and 10% respectively), which again demonstrates the utility and application of already existing mechanisms for the protection of class action defendants.

2. Other Preliminary Merits Tests

Clearly, whether the commencement of class litigation ought to be screened by either a preliminary view of the merits or by some other preliminary assessment is a matter that has provoked a range of opinions. Whilst numerous commentators,[144] law reform commissions[145] and judicial overviews[146] have advocated *some* form of favourable preliminary view of the merits of the claim as a commencement criterion, both the commissions of Scotland[147] and Manitoba[148] recommended against any judicial preliminary assessment of the merits, and other academic commentary disputes the wisdom of such a criterion.[149]

From a comparative perspective, it is interesting to canvass two other options of preliminary merits assessment which have been either implemented or recommended across the focus jurisdictions.

(a) Minimum financial threshold

When the Australian federal regime was introduced, one commentator[150] suggested the desirability of imposing a minimum limit of loss or damage which each class member must hurdle in order to ensure that such proceedings were not frivolous or vexatious. Although the very intention of Parliament was that

[144] Eg, Ontario: G Hickinbottom, "Multi-Party Actions: The Defendant's Perspective" [1996] *Litigator* 62, 64; Australia: M Tobias, paper presented to Seminar on Class Actions (Sydney, 28 May 1979), quoted in "Practice Notes" (1979) 53 *Aust LJ* 670, 671; "Developments in the Law–Class Actions" (1976) 89 *Harvard L Rev* 1318, 1418–19: US: DM Towns, "Merit-Based Class Action Certification: Old Wine in a New Bottle" (1992) 78 *Virginia L Rev* 1001.

[145] Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 7, and cl 3(3)(a) of the Draft Bill (action "is brought in good faith and appears to have merit"); *OLRC Report*, 323.

[146] Lord Woolf recommended that a cost–benefit analysis be undertaken in respect of multi-party litigation in the jurisdiction of England and Wales: *Final Woolf Report*, ch 17, [34], and also see recommendation 3, but not a view of the merits at commencement of the litigation: ch 17, [25], citing in this regard, *SLC Paper*, [7.23].

[147] *SLC Report*, [4.31]; *SLC Paper*, [7.23].

[148] *ManLRC Report*, 49.

[149] Eg: G Bates, "A Case for the Introduction of Class Actions into English Law" [1980] *New LJ* 560, 561 (task should be left to the normal court trial process since bona fides closely tied up with claim); HP Glenn, "The Dilemma of Class Action Reform" (1986) 6 *Oxford J of Legal Studies* 262, 270 (endless scope for preliminary contestation); JS Emerson, "Class Actions" (1989) 19 *Victoria U of Wellington L Rev* 183, 201 (mini-trials in advance of the main action burdensome); W Ervine, "Multi-Party Actions" (1995) 23 *Scots Times* 207, 208 (financial risks likely as sufficient deterrent).

[150] W Pengilley, "Class Actions: A Legislative Hammer to Crack a Nut?" [1988] *Law Society J* 28.

the legislation was meant to cover situations where the class member's interest or claim may be small,

> [o]ne must wonder, in policy terms, whether this is a correct approach or whether it is not perhaps better that individuals wear some of the imperfections of life themselves. Prescribing some minimum amount of damages of each member of the class involved would appear to be a significant step in preventing frivolous litigation.[151]

Such a sentiment accords with the notions of judicial economy and proportionality in the use of court resources which have been previously discussed within the context of class litigation.[152] Notwithstanding that none of the class action regimes of the focus jurisdictions embodies a minimum financial threshold, judicial statements that this may have been a positive idea do occur from time to time, as this British Columbia decision shows:

> there is the question of the utility of having the claims of the entire class adjudicated at all. As I have indicated, the damages suffered by class members, if they exist at all, must be exceedingly small in terms of compensatory damages. While I acknowledge that one goal of class proceedings is to permit the advancement of small claims where legal costs make it uneconomic to advance them in individual cases, I do not believe that this rationale extends to providing a procedure for claims that are so small they are not worthy of adjudication before the Court.[153]

Such a statement exhibits well the tension between the social utility of providing access to the courts for small claims, and burdening the courts with litigation which would likely otherwise not be instituted at all. Therein lies the conundrum of imposing a preliminary merits threshold at all.

However, in contrast, the relatively small amount of each class member's maximum recovery (US$3250) was expressly held by Lindgren J in *ACCC v Giraffe World Australia Pty Ltd*[154] not to be a ground for discontinuance of the class action. The defendant alleged that the small rewards accruing to class members, if successful in their suit, would be outweighed significantly by the costs of proving the allegations in class proceedings. Lindgren J responded that "the policy of Pt IVA is that respondents should not benefit from the fact that individual claims are relatively small and that many group members might not consider it worth their while to litigate them on their own initiative."[155] Under FRCP 23 too, some of the more leading cases have been based upon extremely small individual claims: $70 in the case of *Eisen*,[156] $100 in the case of *Phillips*.[157]

[151] *Ibid*, 30. The author did not suggest a minimum amount.

[152] See pp 50–52, 57–60.

[153] *Nelson v Hoops LP* [2003] BCSC 277, [42]. Cf: *Scott v TD Waterhouse Investor Services (Canada) Inc* (2001), 94 BCLR (3d) 320 (SC) [149] (individual claims as low as $50; arguments that class should not proceed on a cost–benefit analysis unsuccessful).

[154] (1998) 84 FCR 512, 534 (discontinued on other grounds).

[155] *Ibid*.

[156] *Eisen v Carlisle and Jacquelin*, 417 US 156, 94 S Ct 2140 (1974).

[157] *Phillips Petroleum Co v Shutts*, 472 US 797, 809, 105 S Ct 2965 (1985) (a state class action for small sums of interest on royalty payments suspended on the authority of a federal regulation).

The imposition of a minimum financial threshold is a proposal that has been considered elsewhere. Notwithstanding the rejection by the Law Society of England and Wales of any individual/aggregate financial threshold for the group action that was proposed by that body,[158] there is indeed precedent for such an approach. In 1974, restrictions were placed upon the ability of classes to commence US federal court class suits for product liability by virtue of the Magnuson-Moss Consumer Product Warranty Act.[159] This was done by implementing minimum individual claim and aggregate class claim thresholds, and a minimum number of named plaintiffs,[160] for class actions commenced against suppliers and warrantors of allegedly defective products. The drafters of the relevant law stated that "[t]he purpose of these jurisdictional provisions is to avoid trivial or insignificant actions being brought as class actions in the federal courts."[161] Indeed, it remains the case that "Magnuson-Moss is the only US federal statute that imposes a designated threshold prerequisite before a federal class action may be maintained for violation of the Act."[162] Otherwise, the Seventh Circuit has confirmed the usual position that "a de minimis recovery (in monetary terms) should not automatically bar a class action."[163]

The minimum specified number in that particular US statute was stringently criticised by the OLRC as "unnecessary and restrictive".[164] It must also be acknowledged that the size of the individual's minimum recovery is an inappropriate yardstick, given that numerous wrongs can demonstrate widespread unlawful activity on a large scale.[165] Thus, whilst the proposal is of some interest, the next-discussed criterion which seeks to achieve a screening of unsuitable actions has been the subject of greater discussion in the context of class action reform.

[158] Civil Litigation Committee, *Group Actions Made Easier* (1995) [6.9.4].

[159] 15 USC 2301 *et seq* (1975).

[160] Respectively: $25, $50,000: see §2310(d)(3)(A) and (B), and 100 named plaintiffs: see §2310(d)(3).

[161] Interstate and Foreign Commerce Committee, *House Report*, No 93-1107, 13 Jun 1974, 93d Cong, 2d Sess (1974), in 4 US Code Congressional and Administrative News 7702, 7724 (1974).

[162] *Newberg* (4th) § 3.9 pp 270–71.

[163] *Mace v Van Ru Credit Corp*, 109 F 3d 338, 344 (7th Cir 1997) (personal recoveries from 28c).

[164] *OLRC Report*, 329. The OLRC also considered that where the plaintiffs were widely dispersed and unknown to each other, identification of 100 persons could be difficult or impossible: at 330.

[165] *ALRC Report*, [345]. In Australia, eg: *Anderson v HFC Financial Services Ltd* [1988] VR 251 (alleged incorrect calculation of rebate of interest on standard credit contract: test plaintiff's claim $57; total estimated liability to all borrowers $22M), illustrative of similar point in *ALRC Report*, [338]. In US, eg: *Eisen v Carlisle and Jacquelin*, 417 US 156, 157, 94 S Ct 2140 (1974) (plaintiff's maximum individual claim was $70; total class claims and liability exposure of defendant brokerage firms for alleged anti-trust activity $60M); *La Mar v H & B Novelty & Loan Co*, 489 F 2d 461 (9th Cir 1973) ($10 claimed in one case, total claim approx $80M; class not certified for reasons pertaining to multiple defendants).

(b) Cost–benefit analysis

In response to any complaint that too many class actions permit class members to claim trivial amounts—while defendants, lawyers, judges and third parties are burdened with large costs and a consequent drain on resources—a cost–benefit test by which to bolster the commencement criteria seems a prudent answer. It is a proposal that has received close attention in each of the focus jurisdictions, but as yet, remains formally unenacted in all of them (Australia's Pt IVA regime has a variant). Before turning to compare the jurisdictions' treatment of the proposal, it is important to note that a cost–benefit test, and the type of merits-based test discussed in the previous section, are conceptually unique. Hensler and Rowe clearly articulate the difference:

> A cost–benefit assessment can ask whether, assuming that the claims of the plaintiff class have merit, the likely relief to class members would be worth the costs and burdens of litigation in class form. A merits-based factor, far from assuming anything, would preliminarily evaluate the merits of the plaintiff class's claims and give weight to the presence or absence of likely merit in deciding for or against class certification. In practice . . . the two tests might conflate.[166]

The recommendation by the OLRC[167] that the court undertake a cost–benefit analysis of the class litigation at certification was not implemented by the Ontario legislature. The particular test advocated by that Commission was whether the adverse effects of a successfully prosecuted class action upon the class, the courts, and the public, would outweigh the benefits to be derived from that action. This test was intended to be applied, even after the superiority criterion, and the other pre-requisites for certification, were satisfied in respect of a particular action. As Ramsay notes, the failure of the legislature to include this test consequently rendered Ontario's regime less onerous than the OLRC contemplated.[168] At the time, the OLRC proposal was vehemently criticised by Prichard on the following basis:

> It is, I believe, ill-conceived both in theory and in practice. In theory it requires a measurement and then a weighing of matters that are enormously difficult to measure and virtually impossible to compare. In practice it would invite prolonged and unproductive inquiries in virtually every class action, inquiries that would themselves be to the detriment of the class, the courts, and the public. Furthermore, in practice the test is almost certainly unnecessary. If a case is patently contrary to the public interest, I have little doubt that it will not be certified regardless of whether or not the statute includes an explicit cost–benefit test.[169]

[166] DR Hensler and TD Rowe, "Complex Litigation at the Millennium: Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform" (2001) 64 *Law and Contemporary Problems* 137, fn 13.

[167] *OLRC Report*, 411, 416, and cl 6(1) of the Draft Bill.

[168] I Ramsay, "Class Action: Class Proceedings Act 1992" [1993] *Consumer LJ* CS39, CS40.

[169] JRS Prichard, "Class Action Reform: Some General Comments" (1984) 9 *Canadian Business LJ* 309, 316.

However, in British Columbia, it has been judicially admitted that a court "must do something in [that] nature" as part of certification, and that "[t]his is a task for which a trial court judge is uniquely well-qualified."[170] Ironically, in *Larcade v Ontario (Minister of Community & Social Services)*,[171] the court denied certification on the basis of something that looks very close to a cost–benefit test of one description:

> The expense involved in resolving the issues relating only to the interpretation of the statute in a class proceeding—including the cost to the defendant in producing records and documents with respect to members of a potentially very large class, and that involved in giving notice and identifying such members—is, in my judgment, likely to be entirely disproportionate to the benefits that would be obtained by the members of the class as a consequence of certification.[172]

Thus, notwithstanding the absence of any cost–benefit criterion in the class action statute, courts have shown a willingness to invoke one in any event, under the rubric that a class action is not preferable.

In contrast to the OLRC, the ALRC recommended,[173] and the legislature incorporated,[174] a cost–benefit test within Pt IVA, although it is of a different kind from that proposed by the OLRC. It provides that a class action will be inappropriate if the costs to the defendant of identifying group members and distributing any monetary relief to them is excessive, having regard to the amounts likely to be paid in the event of a successful action. The ALRC was particularly careful to note that its cost–benefit test would relate to the amount of the claims of each class member. It contemplated the following scenario:

> For example, if thousands of packets of cereal were each 100g underweight, 500 000 people may suffer loss of a few cents. This kind of case, where the amounts at issue for individuals are trivial, would not be permitted to proceed under the scheme.[175]

Despite the intended filtering of class actions by means of this test, the author has not been able to identify any cases in a decade of the schema's operation in which an action was deemed inappropriate for this reason. Interestingly, the cost–benefit test proposed by the ALRC and embodied in s 33M was not applied in the decision in *Giraffe World*.

It is also instructive to have regard to a somewhat similar proposal in the US, where empirical research undertaken at the request of the Advisory Committee on Rules of Civil Procedure for a series of 1996 proposed amendments to FRCP

[170] *Campbell v Flexwatt Corp* (1998), 44 BCLR (3d) 343 (CA) [66]; *Elms v Laurentian Bank of Canada* (2001), 90 BCLR (3d) 195 (CA) [47].
[171] (2003), 65 OR (3d) 289 (SCJ).
[172] *Ibid*, [61].
[173] *ALRC Report*, [151], and cl 17 of the Draft Bill.
[174] FCA (Aus), s 33M.
[175] *ALRC Report*, [343].

23 was considered to justify the imposition of a cost–benefit criterion.[176] In particular, the Committee recommended the insertion of a new rule 23(c)(F) in respect of class suits for damages: "whether the probable relief to individual class members justifies the costs and burdens of class litigation."[177] The Committee stated:

> The example that was used in much of the ensuing discussion was an overcharge of 2 cents a month imposed by a telephone company for 12 months on 2,000,000 customers. The aggregate damages of $480,000 are not trivial. But it is not clear that such a class should be certified.[178]

Arguments in favour of the insertion of paragraph (F) (termed the "it just ain't worth it" rule[179]) included reference to the above-mentioned empirical study which showed that the median class member recovery was only between $315–$528; the public cynicism of the law provoked by such low recoveries; and the huge administrative burden to the courts created by class actions. On the other hand, it was acknowledged that such a criterion would be hard to measure at the commencement of the action, when individually significant relief is likely to be claimed, and the costs of the proceedings cannot be predicted with any confidence. The Committee Note accompanying the reform proposal explicitly stated that the purpose of the paragraph was to preclude the use of class actions "to aggregate trivial individual claims". The Advisory Committee downplayed the role of access to justice by declaring that "[t]he near certainty that few or no individual actions would be pursued for trivial relief does not require class certification". In a nutshell, the proposal could be summarised: "[s]ome class actions produce great burdens, and the judge should have discretion to say that the class action simply comes at too high a price."[180]

However, many concerns manifested[181] as to how the FRCP 23(c)(F) reform would be implemented, what evidence the certification judge should have to ascertain the equation, how "probable relief" and "costs and burdens" were to be assessed, and what a court would do to balance the respective sides of the

[176] The research is contained in TE Willging *et al*, *An Empirical Study of Class Actions in Four Federal District Courts: First Report to the Advisory Committee on Civil Rules* (Washington DC, Federal Judicial Center, 1996).

[177] "Proposed Amendments to the Federal Rules of Civil Procedure" (1996) 167 FRD 559, 559.

[178] *Report of the Advisory Committee on Civil Rules: Proposed Changes to Rule 23* (1996), available at <http://www.uscourts.gov/rules/Minutes/cv4-1896.htm> "Benefits and Burdens of Class Actions".

[179] Derived, it would appear, from E Cooper, "Rule 23: Challenges to the Rulemaking Process" (1996) 71 *New York U L Rev* 13, 19, and the subject of a leading article by Hensler and Rowe, n 181 below.

[180] Noted by Judicial Conference Committee on Rules of Practice and Procedure, *Minutes of Meeting of 12–13 January 1996*, available at <http://www.uscourts.gov/rules/Minutes/st1-1296.htm>.

[181] As described in: DR Hensler and TD Rowe, "Complex Litigation at the Millennium: Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform" (2001) 64 *Law and Contemporary Problems* 137, 141–42; also: *Rand Institute Report*, 32–37.

equation if there was not sufficient information upon which to make the assessment. Further, the authors of the RAND study into ten class actions candidly admitted that, after their extensive enquiries and examination of the court materials, "[t]o us, it seems unclear which, if any, of the ten class actions 'just weren't worth it'—and which were."[182] The FRCP 23(c)(F) reform ultimately was not enacted.[183]

3. Conclusion

The experience and jurisprudence garnered in the focus jurisdictions indicates that there are several arguments against the incorporation of a preliminary merits criterion within a class action regime. A cost–benefit analysis may be difficult to implement and problematical to assess. The 1996 proposals for FRCP 23 reform raised this conundrum, and meanwhile, Australia's relevant provision in s 33M has been little-used. It also must be recognised that giving courts the power under a regime to deny certification where a cost–benefit criterion is unfavourable to the class may effectively deny relief (ie, access to justice) to class members.[184] The differences in views between, for example, Lindgren J and the ALRC, are (to correlate the Rand Institute's views of the US position) founded upon dissent about the social utility of class actions, particularly small-recovery lawsuits. In that regard, the consistency with which "judges who have different social attitudes and beliefs would arrive at the same assessment of the likely costs and benefits [for litigants] of lawsuits such as these" might be troubling[185] (albeit that it has been judicially noted that undertaking a cost–benefit analysis in deciding whether to certify a proceeding "is a task for which a trial judge is uniquely well-qualified"[186]). It must also be acknowledged that the safeguards available to the defendant in the form of striking out and summary judgment are not merely available; they have been utilised in each focus jurisdiction where the courts have doubted the worth of the class action. Finally, and interestingly, US empirical evidence does not seem to support incorporation of a preliminary merits assessment. Hensler and Rowe note:[187]

> The empirical evidence suggests . . . that the search for a cost-benefit or merit-based standard that can be incorporated into the certification process (in addition to the

[182] *Rand Executive Summary*, 16.

[183] See Judicial Conference Committee on Rules of Practice and Procedure, *Minutes of Meeting of 6–7 October 1997*, available at <http://www.uscourts.gov/rules/Minutes/cv10-97.htm>.

[184] Noted by *OLRC Report*, 412, which also, as previously mentioned, advocated a criterion of this type.

[185] For similar concerns in the context of proposed rule 23(c)(F), see *Rand Institute Report*, 473–74.

[186] *Campbell v Flexwatt Corp* (1998), 44 BCLR (3d) 343 (CA) [66] (Cumming JA).

[187] DR Hensler and TD Rowe, "Complex Litigation at the Millennium: Beyond 'It Just Ain't Worth It': Alternative Strategies for Damage Class Action Reform" (2001) 64 *Law and Contemporary Problems* 137, 144.

> present criteria relating to the form of the litigation [ie, the Rule 23(a) criteria of numerosity, commonality, typicality, and representativeness] and functional concerns [ie, the Rule 23(b)(3) factors of manageability and superiority] and the possibilities of dismissal and summary judgment) may be quixotic. It is difficult to design a fair and adequate procedure for a preliminary determination of the merits, and it is similarly difficult to imagine a cost-benefit test that does not at least implicitly, if not explicitly, incorporate a preliminary merits determination.

However, on the other hand, certain principles which were previously espoused as class action objectives,[188] namely, proportionality and not perfection, the goal of judicial economy, and the concept of judicial activism, management and control rather than the parties being *dominus litis*,[189] tend to warrant the express inclusion of a cost–benefit analysis as a commencement criterion for class proceedings. It can also be argued that class actions confer a "great advantage" upon plaintiffs, and that a quid pro quo for such an advantage is that the action should not be conducted so as to inflict injustice upon the defendants to such actions.[190] Furthermore, under the superiority criterion considered later, the court is required to compare a class action with other methods of adjudicating the dispute.[191] If the court considers that a cost–benefit test is against the class, even though, as a practical matter, no effective alternative proceeding is available to the class, then as DuVal explains, a cost–benefit criterion "encourages a more explicit recognition that the alternative to the class action is often no action at all".[192] The inclusion of both a comparative weighing up of a class action against other dispute resolution methods, and an insular cost–benefit test that has regard to the litigants' interests, represents (as the OLRC accepted) a desirable separation of what are two different considerations. Finally, as indicated previously, the absence of any explicit cost–benefit test within the legislation has not prevented some Canadian courts from judicially applying one in any event so as to deny certification.

Whether a class action regime ought to contain a built-in mechanism to inhibit the schema's use when a class action is "not worth the price" remains one of the most contentious issues in class action jurisprudence.

[188] See ch 3.

[189] In this respect, the OLRC's suggestion that a cost–benefit analysis for class actions would be contrary to unitary actions where "[i]n an individual action, an Ontario court cannot refuse to allow the action to proceed on the ground that the benefits to be derived therefrom will be outweighed by the costs of prosecuting the action. In a sense, a cost–benefit analysis does take place, but it is for the parties to the action to determine the utility of the action going forward, not the court" (at *OLRC Report*, 412) shows just how much the theoretical framework governing civil procedure has changed.

[190] Suggested in the English case: *AB v John Wyeth & Brother Ltd* [1994] 5 Med LR 149 (CA) 153 (litigation re the Benzodiazepine drug; cost of mounting a defence "astronomical"; amount of damages "very modest"; and only an alternative claim against prescribers), discussed in: N Andrews, *Principles of Civil Procedure* (London, Sweet & Maxwell, 1994) 153; M Mildred, "Group Actions" in GG Howells (ed), *The Law of Product Liability* (London, Butterworths, 2001) 375, 454–55, and confirmed on appeal: [1997] 8 Med LR 57 (CA).

[191] Expressly under FCA (Aus), s 33N(1)(a) and (b), and implicitly under CPA (Ont), s 5(1)(d).

[192] See: BS DuVal, "Book Review" (1983) 3 *Windsor Ybk of Access to Justice* 411, 413.

D AN EFFECTIVE REPRESENTATIVE WHERE MULTIPLE DEFENDANTS

As Wilcox J noted,[193] the common law standing rule which says that A may not bring a damages action on behalf of B against C must be overcome within a class action regime, for that is indeed the very purpose of the representative plaintiff's conduct in those class actions in which damages are being sought. The US Supreme Court spoke for all of the focus jurisdictions when it stated: "The class device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only' ".[194] In response, the regimes of the focus jurisdictions confer the requisite standing upon the representative plaintiff to commence proceedings on behalf of class members, although in differing terms.[195]

A particularly difficult question arises, however, where there is more than one defendant (say, D1, D2 and D3). The perplexing issue is whether it is necessary for each and every representative plaintiff to have a cause of action against each defendant? Alternatively, is it sufficient that the representative plaintiffs all *collectively* have causes of action against the defendants, one having a claim against D1, another against D2, another against D3, so that, amongst the representative plaintiffs, a cause of action can be asserted against each defendant?

In the context of the US rule, Newberg has framed the question thus:

> when multiple parties are named as defendants, which often occurs when several persons have engaged in parallel conduct that affects a class of persons in the same or a similar way, [t]he question is whether a plaintiff who has been affected by the conduct of one of the defendants can name all those who engaged in the challenged conduct as defendants, though that plaintiff had no contact with some of them.[196]

Morabito frames[197] the question in an alternative fashion as a choice between two theories, between the "class standing" theory whereby the representative "is invested with the injuries and grievances of absent class members . . . and his or her failure to show a personal injury will not preclude him or her from seeking redress for the class injury"; and the "open door" theory, whereby the class action is "an aggregation of similar, independently justiciable claims", and the

[193] See: *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, 167 (Wilcox J), and discussed by J Kellam and P Long, "Product Liability and Class Actions: A Review" (1998) 9 *Aust Product Liability Reporter* 61, 65; V Morabito, "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295.

[194] *General Telephone Co of Southwest v Falcon*, 457 US 147, 155, 102 S Ct 2364 (1982), citing *Califano v Yamasaki*, 442 US 682, 700–1, 99 S Ct 2545 (1979).

[195] CPA (Ont), s 2(1); FCA (Aus), s 33D(1); FRCP 23(a).

[196] *Newberg* (4th) § 3.18 p 388.

[197] V Morabito, "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada, and the United States" (2003) 41 *Alberta L Rev* 295, 297, citing SM Shafner, "The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions" (1978) 58 *Boston U L Rev* 492, 496.

representative's right to represent a class "is predicated upon his or her personal satisfaction of the standing requirement."

The resolution of this matter has been problematical for class litigants in all focus jurisdictions, and for the courts entrusted with the interpretation of the legislative regimes. Class actions have stumbled at this hurdle. The answer under the US regime has usually been governed by an assessment of the typicality criterion. In the absence of any such express criterion elsewhere in the focus jurisdictions, the Australian position has been legislatively clear and practically difficult, whilst Ontario has fared quite the opposite—legislatively obscure but practically straightforward.

It has been said that resolution of this class action issue "adds an additional dimension for analysis to the traditional [litigation] model."[198] As Sackville J noted in *Hunter Valley Community Investments Pty Ltd v Bell*,[199] it is becoming increasingly frequent for class proceedings to be brought by more than one representative plaintiff against more than one defendant. When that occurs, as Spender J conceded in *Philip Morris (Australia) Ltd v Nixon*,[200] multiple defendants "seriously compound the difficulties."

1. The Canadian Position

The statutory requirements of the class representative under the Ontario legislation are concise. There must be at least one representative plaintiff,[201] and that party must, inter alia, "fairly and adequately represent the interests of the class".[202] Where more than one defendant is nominated in a class action, the legislation is silent about whether the representative plaintiff must have a cause of action against all defendants, or indeed, whether any other scenario should occur. British Columbia's regime provides similarly, and the lack of any reference in the legislation as to whether the representative must have a cause of action against every defendant has been judicially noted in litigation in that province.[203] The answer has thus been left to judicial interpretation—not all of which has been consistent.

The problem arose directly for consideration in the Ontario case of *Ragoonanan Estate v Imperial Tobacco Canada Ltd*.[204] Tragically, a fire occurred at a townhouse, in which R's daughter, brother, and another young girl, died. The blaze was allegedly started by an unextinguished cigarette smoked by R's brother, one of the deceased, manufactured by the defendant

[198] *Newberg* (4th) §3.18 p 394.
[199] (2001) 37 ACSR 326 (FCA) [57].
[200] (2000) 170 ALR 487 (Full FCA) [8].
[201] CPA (Ont), ss 2(1), 5(1)(b).
[202] CPA (Ont), s 5(1)(e)(i).
[203] *Campbell v Flexwatt Corp* (1998), 44 BCLR (3d) 343 (CA) [42].
[204] (2001), 51 OR (3d) 603 (SCJ).

Imperial Tobacco Canada Ltd ("Imperial Tobacco"). The still-lit cigarette came into contact with the couch on which he was sleeping, the cigarette smouldered, the couch burst into flames, and the resultant fire spread too quickly to allow the victims' escape. There were three defendants named in the action—Imperial Tobacco; Rothmans, Benson & Hedges Inc; and JTI-MacDonald Inc. All three companies manufactured cigarettes for the Canadian market, and allegedly, they together supplied the entire market. The basis of the claims in negligence and product liability was that the loss, damage and deaths could have been avoided if the cigarettes sold by the defendants had been "fire-safe" cigarettes.[205] The class of which R was representative plaintiff were all who had suffered loss or injury as a result of a fire allegedly caused by a cigarette igniting upholstered furniture or mattresses. The problem was that the so-called faulty cigarette the subject of the representative plaintiff's claim was manufactured by Imperial Tobacco. The fire occurred irrespective of the acts or omissions of the other two defendants.[206] Therefore, the question for the court was whether it was sufficient for R as representative plaintiff to have a cause of action against one defendant only. It was assumed that, given the coverage of the entire market by the defendants, all putative class members would assert a cause of action against one of the three defendants (although a representative plaintiff against each of the other two defendants had not been identified at the commencement of the action). The representative plaintiff's argument was that, collectively, it was strongly likely[207] that she and all class members could indeed allege a cause of action against all three defendants. Was that sufficient for a class proceeding? It was held not.

In order to ensure that the rules governing pleadings[208] and the procedural regime for class proceedings[209] were "consistent" with each other, Cumming J held that, as against each defendant, there must be a representative plaintiff alleging a cause of action.[210] However, it was not necessary that each representative plaintiff assert a cause of action against each and every defendant, and it was unnecessary that at least one representative plaintiff have a cause of action

[205] These apparently have a reduced propensity for igniting upholstered furniture and mattresses. It was asserted that the defendants knew how to manufacture a safer product, and that it was reasonably foreseeable that, being addictive, cigarettes would be consumed at night in the home.

[206] Conspiracy was not pleaded, nor did the plaintiff allege that the three defendants collectively ensured that no fire-safe cigarette was available on the market: *Ragoonanan* (2001), 51 OR (3d) 603 (SCJ) [27].

[207] Although Cumming J noted that "there cannot be any certainty that there are any persons with a cause of action against RBH and JTI-M": *ibid*, [55].

[208] Rule 21.01(1)(b) of the Ontario Rules of Civil Procedure requires the pleadings to disclose a "reasonable cause of action". This was a strike-out motion that the class action did not satisfy that requirement. Although Cumming J stated (at [53]) that "[i]t is not necessary to offer any definitive interpretation for s 5(1)(a) of the *CPA* in the context of the Rule 21 motion at hand", the decision is significant for what is required in any class proceedings against multiple defendants to prevent successful striking out of the claim against one or more of those defendants.

[209] CPA (Ont), s 5(1)(a) is in almost the same terms, requiring that the pleadings disclose a "cause of action".

[210] *Ragoonanan* (2001), 51 OR (3d) 603 (SCJ) [49], [55].

against every defendant.[211] Cumming J endorsed the opinion of Montgomery J in *Bendall v McGhan Medical Corp*,[212] one of the earliest decisions under the Ontario class actions legislation, in which a class action was brought against two defendants, each of whom manufactured, designed and distributed silicone gel breast implants (Figure 5.1). The class members each had a cause of action against only one defendant, because no collective conduct was alleged, and no woman had implants manufactured by both defendants:

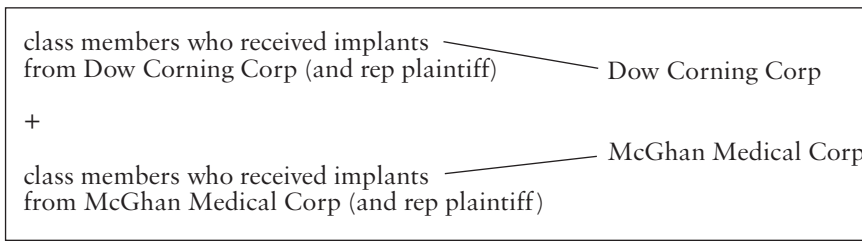

Figure 5.1 ***The*** **Bendall** ***litigation***

Montgomery J held in this litigation that each representative plaintiff (and class member) alleged a cause of action against one of the defendants, and each defendant had asserted against it a claim by a representative plaintiff, which complied with the requirements of the Act.[213] Moreover, the representative plaintiffs and class members shared a requisite common issue (of fact), namely, whether the silicone components could "bleed" through the intact elastomer, with allegedly dangerous health effects.[214]

Despite the views expressed in *Bendall*, subsequent Ontario decisions (which preceded *Ragoonanan*) had indicated that it did not matter if there were some defendants against whom the representative plaintiff did not have any cause of action, provided that there were (unidentified) class members who would have a cause of action against that defendant.[215] However, *Ragoonanan* held that this approach was not sufficient to comply with Ontario's pleadings rules. The *Ragoonanan* view has been subsequently supported at first instance,[216] and also

[211] *Ibid*, [32].

[212] (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div).

[213] Specifically, with CPA (Ont), s 5(1)(a) "the pleadings or the notice of application discloses a cause of action".

[214] *Bendall* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [54].

[215] See *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [43] (delivered 8 mths before *Ragoonanan*); *Gariepy v Shell Oil Co* (2001), 51 OR (3d) 181 (SCJ) [10] (delivered 2 mths before).

[216] *Andersen v St Jude Medical Inc* [2002] OTC 53 (SCJ) [59]–[60]; *Boulanger v Johnson & Johnson Corp* (2002), 14 CCLT (3d) 233 (SCJ) [21], leave to appeal allowed: (SCJ, 28 May 2002), but the actual question on appeal was whether the CPA (Ont) permitted a representative plaintiff to plead causes of action which were not the representative plaintiff's personal causes of action but which were the causes of action of members of the class, asserted by the plaintiff in a representative capacity; it was held that this was permitted: (2003), 226 DLR (4th) 747, 64 OR (3d) 208 (Div Ct)

on appeal.[217] Thus, it has emerged that, in Ontario under the *Ragoonanan* view, a statement of claim must disclose a cause of action against each defendant, such that it is "not sufficient if the pleading simply discloses a 'reasonable cause of action' by the representative plaintiff against only one defendant and then puts forward a similar claim by a speculative group of putative class members against the other defendants."

The position in British Columbia has been judicially described in terms that may not be quite as onerous as Ontario's *Ragoonanan* interpretation. In *Harrington v Dow Corning Corp*,[218] the defendants argued that each representative plaintiff who alleged defective breast implants must have a cause of action against each defendant breast implant manufacturer. However, this argument did not prevail. The court certified the class action, regardless of the fact that there were 16 defendants and the representative plaintiff had a cause of action against only five of them. This confirmed that it was not necessary that a representative plaintiff have a claim against each defendant in order to certify a proceeding under the British Columbia legislation, nor was it apparently necessary that there be a representative plaintiff for each defendant (the latter of these reflecting the *Ragoonanan* view). The *Harrington* decision has been subsequently followed or endorsed in British Columbia.[219] The only caveat under the British Columbia regime is that, if the representative plaintiff who only has claims against D1 cannot adequately represent those class members who have claims against D2, then the court would clearly appoint a representative for that sub-class of members against D2, as the Court of Appeal in *Campbell v Flexwatt Corp* indicated.[220] In the event that that course was ordered by the court, then the Ontario and British Columbia regimes would seem to approach similarity, but otherwise, and as has been judicially acknowledged, "British Columbia courts may be more willing [than Ontario courts] to let a proposed class action

[33]; however, the question did not concern the multiple defendant situation, but rather, multiple causes of action). Both of these were strike-out rather than certification motions. Also: *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [84].

[217] *Hughes v Sunbeam Corp (Canada)* (2002), 219 DLR (4th) 467, 61 OR (3d) 433 (CA) [16], [18] ("Hughes cannot claim to have a reasonable cause of action against the defendant manufacturers who did not manufacture the smoke alarm he purchased. He cannot resist a rule 21.01(1)(b) motion by alleging that some as yet unknown members of a proposed class may have a cause of action against these other manufacturers if the class action is certified. See [*Ragoonanan*]").

[218] (1996), 22 BCLR (3d) 97 (BC SC) [51], aff'd: (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA). For another view of the distinction between BC and Ontario, see V Morabito, "Standing to Sue and Multiple Defendant Class Actions In Australia, Canada and the United States" (2003) 41 *Alberta L Rev* 295, Pts III and IV.

[219] *Pearson v Boliden Ltd* (2001), 94 BCLR (3d) 133 (BC SC [in Chambers])[65] ("A representative plaintiff must not necessarily have a cause of action against each defendant in order to certify a proceeding as a class proceeding"), without the issue drawing direct comment upon appeal (appeal allowed on other grounds): 7 BCLR (4th) 245, 222 DLR (4th) 453 (CA); *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) [42]. Implicit endorsement is also apparent in: *Pausche v British Columbia Hydro and Power Authority* (2000), 81 BCLR (3d) 221 (SC) [24]–[25].

[220] *Campbell*, *ibid*, [43] (the court was discussing where the sub-class had different common issues from the class as a whole, but the reasoning would be analogous in the case of multiple defendants), leave to appeal to SCC ref'd: (SCC, 14 May 1998).

proceed against defendants against whom no representative plaintiff has a claim."[221]

Thus, what is and is not permissible under the Ontario regime is portrayed diagrammatically and hypothetically in Figure 5.2 (where P1 and P2 are representative plaintiffs and D1, D2 and D3 multiple defendants):

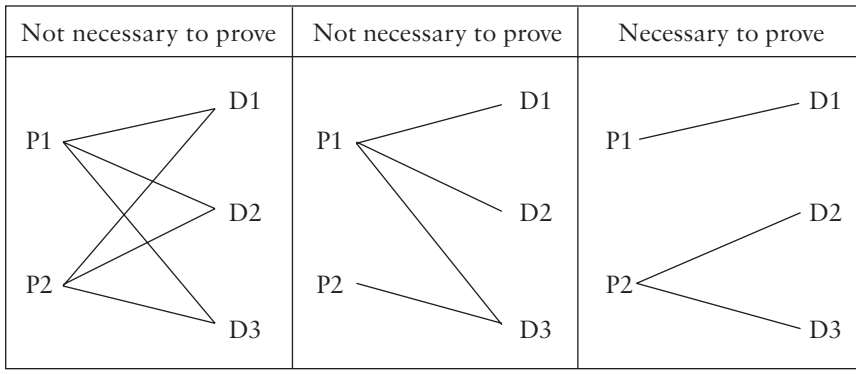

Figure 5.2 ***Ontario representative plaintiff***

Clearly, this position with respect to the representative's standing against multiple defendants has been entirely driven by judicial interpretation rather than from what appears in the legislative drafting of the Canadian class action schemas. Cumming J admitted in *Ragoonanan* that it was arguably not a prerequisite under s 5(1)(a) that the representative plaintiff/s have a cause of action against all defendants, but justified his conclusion on the basis that "[t]his result does not inhibit class proceedings with multiple defendants when there is a generic product (or generic defect) in issue".[222] As noted previously, the *Ragoonanan* view has been followed in Ontario, although it has borne academic criticism.[223]

The pursuit of a class action against multiple defendants is evidently a matter upon which Canadian judicial opinion has shifted from time to time, and upon

[221] *Hughes v Sunbeam Corp (Canada)* (2002), 219 DLR (4th) 467, 61 OR (3d) 433 (CA) [17]. For discussion by Cumming J of the BC position to that time, see: *Ragoonanan* (2001), 51 OR (3d) 603 (SCJ) [40]–[43].

[222] *Ragoonanan*, *ibid*, [56]. Coincidentally, Cumming J came to the same conclusion, but with minimal discussion of the relevant principles associated with multiple defendants, in another judgment handed down on the same day: *Hughes v Sunbeam Corp (Canada)* (2000), 2 CPC (5th) 335 (SCJ) (representative plaintiff incorrectly asserted causes of action arising from allegedly defective smoke alarms against defendant manufacturers who did not manufacture the alarm which he had purchased), and this view was upheld on appeal: (2002), 219 DLR (4th) 467, 61 OR (3d) 433 (CA).

[223] V Morabito, "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada, and the United States" (2003) 41 *Alberta L Rev* 295, 309 (arguing that such a strict construction is inconsistent with the policy goals of class actions statutes; and that the class ought to have been given the opportunity to identify particular class members with claims against the remaining defendants before the strike-out motion was decided).

which the legislature has given little direct guidance. These difficulties have been, if anything, even more transparent under Australia's Pt IVA regime.

2. The Australian Position

Under Pt IVA, the relevant standing provisions of s 33D(1) and s 33C(1)(a) provide, respectively, as follows:

> [A] person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph.

and

> where 7 or more persons have claims against the same person; . . . a proceeding may be commenced by one or more of those persons as representing some or all of them.

These provisions when read in combination do not prevent several defendants from being joined to a single Pt IVA proceeding. Of s 33D(1), it has been judicially stated that "the representative procedure adopted in the Court of Chancery accorded the representative party standing to make claims on behalf of members of the represented group. [It] merely continues and adapts the same long-standing principle."[224] However, uncertainties pervade this issue. The provisions do not state whether every representative and represented party (ie every class member) must have a claim against all defendants, and this has been the subject of intense judicial debate, for more than a decade after the regime's enactment.

(a) The Philip Morris *interpretation*

The aforementioned provisions were interpreted by Wilcox J in two seminal cases in 1997—*Ryan v Great Lakes Council*[225] and *Symington v Hoechst Schering Agrevo Pty Ltd*[226]—to mean that, in order to be competent, the representative party must have standing himself or herself to sue *each and every* defendant. In the latter decision, Wilcox J stated that the applicant:

[224] *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [97]. Also: *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424 , 442 (s 33C "identifies the circumstances when it will be appropriate for representative proceedings to be utilised and 33D then proceeds to identify who may be the initiator of those representative proceedings").

[225] (1997) 78 FCR 309, 312 (185 consumers infected with Hepatitis A after eating oysters from lake contaminated with human faeces; action against several defendants–local authority, oyster farmers, and oyster distributors; representative plaintiff awarded $33,000; total payout to class members about $7.5m: J Bushby and S Taylor, "$7.5 million Payout in Oyster Case" (1999) 10 *Aust Product Liability Reporter* 4.

[226] (1997) 78 FCR 164 (class of graziers and feedlot operators sustained losses when cattle ingested/absorbed pesticide sprayed aerially on adjoining cotton fields; cattle impounded and meat sales lost after endosulfan residues were found in beef; multiple defendants–who manufactured and distributed pesticide–sued).

> must himself or herself have standing to sue the particular respondent and, where there is more than one respondent, each of them. It is not enough that the applicant has standing to sue one respondent and other people have claims against some other respondent which arise out of similar or related circumstances and give rise to a substantial common issue of law or fact.[227]

This construction has been endorsed at appellate level. Sackville J reiterated in the failed tobacco class action in *Philip Morris (Australia) Ltd v Nixon*, where his Honour delivered the principal judgment of the Full Court:

> s 33C(1)(a) requires *every applicant and represented party* to have a claim against the one respondent or, if there is more than one, against all respondents. This conclusion follows from the language of s 33C(1)(a) itself and is consistent with the approach taken by the [ALRC] in *Grouped Proceedings*. . . . It follows that s 33C(1)(a) is not satisfied if some applicants and group members have claims against one respondent (or group of respondents) while other applicants and group members have claims against another respondent (or group of respondents).[228]

The Full Federal Court confirmed in this case that s 33C(1)(a) requires every applicant and represented party to have a claim against the one respondent or, if there is more than one, against all respondents. Of course, the fact that a representative plaintiff or class member may ultimately *succeed* against only one defendant does not mean that the person makes a claim against only that defendant—"[t]here is a world of difference between a claim and success on the claim".[229]

The *Philip Morris* approach is a very strict interpretation indeed. As confirmed on other occasions by the Australian judiciary,[230] the requirements of s 33C(1)(a) are not satisfied if one representative plaintiff had claims against one defendant, and another representative plaintiff had claims against another defendant (which is precisely what occurred in the breast implant litigation in *Bendall*, and inevitably had to occur, given that no class member had breast implants from both manufacturers). Added to this is the minimum numerosity threshold under Pt IVA—as against each defendant in these multiple defendant scenarios, there must be at least seven class members. Where that is not made out (ie, where there are at least seven against D1 but only three, say, against D2),

[227] *Ibid*, 167, repeated by Wilcox J in *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [56] ("in *Symington* . . . I held that [s 33C(1)(a)] requires that the applicant, or each one of several applicants, and each group member must have a claim against each respondent; it is not sufficient for one applicant to make a claim against one respondent and another applicant or a group member to make a claim against some other respondent").

[228] (2000) 170 ALR 487 (Full FCA), [126]–[127] (emphasis added) (class action against six tobacco companies disallowed).

[229] *King v GIO Aust Holdings Ltd* [2000] FCA 1543 (Full FCA) [7].

[230] Eg: *Finance Sector Union of Aust v Commonwealth Bank of Aust* (1999) 94 FCR 179 (Full FCA) [22]; *Batten v CTMS Ltd* [2000] FCA 915, [12]–[14]; *King v GIO Aust Holdings Ltd* (2000) 100 FCR 209, [21]; *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ACSR 326 (FCA) [57]. But for where the *Philip Morris* interpretation has *not* been strictly adhered to, see: V Morabito, "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295, 308–13.

then there is a possibility (judicially flagged[231] and academically supported[232]) of joining a class action against D1 with a personal action instituted by those three individually against D2. However, for present purposes, we will assume that both D1 and D2 have at least seven class members wishing to institute proceedings against them.

The *Philip Morris* litigation, in which the primary judge's allowance of the proceedings was overturned by the Full Federal Court, is particularly illustrative of the difficulties thrown up by the Australian schema if s 33C(1)(a) was to bear such a strict interpretation. Had that case been instituted under the Ontario legislation, for example, it would (other things being equal) have been successfully commenced because each representative smoker alleged a cause of action against one of the defendant tobacco manufacturers, and each defendant had asserted against it a claim by a representative plaintiff.

However, in this tobacco suit under Pt IVA, each of the defendants brought strike-out applications on the basis that some of the representatives/class members might not have claims against one or other of the defendants, because they did not smoke, and never had smoked, the cigarettes manufactured by that defendant. This was supported by the fact that one representative never claimed to have smoked Philip Morris's cigarettes.[233] The Full Federal Court held that, if each of the representative plaintiffs and class member smokers were to have a claim against *every one* of the defendant companies as s 33C(1)(a) required, then there were only two options to assert by way of claim. The first possibility was to argue that every persuasion, lobbying effort and statement about cigarette smoking was part of a *single campaign* to which all defendants were joint parties, and that the campaign caused the class members' loss or damage. The second possible argument was to allege that any conduct on the part of one of the defendants was conduct for which each of the defendants shared causal responsibility because each defendant *aided and abetted the others*. Since neither assertion was possible on the facts as pleaded,[234] the class proceedings were held not to be properly commenced. Indeed, if the class tried to prove that *every* smoker in the class, whether representative plaintiff or class member, was influenced to commence, or continue, smoking by the separate conduct of *each* of the three tobacco companies, Sackville J considered that such a case would encounter "formidable factual difficulties" and was "unlikely".[235] Hill J was

[231] *Ryan v Great Lakes Council* (1997) 78 FCR 309, 312 ("Nor is there any reason why an Applicant could not, within the one action, use the Part IVA procedure against one or more respondents but not against others; the action is in the applicant's name alone, and it might be convenient to determine connected non-representative claims at the same time as the claims the applicant brings for the benefit of the group").

[232] See J Beach, "Representative Proceedings–Pleadings" (Commonwealth Law Conference, Melbourne, 2003) [23.2].

[233] (2000) 170 ALR 487 (Full FCA) [89].

[234] *Ibid*, (Full FCA): Hill J, [17]; Spender J, [4]–[6]; Sackville J, [141]–[143].

[235] *Ibid*, [156].

even blunter. He considered it "impossible to conceive of a case being brought where every member of the class has a claim against all the respondents".[236]

Under this *Philip Morris* interpretation, where some class members represented by representative plaintiff P1 have personal claims against D2, but where P1 has no personal claim against D2, then the claims against D1 and D2 must be heard in separate class actions in order to ensure that, within each class action, each representative plaintiff had asserted a claim against each defendant. To illustrate the differences between the Australian position, as manifested in *Philip Morris*, and the Canadian position (cf Figures 5.2 and 5.3), it is convenient to outline the position under Pt IVA as Figure 5.3, where each of the scenarios represents *one* class action only (not two class actions heard together).

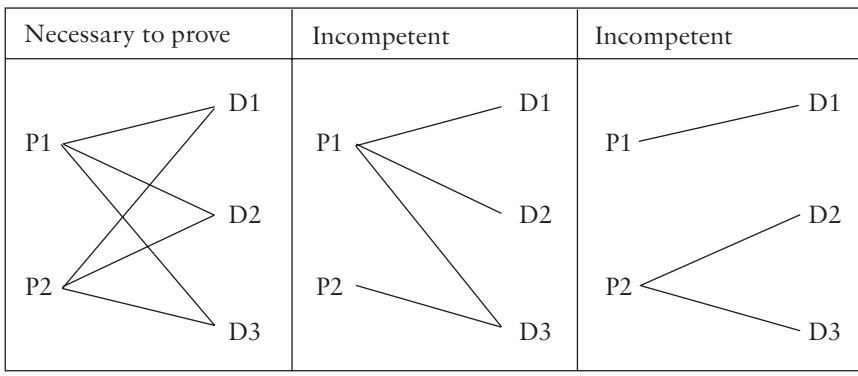

Figure 5.3 ***Australian representative plaintiff***

Therefore, whilst it has been postulated that the tobacco defendants in *Philip Morris* "escaped on a technicality",[237] and whilst the "purist legal view"[238] may dictate that it is quite wrong for D1 to be lumbered with responsibility for the action of D2 (absent an allegation of conspiracy or joint tortfeasors), it is undoubtedly the case that the Australian requirement that each representative plaintiff (and class member) has to allege a cause of action against each defendant has imposed a severe restriction upon the utility of Pt IVA where more than one defendant is sued. As one judiciary member put it, such strict application of s 33C(1)(a) could give rise to requirements and limitations that had "little to do with the purpose or efficacy of Part IVA".[239] Academically too, the *Philip*

[236] *Ibid*, [20]. Also Spender J, [2] ("pleadings are fundamentally flawed").

[237] W Pengilley, "Class Actions Stumble: Tobacco Companies Win" (2000) 16 *Trade Practices L Bulletin* 31, 32.

[238] Eg, this is the basis upon which Pengilley has supported the outcome in *Philip Morris*: "Representative Actions under the Trade Practices Act: The Lessons for Smokers and Tobacco Companies" (2000) 8 *Competition and Consumer LJ* 176.

[239] *Bray v Hoffmann-La Roche Ltd* [2002] FCA 1405 [9] (Merkel J).

Morris approach has been criticised.[240] Interestingly, Lehane J noted[241] that this requirement, whilst an integral element of Pt IVA, does not apply under the representative rule (although that rule, of course, requires the even more restrictive "same interest").

(b) Overcoming the Philip Morris *interpretation*

These continuing difficulties posed by the strict interpretation of s 33C(1)(a) and s 33D(1) point to the need to either redraft the Australian schema along the lines of the Ontario legislation, seek to employ two class actions so that there is an effective representative in each one but then consolidate them[242] in some fashion, or judicially do away with the *Philip Morris* interpretation. The second of these avenues has been mooted and sparingly applied,[243] accompanied by both academic endorsement[244] and criticism.[245] The two immediate problems with the possibility of hearing separate proceedings together is that, firstly, the leading case diverged from the "separate class actions + consolidation" approach which it endorsed;[246] and secondly, an order that separate proceedings be heard

[240] P Gordon and L Nichols, "The Class Struggle" (2001) 48 *Plaintiff* 6, 10 ("defendants are more likely to escape liability if by their conduct they cause harm or loss to more people over a greater period of time, and if they do so in concert with others"); J Beach, "Representative Proceedings–Pleadings" (Commonwealth Law Conference, Melbourne, 2003) [21] ("[c]laims against multiple respondents give rise to various difficulties at various levels"); V Morabito, "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295, 304 ("a generous approach [should] be taken to the construction and application of Part IVA. . . . The *Philip Morris* principle is not in accordance with [this] desirable philosophy").

[241] *Sz v Minister for Immigration and Multicultural Affairs* (2000) 172 ALR 172 (FCA) 175.

[242] Under FCR, Ord 6 r 2 (preserved by s 33ZG(c)(iii)), the two actions could be joined by making orders for the joinder of the plaintiffs and the joinder of the defendants.

[243] See comments by Wilcox J in *Ryan v Great Lakes Council* (1997) 78 FCR 309, 312–13 ("Nor is it forbidden to consolidate the hearing of two or more representative proceedings, brought by different representatives but having, as between them, such similarity as to warrant their being heard together. . . . it may be appropriate to consolidate that proceeding with this one; the claim against the council, at least, will be common to both proceedings, and the expert and other evidence seems likely to be substantially similar in nature and effect. . . . I emphasise that, in mentioning consolidation, I am not expressing a concluded view about its desirability. I mention it merely as a possibility that may arise"); *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) [127] (Sackville J); *Batten v CTMS Ltd* [2000] FCA 915, [14], [18], further explained in *Milfull v Terranora Lakes Country Club Ltd* [2002] FCA 178, [20].

[244] P Mann, "Representative Proceedings" [1997] *Commercial Law Assn* 4, 5.

[245] J Beach, "Representative Proceedings–Pleadings" (Commonwealth Law Conference, Melbourne, 2003) [23.2] ("the observations of Sackville J do throw doubt on what *Ryan* considered to be permissible"). See also the detailed discussion by V Morabito of this conundrum in "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295, 316–17.

[246] Mr Ryan was given leave to join further representatives, each of whom made a personal claim against a particular grower or distributor and was therefore able to represent other group members who had claims against that grower or distributor–as explained in *Ryan v Great Lakes Council* [1999] FCA 177, (1999) 102 LGERA 123 (FCA) [5]; and also see, on appeal: *Graham Barclay Oysters Pty Ltd v Ryan* [2000] FCA 1099, (2000) 102 FCR 307, [84]. The inconsistency of approach under Pt IVA is fully explored in: Morabito, *ibid*, 311–13, and by the same author: "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada, and the United States" (2003) 41 *Alberta L Rev* 295, 300–1.

together may not be forthcoming—which will cause the class action to run aground for at least some of the class members. Almost ten years to the day after the commencement of the Australian regime, that particular problem manifested.[247]

Even more interestingly, however, and to a partial extent only, some considerable doubt has been cast upon the *Philip Morris* interpretation in another Full Federal Court decision in *Bray v F Hoffmann-La Roche Ltd*,[248] although the court was not unanimous in doing so. The representative plaintiff in this case commenced the class action in *Hoffmann-La Roche Ltd* on behalf of all persons who purchased the relevant vitamins in Australia during a period of just over seven years. The 11 defendants were all companies involved in the manufacture and sale of vitamin products who, during the 1990s, carried on an international price fixing and market sharing (cartel) arrangement in respect of particular vitamin products. The defendants argued that not every one of the *class members* had a claim against each and every defendant. Therefore, it contended that, according to the *Philip Morris* interpretation where multiple defendants are sued by a class under Pt IVA, the requirements of s 33C(1)(a) had not been complied with.

However, in obiter,[249] a majority of the Full Federal Court in *Hoffmann-La Roche* considered *Philip Morris* to have been wrongly decided on the point and should not be followed.[250] Various reasons were given for that change of view. Perhaps the most important of these was that the court sought to restrict, indeed, rewrite, previous judicial statements (particularly those in *Symington* and *Ryan* referred to at the outset of this section) so that those decisions were truly authority for the proposition that where there was more than one defendant, the *representative plaintiffs* had to have standing to sue each of them. But, said the majority, these earlier authorities should not be taken to be authority for the proposition that every *class* member must have a claim against every defendant, that any statement by the *Symington* court that every class member had to have a claim against each and every defendant went much further than that case scenario had actually required, and to the extent that *Philip Morris* required that, then it was wrongly decided.[251]

[247] *Milfull v Terranora Lakes Country Club Ltd* [2002] FCA 178, [22]. For academic criticism of this decision, see: V Morabito, "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295, 318–20.

[248] [2003] FCAFC 153 (15 Jul 2003).

[249] Of the members of the Full Federal Court, Carr J was satisfied that the class members did each have a claim (for injunctive relief) against each of the defendants, but dealt with the multiple defendant point in any event (rendering discussion of the multiple defendant point obiter only); and Finkelstein J was unconvinced that the class members did have a claim against every defendant, but appeared to proceed on the basis that they did. Only Branson J considered that the class members did not each have a claim against all defendants, which required her to deal with the multiple defendant point substantively.

[250] *Bray v Hoffmann-La Roche Ltd* [2003] FCAFC 153, [122], [130] (Carr J); [243] (Finkelstein J). Cf Branson J [199].

[251] See particularly the discussion by Carr J [124]–[126], Finkelstein J [243].

Other reasons put forward by the majority for their questioning of the *Philip Morris* approach were that: the representative plaintiffs in *Philip Morris* accepted[252] that their pleading had to allege facts that established that they and every member of the represented class had a claim against every defendant, without arguing the point fully;[253] that previous decisions[254] had managed to proceed to trial satisfactorily without every class member having a claim against each defendant;[255] that it was truly possible to deal with the problem of class members not having a claim against every defendant quite simply (by consolidation of proceedings instituted by separate representative plaintiffs, or by permitting a representative plaintiff to act for a sub-class which only had claims against one defendant and not against others);[256] and that there were sufficient other procedural protections in Pt IVA to ensure that representative proceedings were not abused, without having to require that every class member had a claim as against every defendant.[257] Finally, the softer construction of not requiring each class member to have a claim against each defendant was said to "fit squarely with the language of s 33C(1) and at the same time satisfies the policy behind the introduction of Part IVA."[258] Finkelstein J was even stronger in his views:

> [Section 33C(1)(a)] simply does not address the situation where some members of the group, say ten out of a group of fifteen, also have claims (that is, causes of action) against some other person, being causes of action which satisfy both s 33C(1)(b) (each claim arises out of the same circumstances) and s 33C(1)(c) (each claim gives rise to common issues of law or fact). Is it necessary for the claims of this smaller group to be prosecuted in a separate proceeding or can they be joined in the proceeding brought by the larger group? I will not place a construction on s 33C which requires separate proceedings to be instituted. If it were impermissible to bring such an action, all the objectives of Pt IVA, the reduction of legal costs, the enhancement of access by individuals to legal remedies, the promotion of the efficient use of court resources, ensuring consistency in the determination of common issues, and making the law more enforceable and effective, would be undermined.[259]

Again, as with the consolidation avenue, the issue is not without considerable difficulty, with the minority, Branson J, opining that "I do not feel able to accept the argument that *Philip Morris* is, in this regard, clearly wrong. While the decision has attracted criticism, it reflects a construction of Part IVA of the FCA which, in my view, is plainly open. I consider that *Philip Morris* should be fol-

[252] *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) [3] (Spender J), [108], [126] (Sackville J).

[253] *Bray v Hoffmann-La Roche Ltd* [2003] FCAFC 153, Carr J [123], Finkelstein J [246].

[254] Namely, the herbicide/cattle ingestion case of *Schneider v Hoechst Schering Agrevo Pty Ltd*, and the contaminated oyster case of *Ryan v Great Lakes Council*.

[255] *Bray v Hoffmann-La Roche Ltd* [2003] FCAFC 153, Carr J [127]–[128].

[256] *Bray*, *ibid*, Carr J [127], [130], agreeing on this point with: V Morabito, "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295, 311–13.

[257] *Ibid*.

[258] *Ibid*, [129].

[259] *Ibid*, [248].

lowed by this Court unless and until the High Court takes a different view of the proper construction of s 33C(1) of the FCA."[260] Clearly, then, the matter is far from settled at the Australian appellate level, and the state of disarray is all the more pointed when one considers the straightforward manner in which the *Bendall* litigation, for example, was handled under Ontario's legislation as drafted.

It will be evident from the majority's reasoning in *Hoffmann-La Roche* that the requirement that each *representative plaintiff* have a cause of action against each defendant has *not* been amended as a result of the *Hoffmann-La Roche* interpretation. Therefore, post the *Hoffmann* decision of the Full Federal Court, the scenario outlined in Figure 5.3 above appears to remain true for representative plaintiffs under Pt IVA, albeit that not all *class members* which they purport to represent may have a claim against every defendant. Whilst this represents something of a softening of the *Philip Morris* stricture, it by no means goes so far as is permitted in the Ontario jurisdiction, where it is sufficient that there is a representative plaintiff for each and every one of the defendants, but not necessarily the same representative plaintiff.

3. The US Position

Turning now to the remaining focus jurisdiction, some direction as to the position under the US federal class action regime was provided by the leading case of *La Mar v H&B Novelty & Loan Co*,[261] which was a Truth in Lending Act claim against all licensed pawnbrokers in Oregon. According to the Ninth Circuit, where the representative plaintiff has had no dealings with a particular defendant, then (in the absence of any successful allegation that all the defendants acted in parallel as the result of a conspiracy which affected the representative plaintiff, or were joint tortfeasors, or were subject to the judicially created juridical link exception[262]) that plaintiff cannot have a claim typical of other class members who have dealt with that defendant.[263] "[H]e cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury."[264] According to Newberg, this decision served to clarify that "the typicality requirement of FRCP 23(a)(3) prevents a representative plaintiff from institut-

[260] *Ibid*, [199].

[261] 489 F 2d 461 (9th Cir 1973).

[262] The juridical link exception allows plaintiffs to sue all defendants similarly situated if they can show that "all their injuries arose out of the same legal rule that was binding on all of the defendants", or that the defendants are otherwise "juridically related in a manner that suggests a single resolution of the dispute would be expeditious". See: *La Mar v H & B Novelty & Loan Co*, 489 F 2d 461, 469–70 (9th Cir 1973); and, for further discussion: WD Henderson, "Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III" (2000) 67 *U of Chicago L Rev* 1347, 1348, 1356–57.

[263] *La Mar v H & B Novelty & Loan Co*, 489 F 2d 461, 465–66 (9th Cir 1973).

[264] *Ibid*, 462.

ing a class action against a single defendant, and an unrelated group of defendants who have engaged in conduct closely similar to that of the single defendant, on behalf of all those injured by all the defendants sought to be included in the defendant class."[265]

It was further explained in *Akerman v Oryx Communications Inc*[266] that the fact that plaintiffs sought certification "as representatives of a class, at least one of whose members most probably will have [dealt with] each of the proposed defendants, in no way altered the fundamental requirement that each plaintiff have standing to sue each defendant." The US Supreme Court was equally as adamant:

> That a suit may be a class action, however, adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent'.[267]

All of these statements seemingly echo the strict position adopted by *Philip Morris* under Australia's Pt IVA regime, that the class representative/s must possess a cause of action against each defendant.

However, despite this apparently clear exposition of principle, the position under FRCP 23 has been muddied by the previously-mentioned two exceptions which were articulated first in *La Mar*. As Henderson explains,[268]

> [a]lthough courts generally require that the class representative have a cause of action against each defendant, there are two exceptions to this requirement: '(1) Situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants . . . and (2) Instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.' These two provisions are called, respectively, the 'concerted action' and 'juridical link' exceptions. Together they are commonly referred to as the 'juridical links doctrine'.

[265] *Newberg* (4th) §3.18 p 392. See also: *Angel Music Inc v ABC Sports Inc*, 112 FRD 70 (SD NY 1986) (copyright owner represented plaintiff class of music publisher and copyright owners; sued defendant class of producers and distributors for failing to obtain licences; representative plaintiff had claim against one defendant only; no standing to bring class action to sue remaining defendants, as he had no claims asserted against them; copyright owner could not typify claims of potential copyright owners and publishers, lacked typicality to represent class).

[266] 609 F Supp 363, 376 (SDNY 1984), referred to in RA Givens, *Manual of Federal Practice* (Newark, NJ, Matthew Bender, as updated) §3.140.

[267] *Simon v Eastern Kentucky Welfare Rights Organization*, 426 US 26, 40, fn 20 (1976), citing *Warth v Seldin*, 422 US 490, 502, 95 S Ct 2197 (1975).

[268] WD Henderson, "Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III" (2000) 67 *U of Chicago L Rev* 1347, 1347–48. See also: *Newberg* (4th) § 3.18 pp 389–90; V Morabito, "Standing to Sue Multiple Defendant Class Actions in Australia, Canada, and the United States" (2003) 41 *Alberta L Rev* 295, 328.

The concerted action exception has manifested in a number of decisions where conspiracy could be alleged.[269] The juridical link exception has been applied where there has been a consistent rule or policy adopted by all the defendants,[270] and has also been extended to encompass individual corporations that at one time shared a common corporate ownership.[271]

Newberg describes the principles pertinent to where a class representative seeks to sue multiple defendants under FRCP 23 in the following terms:

> In the multiple defendant situation, the court must determine whether the plaintiff's claims are typical of those of the plaintiff's class members, who in turn have claims against certain named defendants with whom the plaintiff has had no prior dealings. The plaintiff's claims may not only be typical of, but, in fact, may be identical to other class members, except that the plaintiff's claim may be against one defendant with whom the plaintiff had had dealings, and several class members' claims may be exclusively against other defendants with whom the plaintiff has not had prior contacts. The traditional typicality test compares the plaintiff's claims and the class claims. The multiple defendant situation focuses instead on the relationship, if any, between the plaintiff's claims and the challenged conduct of the defendants with whom the plaintiff had not had earlier dealings. If a sufficient inter-relationship between the plaintiff's claims and the defendants' conduct can be shown in order to make the additional defendants potentially liable to the plaintiff, then the plaintiff has standing to sue such defendants, and the plaintiff's claims should satisfy the typicality test.[272]

It seems plain from the above passage that Newberg envisages that questions concerning the ability of a representative plaintiff to sue multiple defendants when he or she has had dealings with only one or some of them can be considered both as questions of standing and typicality.[273] However, Henderson

[269] *Roberts v Heim*, 670 F Supp 1466, 1491 (ND Cal 1987) (named plaintiffs invested in only 4 limited partnerships; if no conspiracy established, decertification likely "for failure to meet the typicality requirement); *In re Industrial Diamonds Antitrust Litig*, 167 FRD 374, 380 (SD NY 1996) (re alleged conspiracy to artificially inflate world-market diamond prices, a representative plaintiff may satisfy the adequacy and typicality requirements without having purchased products from all of the defendants); *Cumberland Farms Inc v Browning-Ferris Industries Inc*, 120 FRD 642, 647 (ED Pa 1988) (re alleged conspiracy on part of providers of containerized solid waste removal and disposal services; representative plaintiffs who had purchased services from one or more defendants adequate representatives); *Walco Investments Inc v Thenen*, 168 FRD 315, 335 (SD Fla 1996).

[270] *Marchwinski v Oliver Tyrone Corp*, 81 FRD 487, 489 (W D Pa 1979) (finding employers juridically related by a union contract). See, for further discussion: WD Henderson, "Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III" (2000) 67 *U of Chicago L Rev* 1347, 1356, and more recently, the doctrine has received further judicial explanation: *Matte v Sunshine Mobile Homes Inc*, 270 F Supp 2d 805, 821, 824ff (WD La 2003) ("Plaintiffs argue that the 'juridical links doctrine' provides an exception to the general standing requirements. The short answer to this argument is that the juridical links doctrine has no bearing on the issue of standing. Instead, it provides an exception to the Rule 23(a) requirement of "typicality" and/or "adequacy of representation" in class actions against multiple defendants").

[271] *Barker v FSC Securities Corp*, 133 FRD 548, 550–53 (W D Ark 1989) (two corporations defendants; juridical link exception applied because both defendants were subsidiaries of same parent corporation for 4/12 years in which plaintiff class members allegedly injured), cited in Henderson, *ibid*, fn 59.

[272] *Newberg* (4th) §3.18 p 394.

[273] *Newberg* (4th) also reiterates that point at §3.18 p 388.

argues,[274] in contrast, that the case law is not clear as to whether the concerted action and juridical link doctrines are exceptions to standing, or whether the juridical links doctrine is an exception to the Rule 23(a)(3) typicality requirement, and that this uncertainty "has led to a confusing merger of procedural and jurisdictional issues and has hindered the ability of courts to define and limit the doctrine's proper application."

Whatever the merits of this particular debate, a recent example of the conundrum of multiple defendants, and the finding of an appropriate linkage via the juridical links doctrine, is provided by a Seventh Circuit decision in *Payton v County of Kane*.[275] The case arose out of a dispute over the Illinois counties' practice of imposing a bail fee of between $1 and $45, above and beyond the set bail amount, as a condition for release on bail. The class representatives sued 19 Illinois counties claiming that the counties violated the class representatives' Eighth and Fourteenth Amendment rights by forcing them to pay these fees. In 1997, two of the named plaintiffs had to post a bond fee of $15 to secure their release from the DuPage County Jail, and a year later, the other four named plaintiffs had to post a bond fee of $11 before they were discharged from the Kane County Jail, but no plaintiffs were named who were charged a bond fee by any county other than Kane and DuPage. Thus, was the class action valid as against the 17 additional counties?

The Seventh Circuit stated that "this is a classic problem of standing: to bring a valid case, a plaintiff must allege that a defendant—the very defendant sued—has somehow wronged her in a legally cognizable way."[276] The court then considered the "juridical link" doctrine, and concluded:

> If all the defendants took part in a similar scheme that was sustained either by a contract or conspiracy, or was mandated by a uniform state rule, it is appropriate to join as defendants even parties with whom the named class representative did not have direct contact' and then 'If the defendants with whom the named representative did not interact directly are following a common statute . . . we see nothing in either standing doctrine or Rule 23 that automatically precludes use of the class action device.[277]

However, following upon reference to the abovementioned statements, Johnston has persuasively criticised the decision on the following basis:

> The decision in *Payton*, relying on the juridical link doctrine, is troubling. By adopting the juridical link doctrine, the Seventh Circuit avoids fundamental standing requirements. Effectively, in the name of efficiency, the Court allowed a plaintiff to sue a defendant who did not injure the plaintiff. Moreover, in analyzing difficult class

[274] WD Henderson, "Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III" (2000) 67 *U of Chicago L Rev* 1347, 1361. V Morabito also critiques the doctrine in "Standing to Sue and Multiple Defendant Class Actions in Australia, Canada, and the United States" (2003) 41 *Alberta L Rev* 295, 328–32.

[275] 308 F 3d 673 (7th Cir 2002).

[276] *Ibid*, 678.

[277] *Ibid*, 679, 681–82.

> action issues, courts are often concerned about due process principles, including fundamental fairness. It seems hard to imagine a scenario more unfair than to require a defendant to defend against allegations made by a plaintiff whom the defendant never injured.[278]

Henderson agrees[279] that "an aggressive application of the juridical links doctrine serves the interests of plaintiffs' attorneys at the alternate expense of . . . defendants", and argues cogently that a better option would require a representative plaintiff to match each named defendant, even if that might create logistical difficulties in finding additional injured parties.

Absent any appropriate linkage, however, the position remains that, under FRCP 23, a class representative will not be able to represent the class as against additional defendants when the representative has had no dealings with those particular defendants. That the US requirement of standing in the case of multiple defendants is more onerous than the position applying in British Columbia has been explained by the British Columbia Court of Appeal[280] as being the direct result of a typicality criterion in FRCP which has no equivalent in the regimes of the Canadian provinces:

> The defendants also referred to a number of American cases in support of their proposition that the representative plaintiffs must have a cause of action against all defendants. These cases, although relevant, are not particularly helpful on this issue as they are based on the American requirement of 'typicality' which is not part of Canadian law. . . . The typicality requirement has been interpreted to mean that the representative plaintiffs must have the same cause of action against the defendants as all members of the class. This requirement is not a part of the British Columbia Class Proceedings Act nor its Ontario counterpart. This indicates . . . that it is not necessary that a representative plaintiff have a cause of action against each defendant in order to certify a proceeding as a class proceeding.

4. Concluding Observations

It is undoubtedly the case that the scenario of multiple defendants has been accommodated more easily under the Canadian provincial regimes than under the Australian and US schemas. The differences have arisen partly as a result of different legislative drafting, s 33D(1) and s 33C(1)(a) in Pt IVA, and the typicality criterion of FRCP 23(a)(3), having no equivalents under the Canadian legislative schemas. Indeed, the contrary positions adopted in the post-FRCP 23 regimes is of particular interest. In *Ragoonanan*, Cumming J justified the softer

[278] ID Johnston, "Survey of Seventh Circuit Decisions: Class Actions" (2003) 36 *John Marshall L Rev* 837, 840, earlier quoted statements at 438.

[279] WD Henderson, "Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III" (2000) 67 *U of Chicago L Rev* 1347, 1370.

[280] *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) [44]–[45].

construction of requisite standing for reasons that reflect the overarching principle of proportionality rather than perfection:

> This interpretation . . . does not detract from the underlying policy goals of the CPA being to facilitate access to justice, judicial efficiency and behaviour modification. The goal of 'access to justice' is to afford plaintiffs who are *similarly situated* to the representative plaintiff to bring their common cause of action against one or more defendants.[281]

Quite apart from the recently-encountered difficulties of reconstituting a class action with consolidation of separate suits, the problems of accommodating multiple defendants under the Australian regime are all the more puzzling when one considers the judicial advocacy that "it is important not to take an overly legalistic approach to Pt IVA",[282] and that the regime was "not . . . designed to make it difficult to commence proceedings or put procedural barriers in the way of so doing."[283] Moreover, these problems seem to be ongoing, given that, in *Hoffmann-La Roche*, it was considered necessary to "consider afresh what is the true effect of s 33C(1)"[284]—some 11 years after the provision was enacted—and one member of the court considered that High Court clarification of the statutory drafting of s 33C(1) might be necessary.[285]

The question of an effective representative plaintiff vis-à-vis multiple defendants has been the subject of conflicting academic comment in Canada and Australia,[286] hardly surprising in light of the different legislative and judicial approaches which have been adopted. Certainly, the issue is important. It is complex and vital to proper commencement; secondly, the *Bendall* and *Harrington* decisions stand in stark contrast to what is permitted under Pt IVA; and thirdly, in each jurisdiction, actions have been instituted incorrectly because of an ineffective representative[287] almost a decade after the legislation's incep-

[281] *Ragoonanan Estate v Imperial Tobacco Canada Ltd* (2001), 51 OR (3d) 603 (SCJ) [59] (emphasis in original).

[282] *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) ATPR ¶41-679 (FCA) [49]; *Schanka v Employment National (Admin) Pty Ltd* (2001) 114 FCR 379, [16].

[283] *Finance Sector Union of Aust v Commonwealth Bank of Aust* (1999) 89 FCR 417, 419.

[284] *Bray v Hoffmann-La Roche Ltd* [2003] FCAFC 153, Carr J [243].

[285] *Ibid*, Branson J [200].

[286] In Ontario, eg: C Mauro, "Class Actions: The Defendant's Perspective" (1994) 5 *Canadian Insurance L Rev* 29, 30; P Iacono, "Class Actions: The Ontario Experience" (1994) 5 *Canadian Insurance L Rev* 75, 77; WK Branch, *Class Actions in Canada* (Vancouver, Western Legal Publications, 1996) [looseleaf] [4.550], [4.555]; J Campion and V Stewart, "Class Actions: Procedure and Strategy" (1997) 19 *Advocates' Q* 20, 47; G Watson and M McGowan, *Ontario Civil Practice 2001* (Scarborough, Carswell Thomson, 2000) vol 1, 335; D Lennox, "Building a Class (2001) 24 *Advocates' Q* 377, 387–88. For thorough discussion of the Australian position, pre-*Hoffmann* (Full FCA), see: V Morabito, "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295. Also: P Mann, "Representative Proceedings" [1997] *Commercial Law Assn* 4, 5; J Beach, 'Representative Proceedings' (Commonwealth Law Conference, Melbourne, 2003).

[287] In *Ragoonanan Estate v Imperial Tobacco Canada Ltd* (2001), 51 OR (3d) 603 (SCJ), the action was struck out against the defendants other than Imperial Tobacco because no reasonable cause of action by a representative plaintiff against those defendants was disclosed. In *Philip Morris*, the action was struck out by majority (Spender and Hill JJ).

tion. The issue has also been peppered by occasional judicial statements, the accuracy of which is not quite settled. For example, Cumming J's statement[288] that, in Australia, at least one representative plaintiff must have a claim against each defendant is indeed *not* a true reflection of Sackville J's (more stringent) views in *Philip Morris* (which have been reproduced verbatim previously).

Factual scenarios that enable a cause of action to be asserted against each defendant by *all* those who allegedly have suffered loss and damage as a result of the conduct of one or more of the defendants which arose out of similar circumstances will be unusual, as the previously-mentioned law suits against breast implant, vitamin and cigarette manufacturers demonstrate. Nevertheless, it may be very convenient that a common issue be decided in class proceedings, which either determines the litigation, or which would advance the subsequent individual hearings by the representative plaintiffs against their particular defendant. For these reasons, the Australian view as espoused in *Philip Morris* is problematical and productive of significant hurdles for plaintiff classes. The Australian position also fares adversely in comparison with that under FRCP 23. In spite of the strictness of the standing and typicality requirements under that regime, the willingness to certify a class action on the basis of an alleged conspiracy among the defendants has enabled greater success in commencing law suits against multiple defendants than has so far occurred in Australia.

In Ontario, provided that common issues arise, then a determination by way of class proceedings where different representatives have claims against different defendants has been upheld if a finding on that common issue "would move the litigation forward." Of the two Canadian approaches, Ontario's *Ragoonanan* view is the author's preference: it exhibits a more flexible and fluid approach than does the Australian approach of separate applications to consolidate, and has been shown to be workable in that jurisdiction in the case of product liability and negligence litigation, and accommodates the governing principles of access to justice, judicial economy and behaviour modification. Most significantly, however, the Ontario view also maintains (in comparison with the more liberal British Columbia view) the traditional approach that a defendant must have a cause of action asserted against it on the face of the pleading. As Cumming J reiterated in *Ragoonanan*, a defendant should not be made "subject to a speculative claim which presumes that one or more unknown persons possibly has a cause of action. It would be wrong to put a defendant to the expense of the litigation process if there is no reasonable cause of action against that defendant on the face of the pleading."[289]

Notwithstanding the criticisms that can be made of trying to fit a class representative into a traditional two-party model of litigation,[290] this author prefers that traditional model, at least to the extent that it has been practised in

[288] *Ragoonanan*, *ibid*, [31].

[289] *Ibid*, [56].

[290] J Wegman Burns, "Decorative Figureheads: Eliminating Class Representatives in Class Actions" (1990) 42 *Hastings LJ* 165, 186–87; V Morabito, "Class Actions Against Multiple

Ontario in accordance with the *Ragoonanan* view. If there is no named opponent in the pleading, the defendant should not be required to defend against an amorphous group of injured persons; the plaintiffs should bear the onus (and financial expense) of identifying, as against each defendant, one of their number who has allegedly suffered injury, loss or damage at the hands of that defendant, failing which no class action should validly commence against that defendant. Having said that, this conundrum of a suitable class representative in class proceedings against multiple defendants is certainly one of the most disparate, and perhaps the most vexed, issues among the class action regimes of the focus jurisdictions.

Respondents" (2002) 30 *Federal L Rev* 295, 313–19. It is for this reason that Morabito, whilst preferring the Ontario approach to that of Pt IVA on the basis that it has not generated manageability or fairness problems and better facilities access to justice in cases such as *Bendall*, ultimately endorses the BC approach.

6

The Requisite Commonality

A INTRODUCTION

AN ONGOING TENSION in class actions, according to Lord Woolf, is the plaintiffs' wish for a group hearing, and the defendant's usual appeal[1] for individualised treatment of class members' claims and discontinuance of the class action. The law balances these "polarised" positions[2] by requiring a nexus of factual or legal issues between the class members' claims before a class action can be commenced. Each of the conundrums in this chapter arises from the courts' attempts to find the necessary common or homogenous interest where there is, to some degree, a disparity in each class member's case.

It has been judicially stated[3] that practical judgments informed by policy and the purpose of the class actions regime have to be applied at some point along the spectrum to rule some questions within the commonality rubric, and some outside it. Since virtually all classes will have some characteristics in common and some unshared characteristics, there is much room for argument.[4] Indeed, some of the issues in this chapter have crystallised only recently by decisions of the highest appellate authority,[5] and in light of these pronouncements, certain cases in the focus jurisdictions bearing upon commonality issues have had to be reviewed.[6] All of this serves to emphasise the continued evolution of the class action concept generally.

[1] But not always: class actions can have advantages for defendants too—having common issues resolved one way, dealing with one representative plaintiff only, in one forum, with access to statutory case management to expedite the case, with finality of litigation: T Pinos, "Class Actions Revisited?" [1987] *Law Institute J* 448, 449; *AltaLRI Report*, [120]–[124]. In the US, even large class action settlements can increase share market value of corporate defendants, as a sign they can get on with their affairs: JB Weinstein, "Compensating Large Numbers of People for Inflicted Harms" (2001) 11 *Duke J of Comparative and Intl Law* 165, 175.

[2] *Final Woolf Report*, ch 17, [9].

[3] *Zhang v Minister for Immigration, Local Govt & Ethnic Affairs* (1993) 45 FCR 384, 405 (French J).

[4] SC Yeazell, *Civil Procedure* (4th edn, Boston, Little Brown and Co, 1996) 967; *OLRC Report*, 340.

[5] Eg, "substantiality" in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA), and "common issues" in *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC).

[6] Eg, in Australia, see *Murphy v Overton Investments Pty Ltd* [1999] FCA 1673 (decision did not change). In Ontario, see: *Rosedale Motors Inc v Petro-Canada Inc* (Div Ct, 22 Oct 2001) (there was a reversal: "The law on the point has evolved since [the original] decision, and in light of recent pronouncements by the Supreme Court of Canada, in our view, the class action should be certified": at [1]). See also, observations of Gans J in *Franklin v U of Toronto* (2001), 16 CPC (5th) 317 (SCJ) [5].

The focus regimes of the US,[7] Ontario[8] and Australia[9] refer to the determination of a question or issue "of fact or law" that is common among all the class members. Two introductory points are worthy of brief comment. First, the language of each statute is transparent: either common questions of fact *or* law will be sufficient. Therefore, a judicial decision to deny class action status because, "[t]rue the law would be common to the 'class', but we cannot conceive what the questions of fact would be",[10] is contrary to the express wording of the regimes of each of the focus jurisdictions (albeit that commentators such as Bronsteen and Fiss have put forward a case that the "or" be changed to "and" to strengthen the commonality requirement[11]). Differing factual scenarios as between class members that will require individual determination after the resolution of a common question of law is feasible under any of these class action regimes. Secondly, the thing that is alleged to be "common" must genuinely be in issue or in dispute between the plaintiff class members and the defendant. It must fairly be in contention, not merely in the formal sense that a defence puts an allegation in issue about which there really could not be any dispute.[12] As one court has observed,[13] common issues which "address matters probably not in contention" are not a sufficient basis for a class action, and will not be permitted to proceed.[14]

This chapter will consider specific generic issues that courts in the focus jurisdictions have grappled with when considering the commonality question: whether common issues have to determine liability, and particular issues arising because of the specific drafting of the post-FRCP regimes (section B); how significant must the common issues be in the context of the action as a whole (section C); and whether the common issues must arise out of the same cause of action shared among the class members (section D).

[7] FRCP 23(a)(2).

[8] CPA (Ont), s 5(1)(c), "common issues" defined in s 1. Also: CPA (BC), s 4(1)(c), "common issues" also defined in s 1.

[9] FCA (Aus), s 33C(1)(c).

[10] *Ward v Luttrell*, 292 F Supp 165 (ED La 1968), cited and criticised in *Newberg* (4th) § 3.11 pp 291–94.

[11] J Bronsteen and O Fiss, "The Class Action Rule" (2003) 78 *Notre Dame L Rev* 1419, 1424.

[12] *Murphy v Overton Investments Pty Ltd* [1999] FCA 1123 (Emmett J), reconsidered by his Honour after *Wong* (HCA), and upheld: [1999] FCA 1673 (disagreement between class member lessees and retirement village manager about amount of outgoings; class members complained they were charged for more outgoings than defendant had represented; one valid common issue was whether some lease provisions for calculation of outgoings were "reasonably necessary" for defendant's financial protection, and thus fair and just; other "common issue" alleged by class members was that representations about outgoings were false; but no dispute about that, they were indeed false; "the lessees themselves are saying that they have a liability"; latter was not a common issue).

[13] Hedigan J was commenting upon Pt 4A of the Supreme Court Act 1986 (Vic), which is substantially identical to the schema in Pt IVA.

[14] *Cook v Pasminco Ltd* [2000] VSC 534, [56].

B GENERAL ISSUES WITH RESPECT TO COMMONALITY

1. Common Issues Do Not Have to Determine Liability

Many class actions will involve individual issues, whether in relation to elements of the cause/s of action alleged by the representative plaintiff on behalf of the class members,[15] potential and variable defences available against individual class members,[16] or the quantum of class members' damages where each has suffered different personal loss and damage.

The statutes of the Canadian provinces[17] indicate by express provision that the determination of individual issues for each class member is anticipated, and it has since been judicially stated that the drafters of the Ontario schema "were particularly mindful of the problems created by individual issues."[18] Their presence may be problematical, but will not necessarily be fatal. Several decisions in Ontario support the contention that, whilst resolution of the common issues will not dispose of the litigation and while evidence from individual class members may eventually be required, certification is nevertheless appropriate.[19] In British Columbia, one court has remarked that

> [w]hen examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant impossible.[20]

[15] Eg: whether a particular representation made to each class member, or whether the class member relied upon the representation, or whether the alleged misconduct caused the injury complained of, or whether the damages allegedly suffered by the plaintiff are too remote to be recoverable in law.

[16] Eg: arguments that a person is not a member of the class, that certain claims are time-barred by a statute of limitations, that volenti or contributory negligence apply in light of the plaintiff's actions or omissions, or that the plaintiff failed to mitigate his or her damage.

[17] CPA (Ont), ss 11(1)(c), 25; CPA (BC), ss 11(1)(c), 27, 28.

[18] *Peppiatt v Nicol* (1994), 16 OR (3d) 133 (Gen Div) [47]. Also: *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [48] (Montgomery J).

[19] Eg:*Anderson v Wilson* (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) [36], [38] ("In this case, the common issue as to the standard of conduct expected from the clinics from time to time, and whether they fell below the standard, can fairly be tried as a common issue. Resolving this issue would move the litigation forward. . . .Isolating this one major issue, the class action proceeding clearly appears to be the preferable method of resolution to the benefit of all parties. . . . These reasons should not be read as saying that there cannot be a certification or a common issue if the claimants' evidence is individually necessary"), leave to appeal refused: SCC, 25 May 2000. Also: *Carom v Bre-X Minerals Ltd* (2001), 196 DLR (4th) 344, 51 OR (3d) 236 (CA) [41]; *McNaughton Automotive Ltd v Co-operators General Ins Co* (SCJ, 14 Aug 2003) [37]; *Lau v Bayview Landmark Inc* (1999), 40 CPC (4th) 301 (SCJ) [59]; *Isaacs v Nortel Networks Corp* (2001), 16 CPC (5th) 69 (SCJ) [43]; *Canadian Imperial Bank of Commerce v Deloitte & Touche* (2003), 33 CPC (5th) 127 (Div Ct) [41].

[20] *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) [53] (Cumming JA). Although the comment was made in the context of multiple defendants, it is a truism for all types of class actions in the Ontario and British Columbia provinces. See also: *Anderson v Wilson* (1998), 156 DLR (4th)

The Supreme Court of Canada has considered the question of common issues in three decisions under three different provincial regimes in Canada,[21] and formulated that, as a principle that the court must apply in determining whether there are any common issues, "it is not necessary . . . that the resolution of the common issues be determinative of each class member's claim."[22] Indeed, in the post-FRCP 23 Canadian provincial regimes, the design of the statutes appears to contemplate that much litigation may follow the determination of the common issues.[23] By way of example, provided that there is a common issue of law or fact in the claims of the representative plaintiff and class members, a class action is not precluded by the defendant's raising separate defences against different class members and thereby creating individual issues,[24] although the extent of such individual defences may ultimately dictate against certification.[25]

The statutory position of accommodating individual issues is precisely the same in Australia's federal regime.[26] There is complete unanimity of judicial view[27] that the common issues in class proceedings need *not* be defined as to fully dispose of all claims by class members. If evidence will have to be given of

735, 37 OR (3d) 235 (Div Ct) [21] ("common issues need only be issues of fact or law that move the litigation forward": per Campbell J), cited with approval on appeal: (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) [35].

[21] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC); *Rumley v BC* 2001 SCC 69, 205 DLR (4th) 39 (SCC); *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534 (SCC).

[22] Noted in *Kumar v Mutual Life Ass Co of Canada* (2003), 226 DLR (4th) 112 (Ont CA) [44].

[23] For similar comments, see: MJ Peerless and MA Eizenga, "Class Actions in Breast Implant Litigation" (1996) 16 *Health Law in Canada* 78, 80.

[24] Eg: *Maxwell v MLG Ventures Ltd* (1995), 7 CCLS 155 (Gen Div) [8] where the possibility of individual defences of actual knowledge and limitation periods did not prevent certification of a misrepresentation claim.

[25] Eg, these actions were not certified, inter alia, because of the following possible defences against different class members: *Williams v Mutual Life Ass Co of Canada* (2000), 51 OR (3d) 54 (SCJ) [45] (contributory negligence, limitation periods, and failing to mitigate damages); *Cloud v Canada (A G)* (SCJ, 9 Oct 2001) [74] (laches and limitation periods), aff'd: (2003), 65 OR (3d) 492 (Div Ct) [32]; *Franklin v U of Toronto* (2002), 56 OR (3d) 698 (SCJ) [55] (laches—the possibility "creates a significant number of individual triable issues"); *Fehringer v Sun Media Corp* (2002), 27 CPC (5th) 155 (SCJ) [22] (various limitation periods), aff'd: (Div Ct, 30 Sep 2003).

[26] FCA (Aus), s 33Q.

[27] Eg: *Community & Public Sector Union v State of Vic* (1999) 90 IR 4 (FCA) [23]; *McMullin v ICI Aust Operations Pty Ltd* (1997) 72 FCR 1, 10 (class action permitted, notwithstanding individual issues of causation, contributory negligence and damages); *King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd)* [2003] FCA 212, [9] ("The course I propose to follow is consistent with what I understand to be the scheme of Part IVA of the Act where, at least ordinarily, the Court would address common issues before moving to determine the claims of any particular individual including the representative party. It is not correct to say . . . that if the applicant cannot prove reliance and damage the whole of the proceeding must fail"); *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [153] (causation may need to be proved individually; nevertheless, class action appropriate; "Commonly, for example, a representative proceeding will be suitable to try issues of liability, while proof of damage and other remedies may be left to each individual member of the class to establish. Sometimes the benefit of a representative proceeding will be even less than that. There will be cases where a class action will do no more than resolve certain issues relating to liability, leaving others to be dealt with on an individual basis. Inducement in a fraud case, for example, could rarely be dealt with as a common issue").

individual circumstances in order to establish liability or achieve a final outcome for each class member, that does not preclude sufficient commonality of interest.[28] In a class action based in negligence, for example, it may be that only the question of breach can be dealt with as a common issue, leaving the issue of whether the class members were each owed a duty of care, or whether the alleged breach caused the loss or damage complained of, any possible defences available against individual class members, and their individual damages, as individual enquiries.[29]

As previously pointed out, the US rule certainly does not provide that all questions of law or fact be common to the class. Indeed, US district courts have reiterated that, in order to satisfy the commonality requirement[30] applicable to *all* types of class actions under FRCP 23, a single issue common to all class members will suffice.[31] However, class actions under FRCP 23(b)(3) are subject to a higher standard of commonality than that set out for the (b)(1) and (b)(2) class actions: (b)(3) requires that common issues *predominate* over individual issues. This rule impliedly recognises individual issues in the sense that the very term "predominance" acknowledges that individual issues may also require resolution. Furthermore, the Rules Advisory Committee illustrated, via a fraud example, that individual proof of damages will not preclude a finding of predominance of the common issues over individual issues.[32] In that regard, Newberg notes: "[m]ost courts have agreed on what the predominance test does not entail: The test was not meant to require that the common issues will be

[28] Eg: *Milfull v Teranora Lakes Country Club Ltd* (FCA, 16 Jun 1998) 4; *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 (Full FCA) (20 Nov 1998) (see especially Foster J, dissenting, ultimately approved by HCA); *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304, 311 ("I am not convinced that mere volume of evidence disqualifies a proceeding from being undertaken as a class action. Nor in my experience has complexity ever been a reason for failure to determine an issue. I am also not persuaded that substantial differences in individual circumstances disqualify a case from being a class action. Pt IVA anticipates that individuals in the group will have differing circumstances"); *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) (19 Apr 2000) [17]; *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304, 314 ("disparity of circumstances concerning reliance and damages was not a bar to representative proceedings being pursued in *Metcalfe v NZI Securities Aust Ltd* [1995] ATPR ¶ 40,645. . . . a class action was permitted at first instance. On appeal as *Jenkins v NZI Securities Aust Ltd* (1994) 52 FCR 572, a Full Court of this Court . . . did not disturb, and in fact extended, the representative nature of the proceedings").

[29] Eg: *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) ATPR ¶41-679 (FCA) [52]–[53], aff'd: [1999] FCA 636 (Full FCA) [12], [18]; reiterated by Merkel J subsequently: (2000) ATPR ¶ 41-743 (FCA) [59]. For an example of where a class action was permitted, but the evidence of causation given by class members was so individual that it did not assist any other class member (or the representative), and unconvinced of the causal link between alleged breach and loss for any of the class members, the class action itself failed: *Schneider v Hoechst Schering Agrevo Pty Ltd* (2000) Aust Torts Reports ¶81-560 (FCA) [195]–[196].

[30] Contained in FRCP 23(a)(2).

[31] *Buford v H&R Block Inc*, 168 FRD 340, 348 (SD Ga 1996) ("a single common issue is sufficient"); *Meiresonne v Marriott Corp*, 124 FRD 619, 622 (ND Ill 1989).

[32] Rules Advisory Committee, "Notes to 1966 Amendments to Rule 23" (1966) 39 FRD 69, 103 ("A fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class").

dispositive of the controversy or even be determinative of the liability issues involved".[33] Consistent with this, class actions have been certified under FRCP 23(b)(3) where an element of the cause of action,[34] the class members' damages,[35] or a defence raised by the defendant,[36] were individual issues (and hence, the litigation could not be entirely disposed of after the common issues had been decided).

2. Overcoming *Markt* with Express No-bar Factors: Ongoing Difficulties

The class action regimes of Australia and the Canadian provinces differ from the US federal rule in that they seek to assist the commencement of class litigation by implementing statutory no-bar matters,[37] a series of "negative criteria",[38] which cannot be the sole basis for refusal to certify. Tolerance for individual elements that may require separate determination—individual damages, separate contracts, different remedies—aims "to resolve issues which bedevilled the representative procedure."[39] Essentially, the legislature had to "ensure that the courts [did] not resurrect many of the same procedural roadblocks" that existed previously.[40] It is very evident that the law reform agencies in Australia[41] and Ontario[42] which were charged with the task of proposing class action reform were extremely keen to remove the spectre of the decision in *Markt & Co Ltd v Knight Shipping Co Ltd*[43] in which the aforementioned indi-

[33] *Newberg* (4th) § 4.25 p 169, and for earlier points in text, see: § 3.10, pp 290–94.

[34] Eg: *Eisenberg v Gagnon*, 766 F 2d 770, 779 (3rd Cir 1985) (reliance of each class member investor on offering memorandum an individual issue, but not fatal); *In re Industrial Diamonds Antitrust Litig*, 167 FRD 374 (SD NY 1996) (the issues of each putative class member's lack of knowledge and due diligence might require individualised consideration, but not fatal).

[35] Eg: *In re Asbestos School Litig*, 104 FRD 422, 432 (ED Pa 1984) ("the 'overwhelming weight of authority' holds that the need for individual damages calculations does not diminish the appropriateness of class action certification where common questions as to liability predominate"); *Walton v Franklin Collection Agency Inc*, 190 FRD 404, 412 (ND Miss 2000) ("small differences in the amount of damages suffered by each class member would not preclude certification when the 'fact of injury' was common to all"); *In re Industrial Diamonds Antitrust Litig*, *ibid*, 382 ("courts have routinely held, however, that the need for individualised determinations of the putative class members' damages did not, without more, preclude certification of a class under Rule 23(b)(3)").

[36] Eg: *In re Visa Check/MasterMoney Antitrust Litig*, 280 F 3d 124, 138 (2nd Cir 2001) (variations in application of mitigation defence for damages calculation not fatal); *Gunter v Ridgewood Energy Corp*, 164 FRD 391 (DNJ 1996) in which possible defence that some class members did not rely on an allegedly misleading letter because they did not vote in favour of the proposal not fatal.

[37] FCA (Aus), s 33C(2); CPA (Ont), s 6; CPA (BC), s 7.

[38] M Boodman, "The Malaise of Mass Torts" (1994) 20 *Queen's LJ* 213, 234.

[39] Discussed by the High Court in: *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) [12], particularly in light of its previous decision in *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 (HCA). See also: ch 4 pp 78–90.

[40] B Bresner, "Recent Developments in Class Action Litigation in Canada" [1998] *Intl J of Ins Law* 187, 188.

[41] *ALRC Report*, [45] ("The traditional form of representative procedure is, however, limited").

[42] *OLRC Report*, 22–33, discussing the effect of *Markt* upon plaintiff class actions under Rule 75 of the Supreme Court of Ontario Rules of Practice.

[43] [1910] 2 KB 1021 (CA).

vidual elements had precluded use of the representative rule, and the legislatures in both jurisdictions acted accordingly.

The fact that more than one of the negative criteria are present in a litigious scenario in these particular focus jurisdictions does not mean that the class proceeding should not continue[44] (although Ontario courts[45] have indicated that the more of the statutory no-bar features present, and given the cumulative effect which they have, then the more likely it is that class proceedings will not be preferable to other processes). The Ontario legislative wording—that the court should not refuse to certify "solely on any of the following grounds"[46]—has actually run into interpretational difficulties.[47] It has since been "judicially redrafted"[48] to mean that "any one or more" of the statutory no-bar factors will not preclude a class action. Avoidance of that difficulty would be possible by either the adoption of similar drafting, or by pursuing the Pt IVA option[49] of permitting a class action "whether or not" any of the bars are present.

However, this legislative effort to remove obstacles to a class action does not mean that issues of commonality have lost their relevancy. For one thing, consistency of decisions where there are clearly individual issues which will require determination if the class members' claims are to ultimately be resolved, is one factor leading to some difficulties. Also, there is a constant tension between the wish to facilitate a useful schema in which the strictures of the representative rule are not revisited, and the need to find sufficient commonality such that a class action will actually move the litigation forward. Two sample causes of action—breach of contract and the tort of misrepresentation—provide useful examples of the difficulties of progressing class actions, even in the post-*Markt* era.

(a) Breach of contract

It will be recalled that one of the most significant strictures placed on the representative rule by the decision in *Markt & Co Ltd v Knight Shipping Co Ltd*[50] was that a representative action could not be founded upon separate contracts between each of the members of a plaintiff class and the defendant. The bills of

[44] *Community & Public Sector Union v State of Vic* (1999) 90 IR 4 (FCA) [23]; *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [27]–[28] (4/5 of the no-bar criteria did not preclude commencement of class action).

[45] Eg: *Controltech Engineering Inc v Ontario Hydro* (1998), 72 OTC 351 (SCJ) [28], aff'd: (2000), 130 OAC 367 (Div Ct); *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [29]; *Williams v Mutual Life Ass Co of Canada* (2000), 51 OR (3d) 54 (SCJ) [44].

[46] CPA (Ont), s 6, opening words.

[47] *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496 (Div Ct) [128]–[130] (Moldaver J).

[48] Eg: *Nantais v Telectronics Proprietary (Canada) Ltd* (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div) [47] (Brockenshire J noted: "I would hope that a subsequent amendment to the section would remove any confusion"); *Anderson v Wilson* (1997), 32 OR (3d) 400 (Gen Div) [19]; *Bunn v Ribcor Holdings Inc* (1998), 38 CLR (2d) 291 (Gen Div)[40]. Also pursued in *ManLRC Report*, 58, in response to *Abdool*.

[49] FCA (Aus), s 33C(2).

[50] [1910] 2 KB 1021 (CA).

lading constituting the contracts "manifestly might differ much in their form, as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped"[51] and were "in no way connected".[52] The legal rights underpinning each class member's claim would therefore be different, even if the form of the contracts was identical.[53] Moreover, that decision marked the view that the representative action was "absolutely inapplicable" where the claim of the plaintiff was for damages,[54] for the representative's claim for his personal damages in no way benefited the class that he purported to represent.[55]

In response, the newer class action regimes[56] have specifically provided that class proceedings are possible, even if the relief claimed relates to separate contracts involving different class members. In this respect, the no-bar factor has proven useful to date. If the form of the contract is common between all class members and the defendant, with no oral or implied terms to consider, then sufficient commonality is likely to be found, as decisions from both Australia[57] and Ontario[58] demonstrate. However, it must be conceded that a no-bar factor that certification or commencement is not to be refused because the relief relates to separate contracts of the class members is by no means a cure-all. The individual question such as whether a term should be implied into the contract of each class member, for example, may well preclude sufficient commonality to permit a class action.[59]

[51] [1910] 2 KB 1029 (Vaughan Williams LJ).

[52] *Ibid*, 1040 (Fletcher Moulton LJ).

[53] *Ibid*.

[54] The relief claimed was "damages for breach of contract and duty in and about the carriage of goods by sea": *ibid*, 1022.

[55] *Ibid*, 1035 (Fletcher Moulton LJ).

[56] CPA (Ont), s 6(2); CPA (BC), s 7(b); FCA (Aus), s 33C(2)(b)(i). See also, for judicial recognition of the same principle under FRCP 23: *Mick v Level Propane Gases Inc*, 203 FRD 324, 331 (SD Ohio 2001).

[57] Eg: *Finance Sector Union of Aust v Commonwealth Bank of Aust* (1999) 94 FCR 179 (Full FCA) (standard form employment contracts); *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) (standard contracts to purchase lots in a residential building); *Vasram v AMP Life Ltd* [2000] FCA 1676 (common issue revised by court to concentrate upon the express terms of insurance policies entered into between each class member and the defendant). For potential use of class actions where traders holding leases from a common lessor suffer loss arising from lessor's actions, see: WD Duncan and S Christensen, "Safety in Numbers?" (2001) 8 *Aust Property LJ* 255, 259–62.

[58] *Cheung v Kings Land Development Inc* (2002), 55 OR (3d) 747 (SCJ) (standard form agreements of purchase and sale).

[59] *Macleod v Viacom Entertainment Canada Inc* (2003), 28 CPC (5th) 160 (SCJ) [24] ("The question whether such a term should be implied must depend upon the manner, and degree, of disclosure to each member of the fees the defendants intended to charge and it may, indeed, be affected by 'Who said what to whom, and when' as well as by the member's past experience of renting videos from the defendants or, perhaps, from other retail outlets. I do not accept the proposition that the issue could be determined solely from evidence of general practices adopted by the defendants without regard to the knowledge and understanding of individual members"); *Collette v Great Pacific Management Co* [2003] BCSC 332, [46] ("Any suggestion that such contracts ought to include the [alleged] implied terms . . . must . . . be considered on the individual factual circumstances of each investment advisor/client relationship upon persuading the court of that necessity. Such an individualized requirement cannot be reasonably viewed as giving rise to a common issue").

As a further conundrum, inconsistency between decisions can arise. In two employment cases in Ontario, remarkably similar fact scenarios in respect of class actions based upon an allegation of breach of contract were decided in quite opposite fashion.[60]

In *Huras v Com Dev Ltd*,[61] where the employee class alleged that its employer failed to provide the class members with shares to which they claimed entitlement under an "employee stock option plan", they failed to convince the court that it was a suitable case for a class proceeding. The only cause of action asserted was breach of their employment contracts, in particular, that the employee handbook constituted a term of employment; that they were never permitted to participate in the stock plan in the employee handbook; and that they were entitled to damages. On the other hand, in *Webb v K-Mart Canada Ltd*,[62] in which the representative plaintiff sought damages for wrongful dismissal on behalf of about 3000–4000 former employees of the corporate retailer who were each employed under an oral contract of indefinite duration, and whose employment was terminated by K-Mart, the action was certified. Yet, in each case, there were significant individual issues to be determined. In *Huras*, the terms had to be determined by considering a number of sources: representations during the course of hiring interviews; the written offer of employment; the employee handbook; and perhaps advertisements seen prior to hiring.[63] In *Webb*, whether the defendant breached the class members' contracts also required individual assessment. There were "very personal questions"[64] to be dealt with relating to whether the employees were given proper notice in circumstances where the contract did not contain a notice period. Individual assessment of damages was required in both cases. In *Webb*, the action certified, mitigation by class members of their damages was also in contention.[65]

Such variant decisions as to whether actions have sufficient commonality to predicate class proceedings can make the predictability of outcome rather troublesome. Hence, although it has been considered absolutely vital to incorporate into the modern focus jurisdiction class action regimes a series of no-bar factors which will ensure that the restrictive interpretation of *Markt* is forever "buried", the decisions under the regimes do require a degree of consistency before any firm conclusions can be drawn about the utility of the class action procedure in circumstances where such action was once problematic.

[60] For a short comparative discussion of these two Ontario decisions, delivered within a month of each other, see: C Reeve, "Case note" (1999) 9 *Employment and Labour L Reporter* 72.

[61] (2000), 36 CPC (4th) 31 (SCJ).

[62] (2000), 45 OR (3d) 389 (SCJ); supp reasons: (2000), 45 OR (3d) 425 (SCJ); leave to appeal refused: (2000), 45 OR (3d) 638n (Div Ct).

[63] *Huras* (2000), 36 CPC (4th) 31 (SCJ) [16], [18].

[64] *Webb* (2000), 45 OR (3d) 389 (SCJ) [23].

[65] *Webb* (SCJ), *ibid*, [10], [31].

(b) Misrepresentation

It has been judicially recognised that the very nature of the tort of misrepresentation and its elements gives rise to a whole host of individual issues that renders certification problematical.[66] As Montgomery J noted in *Abdool v Anaheim Management Ltd*, "[t]he inherent nature of misrepresentation actions makes it difficult to find central facts capable of proof on a common basis".[67] Individual issues such as a special relationship of proximity between the defendant author and the class member recipients of the statement, separate defences, individual loss and damage, reliance by individual class members upon the representation, the factual questions of who said what, when and to whom, all serve to present a complex scenario that even the statutory no-bar factors in the post-FRCP 23 regimes cannot always overcome. However, the task of establishing the requisite commonality is difficult but not intended to be impossible. There have been several judicial statements in Ontario[68] and Australia,[69] and supportive academic opinion,[70] to the effect that individualised proof of reliance in misrepresentation claims does *not* necessarily preclude class proceedings. Indeed, as Wilcox J has pointed out, if a class action were to be barred in the event that the cause of action required proof of reliance on the part of each class member, then that would represent a major limitation on the utility of a class action regime in Australia.[71]

The development of jurisprudence with respect to class actions, misrepresentation, and commonality, has been marked by cautious and incremental steps in

[66] Eg: *Carom v Bre-X Minerals Ltd* (2001), 196 DLR (4th) 344, 51 OR (3d) 236 (CA) [8] ("certifications of class actions have not been automatic. Probably the most notable domain in which certification has been refused relates to claims grounded in allegations of misrepresentation"); *Hollick v Metropolitan Toronto (Municipality)* (2000), 181 DLR (4th) 426, 46 OR (3d) 257 (Ont CA) [25] (obiter, analogised with the private nuisance alleged); *Kumar v Mutual Life Ass Co of Canada* (2001), 17 CPC (5th) 103 (Div Ct) [24]; *Williams v Mutual Life Ass Co of Canada* (2000), 51 OR (3d) 54 (SCJ) [22].

[67] (1994), 15 OR (3d) 39 (Gen Div)[52].

[68] Eg: *Maxwell v MLG Ventures Ltd* (1995), 7 CCLS 155 (Gen Div) [7]; *Schweyer v Laidlaw Carriers Inc* (2000), 44 CPC (4th) 236 (SCJ) [41]–[43], [45]; *Carom v Bre-X Minerals Ltd* (2001), 196 DLR (4th) 344, 51 OR (3d) 236 (Ont CA) [49].

[69] Eg: *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 464; *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [127] (although this trial decision was overturned on appeal, Wilcox J's finding that an individual assessment of reliance does not preclude a class action was not the subject of criticism on appeal); *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304, in which different defences were possible as against the various borrower class members, because the borrowers had differing levels of legal or financial expertise and some received legal advice (thus possibly pointing to either contributory negligence or a lack of reliance), yet a class action was permitted to proceed; *Milfull v Terranora Lakes Country Club Ltd* (FCA, 16 Jun 1998) 4–5.

[70] Eg: GD Watson, "Initial Interpretations of Ontario's Class Proceedings Act" (1993), 18 CPC (3d) 344, 353–54; JJ Chapman, "Class Proceedings for Prospectus Misrepresentations" (1994) 73 *Canadian Bar Rev* 492, 507; W Pengilley, "What is a Class Action?" (1999) 15 *Trade Practices L Bulletin* 69, 73; JA Campion, "Misrepresentation in Class Proceedings: The Cardozo Nightmare?" (2001) 24 *Advocates' Q* 129, 168–69.

[71] *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [127].

those focus jurisdictions that have implemented the statutory no-bar factors. Class actions based upon claims for misrepresentations have failed consistently upon lack of any commonality of issues of law or fact in Ontario, particularly prominently in commercial transactions[72] and educational services.[73] Misrepresentation-based class actions have also not fared well in Australia.[74] This coincides with the view that separate written and oral misrepresentations can be problematical to certify under FRCP 23 as well.[75] The features of these cases include: many different representations; made by different representatives of the defendant; to class members who had differing levels of knowledge; made over a long time period, and on different occasions; with differing levels of formality; to some class members and not to others; some of whom had third party advice and others who did not; some of whom relied on the statement and others who did not; causing varying amounts of damage; and perhaps giving rise to complex business relationships between the parties which were not based exclusively on the representations.

[72] *Controltech Engineering Inc v Ontario Hydro* (1998), 72 OTC 351 (Gen Div) [16]–[17]; *Carom v Bre-X Minerals Ltd* (1999), 44 OR (3d) 173 (SCJ) [12], [259]–[268] (claims against brokers and analysts for negligent misrepresentation not certified partly because their multiple representations to class member investors could not be reduced to a single representation; that aspect of decision not appealed); *Millgate Financial Corp v BF Realty Holdings Ltd* (1999), 28 CPC (4th) 72 (Gen Div) [52] ("In respect of the 'misrepresentation' claim, certification would result in several individual trials"); *Huras v Com Dev Ltd* (2000), 36 CPC (4th) 31 (SCJ) [19]; *Williams v Mutual Life Ass Co of Canada* (2000), 51 OR (3d) 54 (SCJ) [24]–[33]; *Kumar v Mutual Life Ass Co of Canada* (2003), 226 DLR (4th) 112 (Ont CA) [57]–[58], affirming *Kumar v Mutual Life Ass Co of Canada* (2001), 17 CPC (5th) 103 (Div Ct); and affirming earlier: *Kumar v Mutual Life Ass Co of Canada* (2000), 47 CCLI (3d) 24 (SCJ), and *Zicherman v Equitable Life Ins Co of Canada* (2000), 47 CCLI (3d) 39 (SCJ).

[73] *Olar v Laurentian University* (2003), 37 CPC (5th) 129 (SCJ) [38]–[40]; *Hickey-Button v Loyalist College of Applied Arts and Technology* (2003), 31 CPC (5th) 171 (SCJ) [11]; *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [33].

[74] *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 (FCA) 728; *Murphy v Overton Investments Pty Ltd* [1999] FCA 689, [15], [23]; *Bowler v Hilda Pty Ltd* (FCA, 25 Oct 1996) (discontinuance of class action not challenged on appeal); *Sereika v Cardinal Financial Securities Ltd* [2001] FCA 1715, [16]; *McIntyre v Eastern Prosperity Investments Pty Ltd* [2001] FCA 1734, [6] (allegations of "representations made to [class members] at various times and in various ways relating to prospective alterations and refurbishments of the shopping centre"; struck out as improperly pleaded, and problematic for class litigation); *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 (Full FCA) 289 ("the case illustrates in a number of ways the difficulties involved in doing justice, in group proceedings, to a number of individual claims for damages based on tort or on representations said to constitute misleading or deceptive conduct. Each member of the group must, in order to make good a claim for relief, establish that there is, in the circumstances of his or her dealings with the respondent, a factual basis supporting each element of the causes of action relied on [which was not done here]").

[75] Eg: *In re Managed Care Litig*, 209 FRD 678, 691–92 (SD Fla 2002) ("The only way to determine what each plaintiff relied upon is to ask each individual plaintiff—something which, if done, precludes class certification because individual issues will predominate over the class issues"); *Kaczmarek v IBM Corp*, 186 FRD 307, 311–12 (SD NY 1999) ("in order to address plaintiffs' CPL and fraudulent and negligent misrepresentation claims, the Court would have to examine each of the individual representations made to plaintiffs").

Although the early life of class actions was hallmarked by both appellate overrule[76] and a frustrating absence of explanation,[77] the case law under the Australian and Ontario regimes now undoubtedly demonstrates that there are sometimes common issues which *can* move the litigation forward for all class members who claim that they suffered loss and damage by reason of reliance on representations which were untrue. In the exceptional scenario of a single alleged misrepresentation, it is possible for class proceedings to determine whether the single statement, written or oral, amounted to a representation, and if so, whether it was false or negligently made.[78] Additionally, class claims based on the one allegedly inaccurate statement that is faithfully reproduced on several occasions, whether in a newspaper advertisement,[79] or in a series of conveyancing statements supplied to purchasers,[80] have also been successfully certified. On the same basis, if there is a purported disclaimer in a single document, then its effectiveness can also conceivably constitute a common issue for determination in class proceedings.[81]

[76] Eg: *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496 (Div Ct) [83]–[92] (in this passage, O'Brien J overruled Montgomery J's earlier doubts that misrepresentation could not base a class action); *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA), overruling the earlier decision of Wilcox J.

[77] Alleged misrepresentations in information package to promote sale of shares in golf club certified in *Peppiatt v Nicol* (1994), 16 OR (3d) 133 (Gen Div) [49], application to decertify denied in: *Peppiatt v Royal Bank of Canada* (1996), 27 OR (3d) 462 (Gen Div). M Boodman points out in "The Malaise of Mass Torts" (1994) 20 *Queen's LJ* 213, 239 that, in *Peppiatt v Nicol*, Chilcott J did not address the arguments in defence that a class proceeding was not appropriate in cases involving allegations of misrepresentation, which was quite unfortunate, given the proximity of the decision to the earlier decision of Montgomery J in *Abdool*, and the fact that the decision was early in the life of the Act.

[78] Eg: in Ontario: *Schweyer v Laidlaw Carriers Inc* (2000), 44 CPC (4th) 236 (SCJ) [40] (one letter sent to all class member employees); *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) 508 (single letter from accounting firm to all class member investors commenting upon financial forecasts in a condominium project; but uncertified on other grounds); *Ward-Price v Mariners Haven Inc* (2002), 36 CPC (5th) 189 (SCJ) [31] ("if proposed common issue (d) is reduced to the single representation contained in the Interim Occupancy Agreement . . . then that would constitute a common issue"), and other examples discussed in the excellent article by Campion, n 70 above. Eg, in Aust: *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304 (same statements made to shareholders in identical documents—precontractual brochure and Calculation of Prime Rate document); *Patrick v Capital Finance Corporation (Australasia) Pty Ltd* [2001] FCA 1073, [13] (complaint of investors revolved around the one prospectus, and what was said to be misuse of funds invested in a way contrary to what the prospectus stated).

[79] Eg: *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd* (1993) 45 FCR 457, 462 (the one substantial common issue of fact in that case, according to Wilcox J, was whether statements published in standard form newspaper advertisements contained false information).

[80] *Despault v King West Village Lofts Ltd* (2001), 10 CPC (5th) 89 (SCJ) [23] (same alleged misrepresentation that specific amounts had been spent for "local improvement charges" per condominium unit).

[81] A disclaimer was contained in the auditors' letter in *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496 (Div Ct) [92], although that common issue was insufficient to convince the Div Ct that a class proceeding would be "preferable". It has been academically questioned whether this fact scenario would be decided in the same manner today: J Campion, "Misrepresentation in Class Proceedings: The Cardozo Nightmare?" (2001) 24 *Advocates' Q* 129, 170; P Iacono, "Class Actions: Ontario Experience" (1994) 5 *Can Ins L Rev* 75, 80.

In a far more difficult scenario, class actions have been held to be permissible if the representations were made to each class member on different occasions, in different conversations, by different persons within the defendant organisation, in a different form of words, provided that "the court can be satisfied that the substance and effect of what was orally represented is the same [for each class member]."[82] However, the case law is mixed in both jurisdictions. A few examples will suffice to illustrate.

Under the Australian Pt IVA regime, commencement of the class action in *Williams v FAI Home Security Pty Ltd (No 2)*[83] was upheld on the basis that representations about a home alarm system manufactured and sold by the defendant were made to the class member purchasers either in writing (contained in a sales kit) or orally (made during conversations, on different dates, and all slightly different in terms), yet the effect of the statements was the same: "the system was the latest in wireless infrared technology"; "a revolutionary new type of radio-based alarm system"; "a brand new type of security package"; "the latest available in electronic surveillance". It did not matter that there may have been some differences in the actual words spoken to each class member. The representations gave rise to one issue of fact common to the claims of all the class members—whether the alarm was the latest technology then available. However, contrast the unsuccessful tobacco litigation in *Philip Morris (Australia) Ltd v Nixon*, where misrepresentation and misleading and deceptive conduct were pleaded:

> Would it be possible to particularise such a case in a manner that makes it clear how class members are said to have been influenced by advertisements or public statements they may never have seen? Is it feasible to contemplate continuing representative proceedings when the smoking history of and factors influencing members of the represented class are likely to vary so substantially?[84]

The difficulty of identifying commonality in misrepresentation cases is no better demonstrated than by the Ontario franchisees–franchisor litigation in *Rosedale Motors Inc v Petro-Canada Inc*.[85] Franchise agreements were entered into by each franchisee class member after discussion with the defendant's representatives. Some of the alleged misrepresentations were contained in a glossy brochure or policy manual; others were alleged to have been made in a letter (which not all members may have received); some were made orally at dealer conventions, or at individual meetings when the agreements were negotiated

[82] *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 (FCA) 728. For further discussion of the difficulties of multiple representations, see: Campion, *ibid*, 173–77.

[83] [2000] FCA 726, [12]–[13]. For a similar scenario in Ontario that also was successfully certified and in which a settlement agreement entered into between Dabbs and others as proposed representatives of the plaintiff class and the defendant was approved under CPA (Ont), s 29, see: *Dabbs v Sun Life Ass Co of Canada* (1999), 40 OR (3d) 429 (Gen Div), from which order a class member unsuccessfully appealed: (1999), 165 DLR (4th) 482, 41 OR (3d) 97 (CA).

[84] (2000) 170 ALR 487 (Full FCA) [158] (Sackville J).

[85] Div Ct, 22 Oct 2001.

and signed. At first instance, Sharpe J disallowed certification on the basis that the case "demonstrates the difficulty, if not the impossibility, of dealing with the misrepresentation aspect of some 40 commercial agreements between relatively sophisticated parties as if they were all one and the same."[86] However, that was overruled on appeal,[87] on the basis that a common representation *could* be found—whether the proposed franchise system was economically viable and likely to substantially increase franchisees' profits. Whether that representation was false or misleading was likely to materially advance the litigation, in the Divisional Court's view. However, in another contemporaneous commercial case[88] in which the systematic marketing of "premium offset" policies by insurance companies reflected the same diversity of authors, circumstances, statements and time lags as occurred in *Rosedale Motors*, certification was denied.

Thus, identifying a thread of commonality from the myriad of individual circumstances between class members and the defendant can be extremely problematic, and the outcome of certification applications difficult to predict. Even in circumstances where express no-bar factors are legislated for to reaffirm the policy underlying modern regimes, that common issues should be considered in common proceedings,[89] the task should not be underestimated, despite the assistance which no-bar factors undoubtedly offer.

3. Disparate Class Members' Circumstances

Both geographical and timeframe disparities among class members may dissuade any findings of commonality, and both have featured heavily across the focus regimes' jurisprudence to date. In response to these and other variations, subclassing is a widely used technique for managing class litigation. These topics will each be considered in turn.

[86] (1999), 42 OR (3d) 776 (Gen Div) 788.

[87] The appeal was heard three years later. The Div Ct acknowledged the effect which the intervening pronouncements of the SCC in *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) and *Rumley v BC* 2001 SCC 69, 205 DLR (4th) 39 (SCC) had upon their decision to reverse the order of Sharpe J.[88] *Kumar v Mutual Life Ass Co of Canada* (2001), 17 CPC (5th) 103 (Div Ct), also an appeal against a denial of certification, and also heard after *Hollick* (SCC, 18 Oct 2001), and after *Rosedale Motor's* appeal. The case was ultimately approved on appeal: *Kumar v Mutual Life Ass Co of Canada* (2003), 226 DLR (4th) 112 (Ont CA), where the court explained the difficulties thus: "establishing that Prudential was negligent in any of the ways suggested by the appellant would not represent a substantial ingredient in each of the class members' claims. . . . since Prudential had no direct dealings with any of the class members at the time the policies were sold, the class members would still at least have to show that the agents with whom they dealt made representations about premium offset, that those representations constituted negligent misrepresentations about the premium offset feature, and that the prospective policyholder reasonably relied upon the representation": at [47].

[89] The justification used in the *ManLRC Report* for the incorporation of no-bar factors: at 57.

(a) Geographical spread

Decisions in all focus jurisdictions unanimously indicate that courts may struggle to find a common issue of law or fact which would sustain a class action where geographical dispersity is evident. Whilst not always a determinative factor, it will always be relevant.

Under FRCP 23, where a nationwide class is sought to be certified, and the applicable law derives from the law of 50 states, then as Bough and Bough explain, differences in state law will compound the disparities among class members from the different states and may hold certification inappropriate because of the commonality obstacle.[90] Although the existence of state law variations is not alone sufficient to preclude class certification[91] (and in some cases, certification has survived this conundrum[92]), representative plaintiffs have frequently been unable to discharge the burden of showing that class certification is appropriate.[93] An excellent illustration of the issue is provided by *In re Catfish Antitrust Litig*,[94] a price-fixing action by food distributors who purchased catfish and catfish products from various companies who processed and sold such products. As it happened, geographical dispersity (whilst relevant) was not ultimately sufficient enough to negate certification. While the court recognised that ownership of catfish processing facilities was geographically diverse across the US, the location and principal places of catfish processing were mostly concentrated in two state regions, the conspiracy allegations against the "major players" did not entail a market-by-market approach to determine whether price-fixing was occurring, and the court said that it was also "not convinced that regional taste preferences for catfish was the type of diversity which diminished the predominance of common questions."[95]

On the other hand, in Ontario, where geographic dispersity of class members is also determinative in the commonality assessment, overcharging claims by a class of franchisees against their franchisor failed certification.[96] It required a comparison of the defendant's prices against those "generally charged or

[90] SR Bough and AG Bough, "Conflict of Laws and Multi-State Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)" (1999) 68 *U of Missouri at Kansas City L Rev* 1, 11, and detailing several cases in nn 91–93 below.

[91] *Valentino v Carter-Wallace Inc*, 97 F 3d 1227, 1230 ("We hold that the law of this circuit, and more specifically our leading decision in Dalkon Shield, does not create any absolute bar to the certification of a multi-state plaintiff class action in the medical products liability context").

[92] *Owner-Operator Independent Drivers Assn v Mayflower Transit Inc*, 204 FRD 138 (SD Ind 2001); *In re Prudential Ins Co of America Sales Practices Litig*, 962 F Supp 450, 467 (DNJ 1997); *In re Telectronics Pacing Sys Inc*, 172 FRD 271, 291–92 (SD Ohio 1997).

[93] *Chin v Chrysler Corp*, 182 FRD 448 (DNJ 1998); *Duncan v Northwest Airlines Inc*, 203 FRD 601 (WD Wash 2001); *Castano v American Tobacco Co*, 84 F 3d 734 (5th Cir 1996).

[94] 826 F Supp 1019 (ND Miss 1993).

[95] *Ibid*, 1039–40.

[96] *909787 Ontario Ltd v Bulk Barn Foods Ltd*, originally certified by Jenkins J: SCJ, 9 Aug 1999 (the first Ontario case in which a class action was successfully launched by franchisees against the franchisor); but leave to appeal granted by Div Ct (15 Oct 1999), and original order certifying the class action set aside on appeal: (2000), 2 CPC (5th) 61 (Div Ct).

realised by other competitive suppliers in the general market area or region in which the franchise business is located"—with the difficulty that the franchisees' stores were spread over a substantially large geographical area in Canada. Prices of competitive suppliers against whom the defendant's prices were to be compared were not the same around the country and this, according to Somers J, raised the "very distinct possibility that there were no common issues which could be manageably tried together."[97]

Australia's class action litigation throws up like examples. In *Connell v Nevada Financial Group Pty Ltd*,[98] Drummond J considered it significant, in finding the requisite commonality in a misrepresentation claim,[99] that all the distributorships were in three confined regions in the state of Queensland. This is to be contrasted with the large geographical region out of which the failed tobacco claims in *Philip Morris (Australia) Ltd v Nixon*[100] arose. Spender J indicated in that case, by use of a "Widget" example of incidents happening in diverse parts of Australia, that geographic dispersity would pose problems when seeking to establish commonality (particularly the s 33C(1)(b) requirement that the claims would arise out of the same, similar or related circumstances).[101]

(b) Lengthy timeframe

An analysis of the case law from the focus jurisdictions also consistently demonstrates that a claim which is dependent upon a defendant's conduct over a lengthy time-frame will frequently incur difficulties establishing commonality. Various reasons have been proposed for time-frame difficulties.

For example, over a long timespan, many factors could contribute to the individual's alleged loss and injury, which will require separate determination. This dilemma has been evident, for example, in environmental pollution claims which arise from emissions over a lengthy period.[102] In the different context of allegedly defective products, those who complain of a product's effect have undoubtedly been exposed to other things which can cause, exacerbate or mimic

[97] *Bulk Barn Foods*, *ibid* (2000), 2 CPC (5th) 61 (Div Ct) [25]. For other Ontario decisions in which the wide geographic coverage was a factor in denying certification of class proceedings, see: *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [32], and earlier: (2000), 181 DLR (4th) 426, 46 OR (3d) 257 (CA) [21]; (1999), 168 DLR (4th) 760, 42 OR (3d) 473 (Div Ct) [19] (16-mile^2 area affected by noxious odours from waste disposal site, differing extent to which class members would be affected); *MacDonald (Litigation Guardian of) v Dufferin-Peel Catholic District School* (SCJ, 2 Nov 2000) (allegations of mould in portable classrooms causing illness; school district covered 2,700 km^2 with enormous variations in temperature, moisture, elevation and weather).

[98] (1996) 139 ALR 723 (FCA) 731.

[99] But not the substantiality criterion, upon which the action ultimately failed.

[100] (2000) 170 ALR 487 (Full FCA).

[101] *Ibid*, [8].

[102] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) (noxious odours and gases allegedly emanated from landfill site for seven years, but too many alternative potential sources of odours over such a lengthy period to give rise to common issues).

the symptoms allegedly caused by that product and complained of in the class action, which can complicate the causation enquiry immensely. As the Ninth Circuit stated in the *Dalkon Shield* case:

> In products liability actions, . . . [n]o single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses . . . may depend on facts peculiar to each plaintiff's case.[103]

Some of these difficulties became evident in *Amchem Products Inc v Windsor*,[104] the well-known asbestos mass tort case. The Supreme Court held that the trial court had committed reversible error by certifying for settlement purposes a class of plaintiffs that never could have been certified in a non-settlement context. Given the decision that settlement classes were subject to the same level of scrutiny as litigation classes, the Supreme Court found that the putative class representatives, persons currently suffering from asbestos-related health problems, could not adequately represent the interests of other class members who might develop symptoms in the future; and that although manageability problems posed by the trial of such a class could be resolved by the settlement itself, the other FRCP 23 requirements (especially that of predominance) outweighed the manageability benefits that the settlement potentially offered. For present purposes, it is notable that the commonality test was not met because of "class members [being] exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time".[105] In addition, each class member also had a different history of cigarette smoking, another time-related factor that complicated causation. These individual differences (plus significant state law variations) overwhelmed the common facts, such that common questions did not predominate.

Moreover, over a lengthy period, it would be necessary to test the alleged wrongful conduct (for each class member) against different circumstances and generations at which it is alleged to have occurred, when society's characteristics and attitudes may have differed. This will give rise to commonality problems. The leading Australian example is provided by the tobacco suit in *Nixon v Philip Morris (Australia) Ltd*[106] against three cigarette manufacturers who supplied the Australian market.[107] The class members sued the defendants for damages, alleging that, over a period of 40 years and 25 years (depending on the

[103] *In re Northern Dist of California Dalkon Shield IUD Prods Liab Litig*, 693 F 2d 847, 853 (9th Cir 1982) (re use of an intrauterine device; no predominance).

[104] 521 US 591, 117 S Ct 2231 (1997).

[105] *Ibid*, 609.

[106] (1999) 95 FCR 453 (trial), and on appeal: *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA).

[107] See, also, the Widget personal injury and false advertising examples provided by Spender J in *Philip Morris* (Full FCA) (2000) 170 ALR 487 (Full FCA) [8]–[9].

cause of action[108]), the defendants' conduct in advertising cigarettes as enhancing life and enjoyment of life; advertising cigarettes as healthy or safe to smoke; and denying that there was any reliable evidence linking cigarette smoking to health risks, was wrongful. The class proceedings failed. The public statements and lobbying alleged on the part of each of the three tobacco defendants were far too varied over the length of time to sustain a class action:

> [T]his case involves vastly different forms of advertising, promotions and other public statements by the three respondents over four decades. It is true that the applicants allege that the various public statements—ranging from a single brand name on a billboard at a sporting match to a submission to a Senate Committee—all make substantially the same representations. Yet to test that allegation it would be necessary to examine each of the public statements made over the four decades in its own context, having regard to the characteristics of the likely audience. This is a far cry from the kind of case envisaged by the [ALRC] as falling within the purview of the representative procedure.[109]

Alternatively, courts have indicated that the sheer number of alleged instances of wrongful behaviour over a lengthy period would pose manageability problems when seeking to obtain a thread of commonality of fact from the vast array of factual instances alleged to have given rise to the claim of each class member. The argument is that the longer the class period, the greater the variation in the defendant's actions, and the greater the likelihood that issues common to the class will be difficult to identify. In addition to the product liability context, this is a notable problem in misrepresentation claims. Ontario jurisprudence provides some useful examples. In one case, misrepresentations given over a 15-year period produced insurmountable difficulties with certification.[110] In another case, that of *Mouhteros v DeVry Canada Inc*,[111] a class of students sought to institute class proceedings against their educational institution for wrongful description (both written and oral) of the facilities and marketability of courses offered. Winkler J denied certification, and despaired:

> [I]n the present case, the various representations were published by the defendant in 67 different television commercials and 30 different newspaper advertisements, or were made verbally by some 122 admissions officers over a six-year period. The nature of the representations made in DeVry's advertising and promotions, the question of whether the representations were false and misleading, and whether they were made

[108] Negligence, and misleading and deceptive conduct under Trade Practices Act 1974 (Aus), respectively.

[109] *Philip Morris* (2000) 170 ALR 487 (Full FCA) [165] (Sackville J). For difficulties in US tobacco class certification, see: *Castano v American Tobacco Co*, 84 F 3d 734, 740 (5th Cir 1996); *Arch v American Tobacco Co*, 175 FRD 469, 474 (ED Pa 1997); *Smith v Brown & Williamson Tobacco Corp*, 174 FRD 90, 92 (WD Mo 1997).

[110] Eg: *Williams v Mutual Life Ass Co of Canada* (2000), 51 OR (3d) 54 (SCJ) [19], [25]–[32] (alleged misrepresentations made over a 15-year period).

[111] (1999), 41 OR (3d) 63 (Gen Div). Cf: *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 (FCA) 731 (discussions said to give rise to common oral representation occurred over relatively short five-month period).

> negligently or fraudulently will vary according to the content of the advertisement or the statements made by the admissions officer, the time at which it was published or communicated, the program of study undertaken by each individual student, and the conditions then extant at each of the DeVry campuses.[112]

In the context of product liability claims under FRCP 23(b)(3), certification of claims arising from the use of drugs and medical devices has also been particularly difficult to achieve due, inter alia, to concerns over other causative factors over the ongoing period of use.[113]

However, a lengthy time period is not *always* fatal (although, as with geographic dispersity, it will always be relevant). As in many areas of class actions jurisprudence, it is difficult to define "hard and fast rules". In circumstances where one of the previously identified problems—changing attitudes, multiple possible contributing factors to injury, or manageability difficulties—may manifest, courts have still allowed class actions to proceed. For example, as Davis notes,[114] the mass tort class action can be validly used under FRCP 23 "when the distribution of the product has occurred over a sufficiently limited period of time to enable a realistic assessment of the defendants' conduct. The marketing of the pacemaker leads in *In re Telectronics Pacing Systems Inc*[115] . . . [was an example] of a sufficiently limited timespan of product marketing so that the proof of liability would not be unwieldy and difficult to obtain." In Ontario too, a class action has been certified for medical malpractice, even though the action "concern[ed] allegations of a general practice over a number of years falling below acceptable standards".[116] The Supreme Court of Canada approved certification of a case of sexual abuse of current and former students at a residential school for the deaf and blind operated by the province of British Columbia, even though there had been a " 'dramatic . . . evolution' in law relating to sexual abuse between 1950 and 1992 and it was quite possible that the

[112] *Ibid*, [23].

[113] Of the numerous cases, a few instances suffice: *In re American Medical Systems Inc*, 75 F 3d 1069, 1085–86 (6th Cir 1996) (decertifying class who sued manufacturers of penile implants; common issues did not predominate; plaintiffs used different products, had different complaints, and different treating physicians, and received different information and assurances); *Valentino v Carter-Wallace Inc*, 97 F 3d 1227, 1235 (9th Cir 1996) (decertifying class re an epilepsy drug); *In re Tetracycline Cases*, 107 FRD 719, 735–36 (WD Mo 1985) (denying certification of class re an antibiotic). For further discussion, see: MLC Feldman, "Predominance and Products Liability Class Actions: An Idea Whose Time Has Passed?" (2000) 74 *Tulane L Rev* 1621, 1625–27, and fn 17; J Barist *et al*, "The End of Mass Class Settlements in the US?" [1997] *Intl Commercial Litigation* 38, 39; JL Stengel and SJ Fink, "Class Actions—Defendant's Perspective" [1997] *Intl Commercial Litigation* 31, 32 ("Outside of the securities and antitrust contexts (and particularly in the products liability and mass tort contexts), . . . plaintiffs have found it considerably more difficult to obtain class certification over a defendant's opposition").

[114] MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev* 159, 229.

[115] 172 FRD 271, 288 (SD Ohio 1997).

[116] *Anderson v Wilson* (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) [34], leave to appeal refused: SCC, 25 May 2000.

nature of a school's obligations to its students has changed over time."[117] Under the US federal rule, it has similarly been stated that class action certification in a securities suit should not be denied merely because the class period was a lengthy one and there were multiple disclosures by the defendants during the class period.[118] The previously discussed decision under Australia's federal regime concerning representations made about a home alarm system also confirms that ongoing statements and conversations over a period can amount to representations of the same substance so as to base a class action.[119]

Thus, it is not necessarily true to say of any of the focus jurisdictions that "class actions will generally arise from one event. They are not available in cases where there are several events occurring over a period of time each of which is specific to different parties."[120] However, case law from all focus jurisdictions does demonstrate that the timespan over which the class members were affected by the defendant's conduct is a necessarily important and relevant factor when determining whether the requisite commonality exists.

(c) Use of sub-classes

The definition of the class of litigants by reference to sub-classes is expressly permitted by the statutory regimes of all focus jurisdictions.[121] They are created where the sub-class contains members having issues that raise common issues not shared by all the class members. Surprisingly, the OLRC recommended against including an express provision dealing with sub-classing on the basis that it "would unnecessarily complicate matters",[122] preferring the view that "if certain issues are common to only part of a class, the court could accommodate these differences by invoking its powers under the general management provision." Other law reform agencies have chosen to expressly provide for subclasses,[123] and the

[117] *Rumley v BC* 2001 SCC 69, 205 DLR (4th) 39 (SCC) [31]. The Supreme Court also referred to the following instances: Eg: *Chace v Crane Canada Inc* (1996), 26 BCLR (3d) 339 (SC [in Chambers]) [28] (class action certified for negligent manufacture and sale over 11-year period on grounds that, if the defendant were "partially successful in its defence and ultimately found to have been negligent over part of the period only, that result c[ould] be accommodated in the answer to the common question", aff'd: (1997), 44 BCLR (3d) 264); *Endean v Canadian Red Cross Society* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (SC) [40] (class action certified for negligence and spoliation over four-year period notwithstanding defendant's argument that the standard of care would have been in flux throughout the material time), although decertified on appeal on the basis that an action for spoliation should not be allowed to stand: (1998), 157 DLR (4th) 465, 48 BCLR (3d) 90 (CA).

[118] *In re LILCO Securities Litig*, 111 FRD 663, 669 (ED NY 1986).[119] *Williams v FAI Home Security Pty Ltd (No 2)* [2000] FCA 726.

[120] W Pengilley, "Class Actions Stumble: Tobacco Companies Win" (2000) 16 *Trade Practices L Bulletin* 31, 32, said in relation to the tobacco litigation under Pt IVA in which the representative plaintiff lost.

[121] CPA (Ont), ss 5(2), 6(5), 8(2); CPA (BC), ss 6(1), 7(e), 8(2); FCA (Aus), s 33Q(2); FRCP 23(c)(4)(B).

[122] *OLRC Report*, 454.

[123] *FCCRC Paper*, 45; *AltaLRI Report*, [166]; *ManLRC Report*, 63.

extensive and successful use of sub-classing across the focus jurisdictions has not subsequently borne out the OLRC's concerns in this regard.[124]

The potential for sub-classing was mooted by the US Supreme Court in *Amchem Products* as one alternative when a class does not meet FRCP 23(b)(3)'s requirements,[125] and consistent with this, the technique has been employed in a variety of scenarios. Tucker has suggested[126] that sub-class designation under FRCP 23(b)(3) is appropriate "where (1) there is antagonism or some conflict of interest between sections of the main class; (2) unmanageability would otherwise result at trial; or (3) one lawsuit presents different questions pertaining to the liability of different defendants for various acts committed at different times." Other commentators have broadly agreed with this analysis.[127]

However, caution must be advocated with sub-classing. As Gensler succinctly explains,[128] it is an inherently limited tool in class action management:

> If the individual class members need to prove an issue individually—reliance, for example—subclassing does not change that. Even if the court could sort the class members into groups based on various theories of reliance, each class member in each group would still need to present individual proof of reliance. Indeed, for truly individual issues, subclassing provides no help because each subclass—properly defined as to that issue—would consist of a single class member. Second, subclassing has secondary consequences for certification. Each subclass must independently satisfy the requirements for class certification. Thus, because each subclass needs to independently satisfy numerosity, the idea that courts can use subclasses to isolate 'problematic' class members is suspect. Moreover, extensive subclassing can create manageability problems that undermine the superiority requirement.

Under the first of the categories where sub-classing is feasible, Tucker notes that antagonism between sections of the class will create the need to subdivide because the requirement that the representative adequately protect the interests of the class[129] would otherwise be impossible to satisfy.[130] Thus, subclasses may be appropriate in a class suit based upon employment discrimination,

[124] For a discussion of subclassing in the Canadian context, see: WE McNally and BE Cotton, "Subclass Designation in Class Action Proceedings" (2002) 25 *Advocates' Q* 216, citing also: JA Hodgson and BA Tough, "Practical Strategies in Class Actions" in (1999) Advocates' Society (Ontario) *Back to Basic Series*, 19–20 Feb 1999; WK Branch, *Class Actions in Canada* (Vancouver, Western Legal Publications, 1996) [4.1620]–[4.1690].

[125] 521 US 591, 605, 608, 627, 117 S Ct (1997).

[126] S Tucker, "The Application of Subclasses to Rule 10b-5 Actions in the Second Circuit" (1990) 25 *New England L Rev* 733, 752.

[127] See, eg: S Bisom-Rapp, "The Use of Subclasses in Class Action Suits under Title VII" (1987) 9 *Industrial Relations LJ* 116; *Newberg* (4th) § 3.25 p 423–24 (subclassing appropriate when groups within proposed class have adverse interests); JC Coffee, "Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation" (2000) 100 *Columbia L Rev* 370, 396; SS Gensler, "Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)" (2003) 56 *Oklahoma L Rev* 289, 321–22.

[128] Gensler, *ibid*, 322.

[129] FRCP 23(a)(4).

[130] Tucker, n 126 above, 753, and see, eg: *Boucher v Syracuse University*, 164 F 3d 113, 119 (2nd Cir 1999).

where conflicts might arise between employees on the one hand and applicants on the other who were denied employment and who will, if granted relief, compete with employees.[131] In the situation of sub-class designation for manageability reasons, a variety of potential scenarios have emerged. For example, the solution of using sub-classes has been used (although not always successfully[132]) under FRCP 23 where a nationwide class action contains some residents of states whose variations in laws compromise commonality.[133] It has also been suggested that a large class could be divided into smaller classes so that the smaller class could be treated as a test case. Hence, notice could be achieved at a reasonable expense rather than communicated to the "entire universe",[134] again assisting the manageability of the action. Under the third category identified by Tucker, where discrete transactions are involved in one proposed class action, and there is no common course of conduct alleged, subclassing may also be the salvation of the action.[135]

The case law from the focus jurisdictions elsewhere reflects a similar willingness for courts to use the sub-classing technique to accommodate differences within the class that would otherwise prevent the commencement and progress of a class action. For example, where one sub-class is advancing a different theory of liability from that of the remaining sub-classes, a problem that potentially arose in Ontario in *Anderson v Wilson*,[136] sub-classes can be useful. It was alleged that, as a result of the negligent administration of electroencephlogram tests, former patients of a clinic contracted Hepatitis B. The class action was only allowed to advance upon the creation of sub-classes, which entailed separating infected patients from those uninfected patients who had been notified of their possible infection. This was necessary (said the Court of Appeal) because the infected patients were seeking to establish that the clinic failed to meet an appropriate standard for infection control and that they were, on the balance of probabilities, infected as a result. In contrast, the uninfected patients were not

[131] *General Telephone Co of the Northwest Inc v EEOC*, 446 US 318, 332, 100 S Ct 1698 (1980).

[132] *In re Rhone-Poulenc Rorer Inc*, 51 F 3d 1293, 1300 (7th Cir 1995) (denying certification for nationwide class on basis that jury "will receive a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia"). Also: *In re Bridgestone/Firestone Inc Tires Products Liab Litig*, 288 F 3d 1012, 1018 (7th Cir 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable").

[133] *In re Telectronics Pacing Systems Inc*, 168 FRD 203, 215 (SD Ohio 1996)("all states do not agree on some of the issues presented here, and therefore, subclasses with proper representatives must be formed"). For further discussion, see: P Venugopal, "The Class Certification of Medical Monitoring Claims" (2002) 102 *Columbia L Rev* 1659, 1693, and fn 159.

[134] Suggested in *Eisen v Carlisle and Jacquelin*, 417 US 156, 180 (1974) by Douglas J dissenting, citing earlier decision: 479 F 2d 1005, 1023 (2nd Cir 1973) and noted in S Tucker, "Application of Subclasses to Rule 10b-5 Actions in the Second Circuit" (1990) 25 *New England L Rev* 733, 756.

[135] *Levine v American Export Industries Inc*, [1975–76] Fed Sec L Rep (CCH) ¶95,412 (SD NY 1976), cited in Tucker, *ibid*, 757.

[136] (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (Ont CA) [38], [40]. Cf: *Lacroix v Canada Mortgage & Housing Corp* (2003), 36 CPC (5th) 150 (SCJ) [54]–[55], where *Anderson* was not followed, and sub-classing would not solve the "real and present" conflicts (if one sub-class who did not share in benefits upon leaving employment were successful with their claim, the members of the group who had already shared in both distributions would see their share reduced accordingly).

seeking to establish that causal link at all, and were indifferent to whether it was established—their theory of liability was that the conduct of the defendants occasioned the sending of notices which caused them nervous shock.[137]

Additionally, sub-classes have been suggested across the post-FRCP 23 jurisdictions to facilitate valid commencement where commonality will be useful to establish prima facie liability, but thereafter, damages assessments will vary from one class of litigants to the other;[138] or where factual differences between one group and another mean that unique defences may be available against the former group;[139] or where a group within the class has a common issue of fact against a defendant that is not shared by all class members;[140] or where the law to be applied to the claims of the class members will be different.[141] Sub-classes may also be useful where the class members suffered different loss and damage. For example, *Cotter v Levy*[142] arose from allegations that the defendants caused, and then continued and/or worsened, an historic fire of four days' duration that consumed vast quantities of stored plastic waste materials, and which allegedly caused a plume of smoke to carry poisonous substances, causing property damage and personal injury in the greater Hamilton area. One sub-class was designated as a group of jail inmates, for whom a particular common issue of whether there was a breach of Charter obligations when the relevant authorities refused to evacuate them, was determinable. The court also required the appointment of another representative plaintiff to represent the sub-class of those who had allegedly suffered pure economic loss only via disruption of their business(to supplement the class representatives who represented those with personal or property injuries, and the inmates).[143]

Without the sub-classing technique, disparity between sub-classes, manageability difficulties, or conflicts of interest, would preclude sufficient commonality to commence a class action. Indeed, to the extent that sub-classes have not been employed to save the commencement of a class action where a sub-class does not have a particular common issue shared with the other litigants, that

[137] *Ibid* (Ont CA), [21], and discussed further: WE McNally and BE Cotton, "Subclass Designation in Class Action Proceedings" (2002) 25 *Advocates' Q* 216, 222.

[138] Foreshadowed in *Milfull v Terranora Lakes Country Club Ltd* (FCA, 16 Jun 1998) 9 for this and other reasons. Also, under FRCP 23, see: *Welch v Board of Directors of Wildwood Golf Club*, 146 FRD 131, 137 (WD Pa 1993).

[139] *Peppiatt v Royal Bank of Canada* (1996), 27 OR (3d) 462 (Gen Div) [57]–[65] (sub-classes mooted where some members of the class received a documentary misrepresentation and some did not).

[140] The *AltaLRI Report*, [165] provides the useful example of where the plaintiff class members obtained a defective product from different distributors who made different representations about the product.

[141] *Scott v TD Waterhouse Investor Services (Canada) Inc* (2001), 94 BCLR (3d) 320 (SC) [72].

[142] SCJ, 24 Mar 2000. Also: *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [71].

[143] *Ibid*, [35]. On this basis, sub-classes may also have been possible in: *Grace v Fort Erie (Town)* (2003), 42 MPLR (3d) 180 (SCJ), where some class members alleged health problems due to bacteria in the Town water, and others alleged property damage due to coloured water; however, the action was not certified because it was not the preferable procedure.

omission has been often criticised.[144]

4. Whether Same, Similar or Related Circumstances

In order to go forth as a class action under Australia's Pt IVA federal regime, and as a further "threshold requirement",[145] the claims of the class members must arise out of the "same, similar or related" circumstances.[146] The different standards imposed by this section are almost singular[147] in class actions jurisprudence. The requirement does not appear in any of the North American focus jurisdiction regimes. Indeed, the OLRC expressly rejected this expression for Ontario's foreshadowed legislation, commenting that whilst the differing standards or terminology may give courts a broad discretion, they "can only give rise to substantial uncertainty."[148]

The leading Australian case which has interpreted this phrase remains the early decision of *Zhang v Minster for Immigration, Local Government and Ethnic Affairs*.[149] French J stated that the "outer limits of eligibility" for class proceedings were that the claims must arise out of *related* circumstances, "a connection wider than identity or similarity."[150] Viewed as a spectrum, "relatedness" becomes the minimum threshold for plaintiffs to cross. That has been supported by other courts,[151] and extra-curially by Wilcox J, although with the added observation that "the burden of that requirement [relatedness] is difficult to state."[152]

To the author also, utility of such a requirement must surely be questioned.

[144] In Ontario, eg: sub-classes not used in *Sutherland v Canadian Red Cross Soc* (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div) to handle factual differences between class members about the knowledge of the safety of blood and blood products at various times, and alternative causes of infection for haemophiliacs and non-haemophiliacs; failure to sub-class criticised by JA Campion and VA Stewart, "Class Actions: Procedure and Strategy" (1997) 19 *Advocates' Q* 20, 48. In US, eg: sub-classes not used in *Boucher v Syracuse University*, 164 F 3d 113 (2nd Cir 1999) (criticising district court's failure to certify two sub-classes, one for each of women interested in playing varsity lacrosse and women who wished to play varsity softball, rather than certifying only the lacrosse and excluding from that class softball players). In Aust, eg: *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [131] ("if at any stage a conflict of interest emerges, between particular classes of group members or particular individuals, that will not necessarily make it impossible or inappropriate to maintain the proceeding as a representative action. It might prove possible to meet any difficulty by the constitution of sub-groups, and the appointment of sub-group representatives"; decision ultimately overruled on the point of inadequate standing against multiple defendants).

[145] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) [28].

[146] FCA (Aus), s 33C(1)(b).

[147] CCP (Que), art 1003(a) authorises the bringing of a class action if "the members raise identical, similar or related questions of law or fact". Also reflected in the GLO schema: CPR 19.10 ("common or related issues of fact or law").[148] *OLRC Report*, 342.

[149] (1993) 45 FCR 384.

[150] *Ibid*, 404–5.

[151] Eg: *Zi v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 83 (FCA) 88; *Philip Morris (Aust) Pty Ltd v Nixon* (2000) 170 ALR 487 (FCA) [162] (Sackville J); *Cook v Pasminco Ltd* [2000] VSC 534, [50] (decided under the State Victorian legislation, of which s 33C(1)(b) is in the same terms as the federal Pt IVA legislation).

[152] "Representative Proceedings in the Federal Court: A Progress Report" (1997) 15 *Aust Bar Rev* 91, 92. Also, by the same author: "Class Actions in Australia" (Commonwealth Law Conference, Melbourne, 2003) 2.

Under Pt IVA to date, the cases which have been denied status as class actions because of a failure to prove relatedness under s 33C(1)(b) have failed to show a "common issue of law or fact" under s 33C(1)(c) in any event. In *Philip Morris (Australia) Ltd v Nixon*,[153] the latter criterion failed because representations of different substance and effect were made to different class members; and the alleged representations were made over a wide geographical scope and over a long time period.[154] The case, in other words, was never going to satisfy the requirement of a common issue of law or fact, quite regardless of showing as tenuous a concept as "related circumstances", which also failed. Both elements have likewise failed in other cases.[155] Indeed, the author is unaware of any case under Pt IVA which has satisfied a common issue of law or fact but has failed "relatedness". On the other hand, the cases which have specifically noted that s 33C(1)(b) was satisfied also complied with the requirement of a common issue of law or fact.[156]

In fact, as Freeman notes, "the terms of s 33C(1) are so effectively expanded by s 33C(2) [that] the courts have not been persuaded to read down "relatedness" to any significant degree",[157] at least not where the court is satisfied that there *is* a common issue in dispute. The criterion certainly has not proven to be the burden to class plaintiffs that the other criteria in s 33C(1) have turned out to be. Therefore, despite early academic[158] and extra-curial[159] comment to the contrary, the case law which has explicitly considered whether claims arise out of the same, similar or related circumstances is unconvincing that such a criterion should exist independently of the requirement of a common issue of fact or law.

Moreover, the ALRC, upon whose recommendation s 33C(1)(b) was incorporated,[160] did not articulate any factual scenario where the standards of "similar" or "related" would differ; nor indeed, did the ALRC explain where

[153] (2000) 170 ALR 487 (Full FCA).

[154] See pp 179–82.

[155] *Soverina Pty Ltd v Natwest Aust Bank Ltd* (1993) 40 FCR 452, 456; *Hunter Valley Community Investments Pty Ltd v Bell* (2001) 37 ACSR 326 (FCA) [66], [71]; *Cook v Pasminco Ltd* [2000] VSC 534, [57].

[156] Eg: *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 (FCA) (although commonality ultimately failed because the common question was not "substantial" as that term was judicially interpreted at the time); *Batten v CTMS Ltd* [2001] FCA 1493, [23]; *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [50], [54], aff'd: *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153, [133]; *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) ATPR ¶41–679 (FCA) [58]–[59]; *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304, 311.

[157] See: R Freeman, "Class Actions the Australian Way" (1999) 10 *Aust Product Liability Reporter* 109, 110. See also V Morabito, "Class Actions Against Multiple Respondents" (2002) 30 *Federal L Rev* 295, 323–24 ("The inclusion of the word 'related' . . . tends to suggest that this provision was not intended to place, in the path of potential representative parties, a significant barrier"). Note observations to the effect that s 33C(1)(b) was given a fairly restrictive operation in *Philip Morris*: J Beach, "Representative Proceedings—Pleadings" (Commonwealth Law Conference, Melbourne, 2003) [23.5] (although, as noted in text above, the case failed s 33C(1)(c) in any event).

[158] P Lynch, "Representative Actions in the Federal Court of Australia" (1994) 12 *Aust Bar Rev* 159, 162–63.

[159] DM Ryan (the Hon), "Development of Representative Proceedings in the Federal Court" (1993) 11 *Aust Bar Rev* 131, 136.

[160] See cl 12(1)(b) of the Draft Bill, and explanatory material in *ALRC Report*, 173.

common issues would be found but where the claims giving rise to the common issues would be unrelated by their material facts.[161] It is also notable that the other focus jurisdictions have managed to operate effective class action regimes in the absence of such a requirement. Therefore, in the author's view, this rather purposeless threshold criterion within the Pt IVA schema is not one that should be emulated elsewhere.

5. Conclusion

Whilst the commonality provisions in the focus jurisdictions are deceptively simple, they hide a multitude of judicially-created criteria for the commencement of class actions. For example, the common issues must be fairly in dispute; they need not determine liability; but they must be raised within manageable time and geographical limits. It has been suggested that the legislative formula that the issues arise out of "same, similar or related" circumstances is not especially helpful as inserted in Pt IVA. Further, whilst it has been regarded as essential in the post-FRCP regimes to specify a number of no-bar factors that indicate (cf *Markt*) that individual issues do not preclude a class action, the enumeration of such matters will not necessarily condone a class action, as case law pertinent to breach of contract and misrepresentation demonstrates.

Now it is appropriate to consider the second question that arises under the commonality assessment in any class action regime.

C HOW SIGNIFICANT MUST THE COMMON ISSUES BE?

To reiterate, prerequisite to the commencement of a class action is the presence of common issues of fact or law. But what is the requisite interrelationship between the common and individual issues? One of the vexed questions in any class action regime is how significant the common issues of fact or of law must be in order to justify class litigation. The relevant legislative drafting in the focus jurisdictions is quite dissimilar in that regard. Following a snapshot of the different statutory terminologies, the analysis will centre upon five questions pertinent to the substantiality of the common issues.

1. The Different Statutory Treatments

Each jurisdiction has adopted a different statutory approach toward the requisite importance of the common issues for class action litigation, as Table 6.1 demonstrates.

[161] *ALRC Report*, [136]–[138].

Table 6.1 ***How significant must the "common" issues be?***

Australia[162]	**British Columbia**[163]	**Ontario**[164]	**United States**[165]
the claims of all [class members] give rise to a *substantial* common issue of law or fact	In determining whether a class proceeding would be the preferable procedure . . . the court must consider . . . (a) whether questions of fact or law common to the members of the class *predominate* over any questions affecting only individual members	the claims . . . of the class members raise common issues of fact or law	questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members

A few comments upon the background of each provision, the deliberate choices made by the drafters, and some judicial interpretations, may be helpful.

Ontario. Only in Ontario is there absolutely no legislative requirement of substantiality of the common issues nor any requirement that common questions of fact or law "predominate" over any questions affecting only individual members. For this reason, the Ontario regime has been judicially[166] and academically[167] described to be less restrictive than its US counterpart, and that this was one of the "vital differences" between the two regimes.

Despite early doubts, in which the predominance test was judicially implied in the face of legislative silence,[168] or alternatively, that the predominant issue was not a factor in the Act at all,[169] a mandatory predominance test was firmly and expressly rejected by Ontario courts[170] and by the Supreme Court of

[162] FCA (Aus), s 33C(1)(c) (emphasis added).

[163] CPA (BC), s 4(2)(a).

[164] CPA (Ont), s 5(1)(c), read in conjunction with the definition of "common issues" in s 1.

[165] FRCP 23(b)(3).

[166] *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [38], [44]. See also, for notation of the difference in the US approach: *Bunn v Ribcor Holdings Inc* (1998), 38 CLR (2d) 291 (Gen Div) [21]; *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [28].

[167] Eg: M McGowan, "Certification of Class Actions in Ontario" (1993), 16 CPC (3d) 172, 174; J Campion and P Martin, "Litigation—Class Actions: Recent Developments of Importance" Canadian Legal Lexpert Directory 2000 LEXD/2000-33; HT Strosberg, "The Class Struggle Continues: Chapter II" (Practical Strategies for Advocates IX, The Advocates Society (Ontario) 4–5 Feb 2000) [4].

[168] In the very first motion for certification under CPA (Ont), in *Abdool v Anaheim Management Ltd* (1994), 15 OR (3d) 39 (Gen Div) [63], Montgomery J held that the Act was not suitable where individual issues predominated over common issues.

[169] Two weeks following *Abdool*, Montgomery J commented in *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [67] that the "[p]redominant issue is not a factor in our Act". As Watson notes, the incompatibility between the two views was understandable, given the difficult task of interpreting, for the first time, a brand new piece of complex legislation: GD Watson, "Initial Interpretations of Ontario's Class Proceedings Act" (1993), 18 CPC (3d) 344, 345.

[170] Eg: *Rosedale Motors Inc v Petro-Canada Inc* (1999), 42 OR (3d) 776 (Gen Div) [31], not affected by appeal: (Div Ct, 22 Oct 2001); *Carom v Bre-X Minerals Ltd* (1998), 41 OR (3d) 780 (Gen Div) [22]; *Huras v Com Dev Ltd* (2000), 36 CPC (4th) 31 (SCJ) [14]; *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) [14].

Canada.[171] Ontario's statute only requires that there are common issues of fact or law, and that class proceedings are preferable.[172] The legislature followed the OLRC's recommendation[173] that to incorporate a mandatory predominance requirement could render the commonality threshold tests too onerous.

However, the OLRC did suggest[174] that, as one of the factors that the court should consider when determining whether a class proceeding would in fact be "preferable" to other methods of proceeding, "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members" should be included. In one of the many ironies concerning the implementation of the OLRC's recommendations, the drafters of the Ontario Act chose to omit that list of factors—but the British Columbia legislature incorporated it.

Nonetheless, the "predominate" factor has been judicially required in Ontario in any event. The proper approach in that jurisdiction "is to weigh all of the relevant factors, including the common issues and the individual issues in the context of the goals of the Act."[175] The Supreme Court has confirmed this comparative element by stating that "whether the common issues justify a class action involves an examination of the 'significance' of the common issues in relation to the individual issues".[176] It would thus appear that the relative importance of the common and individual issues is one of the factors to consider when deciding whether class proceedings are *preferable*.[177] Whilst predominance is not mandatory for commonality, it is relevant to preferability, just as the OLRC intended that it should be.

Despite the seeming simplicity of the legislative drafting of the Ontario regime—no mandatory predominance and a mere common issue of fact or law sufficient—the position has become somewhat "muddied". Three factors must be noted. First, the Supreme Court of Canada has introduced the phrase into the Ontario commonality provision, "the class members' claims must share a *substantial common ingredient* to justify a class action".[178] This phrase has been

[171] *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534 (SCC) [39].

[172] Respectively: CPA (Ont), s 5(1)(c), read in conjunction with the definition of "common issues" in s 1; s 5(1)(d).

[173] *OLRC Report*, 344–45.

[174] *Ibid*, 416, and recommendation 2(a).

[175] *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [26].

[176] Cited in *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [26] as one of the principles arising from *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534 (SCC).

[177] Eg: *Ormrod v Hydro-Electric Comm of the City of Etobicoke* (2001), 53 OR (3d) 285 (SCJ) [36]; *Wilson v Servier Canada Inc* (2001), 52 OR (3d) 20 (Div Ct) [15], refusing leave to appeal from Cumming J's earlier judgment: (2001), 50 OR (3d) 219 (SCJ), especially [108]–[112]; *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [40].

[178] *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534, [39] (emphasis added).

subsequently oft-cited by Ontario courts[179] and introduces a requirement similar to the Australian express provision of "substantial common issue" with which the Australian judiciary has had considerable interpretational difficulties. Secondly, with the importation of a comparison test between the significance of common and individual issues, there is now some judicial uncertainty as to "[w]hether or not this question is properly to be considered in relation to the requirements of section 5(1)(c) [commonality], or in relation to the preferability test in section 5(1)(d)—or whether the requirements overlap".[180] Thirdly, as a result of the Supreme Court's consideration of the principles to be applied under the commonality provision of the Ontario statute, there is the overarching spectre that decisions decided prior to the Supreme Court's decision must be considered with caution, as one court has noted: "the decision to allow the negligent misrepresentation claim as a common issue in [*Carom v Bre-X Minerals Ltd*[181]] was also decided on a standard for determining the existence of common issues that must now be re-evaluated in the light of the subsequent decisions of the Supreme Court of Canada which deal with the appropriate standard to be applied."[182]

All of these factors undermine to some extent the simplicity hoped for by the OLRC, but accurately reflect the complexity of the so-called purposive approach that must be adopted under the Ontario statute when deciding to what extent must a trial of common issues advance the proceedings before certification would be justified.

United States. In contrast, the US federal rule is upfront and mandatory: it expressly requires that the common questions of fact or law predominate over questions affecting only individual class members where damages class actions are instituted. The rationale for this requirement was explained by the Rules Advisory Committee at the time of the rule's introduction in 1966 as follows: "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated . . . It is only where this predominance exists that economies can be achieved by means of the class-action device."[183]

In this respect, class actions under (b)(3) for damages are subject to the "far more demanding"[184] standard of predominance than applicable to class actions

[179] Eg: *Kumar v Mutual Life Ass Co of Canada* (2003), 226 DLR (4th) 112 (Ont CA) [46]; *Givogue v Burke* (2003), 25 CCEL (3d) 91 (SCJ) [22]; *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [26].

[180] *Andersen v St Jude Medical Inc* (SCJ, 16 Sep 2003) [48], [64]. Also: *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 360 (SCJ) [70].

[181] (1999), 44 OR (3d) 173 (SCJ).

[182] *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [31].

[183] Rules Advisory Committee, "Notes to 1966 Amendments to Rule 23" (1966) 39 FRD 69, 102–3.

[184] *Amchem Products Inc v Windsor*, 521 US 591, 624, 117 S Ct 2231 (1997). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation": at 594.

under (b)(1) and (b)(2), for which it is only necessary to prove that common questions exist under FRCP 23(a)(2). In reality, in class suits instituted under (b)(3), courts do sometimes treat the application of the common questions and predominance tests together (that is, if there is predominance of the common issues, then the lesser FRCP 23(a)(2) prerequisite is necessarily satisfied),[185] although some commentators adhere to the view that the common questions requirement continues to exercise a function separate from the predominance requirement.[186] Further, under FRCP 23(b)(3), the close linkage between the superiority and predominance requirements of the rule that must be satisfied at certification have been judicially[187] and academically[188] acknowledged.

The US courts have consistently interpreted "predominance" to require that common issues constitute "a significant part of the individual cases",[189] although as will be discussed shortly, the precise tests by which to measure that significance have varied somewhat. As a result of this uncertainty as to what predominance *means*, it is fair to say that the FRCP 23(b)(3) common questions predominance condition has been viewed elsewhere with a degree of mistrust and trepidation. It was noted by the OLRC[190] to be the source of "considerable controversy", and has been described elsewhere as "one of the most unsatisfactory aspects of US Federal Rule class action procedures."[191] Even the Manual of Federal Practice admits: "[t]he rule does not define or make exactly clear what is meant by the term 'predominate.' "[192] Indeed, much tends to be made, both

[185] *In re Visa Check/MasterMoney Antitrust Litigat*, 280 F 3d 124, 136, fn 6 (2nd Cir 2001); *Smith v Brown & Williamson Tobacco Corp*, 174 FRD 90, 94 (WD Mo 1997); *Gunter v Ridgewood Energy Corp*, 164 FRD 391, 395 (DNJ 1996).

[186] *Newberg* (4th) § 3.10 p 290, and fn 25, § 4-22. Also: M Feldman, "Predominance and Products Liability Class Actions: An Idea Whose Time Has Passed?" (2000) 74 *Tulane L Rev* 1621, 1623 ("It must be separated, doctrinally, from the commonality requirement no matter how tempting it is to mix the two. Predominance invokes a superiority issue that is absent in commonality").

[187] Predominance could not be met in the following: *Amchem Products Inc v Windsor*, 521 US 591, 615–16, 117 S Ct 2231 (2997) (proposed settlement in asbestos exposure class action); *Valentino v Carter-Wallace Inc*, 97 F 3d 1227, 1234–35 (9th Cir 1996) (class claiming injury from epilepsy drug); *Castano v American Tobacco Co*, 84 F 3d 734, 740–44 (5th Cir 1996) (class of cigarette smokers); *In re American Medical Systems Inc*, 75 F 3d 1069, 1080–82 (6th Cir 1996) (class of penile prosthesis patients), and see particularly: Feldman, *ibid*, fn 17.

[188] Eg: Feldman, *ibid*, 1623. Earlier: B Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967) 81 *Harvard L Rev* 356, 389–90. Also: *Newberg* (4th) § 3.10 pp 290–91.

[189] *Watson v Shell Oil Co*, 979 F 2d 1014, 1022 (5th Cir 1992) ("In the context of mass tort litigation, we have held that a class issue predominates if it constitutes a significant part of the individual cases"); *Jenkins v Raymark Industries Inc*, 782 F2d 468, 472 (5th Cir 1986) ("in order to 'predominate' common issues must constitute a significant part of the individual cases"); *In re Asbestos School Litig*, 104 FRD 422, 431–32 (E D Pa 1984) (certification allowed when "common questions . . . [are] a significant aspect of the case"), all cited in RP Phair, "Resolving the 'Choice-of-Law' Problem" (2000) 67 *U of Chicago L Rev* 835, 839, fn 20.

[190] *OLRC Report*, 337.

[191] *ManLRC Report*, 51.

[192] RA Givens, *Manual of Federal Practice* (5th edn, Newark, NJ, Matthew Bender, as updated) § 3.141.

academically[193] and judicially,[194] of the choice within other jurisdictions not to follow the predominance requirement under FRCP 23. However, ironically enough, and despite the different legislative language used, the judicial sentiments about how significant the common issues should be, and the tests by which that should be measured, have been uncannily similar across the focus jurisdictions. This convergence of views will be dealt with shortly.

British Columbia. As another option altogether, in British Columbia, the legislature decided to adopt precisely the recommendation of the OLRC[195] with respect to the requirement of predominance, and include it as one of the factors (under s 4(2)(a)) that a court should be required to weigh in determining the issue of superiority. The statute explicitly states that the commonality requirement may be satisfied "whether or not [the] common issues predominate over issues affecting only individual members".[196] Therefore, of this statute the Supreme Court has said that "while it clearly contemplates that predominance will be a factor in the preferability inquiry . . . it makes equally clear that predominance should *not* be a factor at the commonality stage."[197]

Some members of the British Columbia judiciary have sought to place this province's requirements mid-way along the spectrum, between Ontario and the US, by stating that s 4(2)(a) "not being mandatory in its terms, is less restrictive than the American Rule 23(3). But by requiring predominancy . . . to be considered in relation to the important question of 'preferable procedure', it is more restrictive than the Ontario Act."[198] However, as explained previously, whether such a clear-cut approach can now be maintained is highly doubtful, in light of the judicial statements that predominance of common issues is relevant in Ontario as part of the certification assessment.

Australia. The Australian Pt IVA regime has incorporated the statutory "threshold requirement",[199] unique among the focus jurisdictions, of a "*substantial* common issue of law or fact". The requirement was not a recommendation of

[193] Eg: see *AltaLRI Report*, [159] which called the predominance requirement a "bone of much contention"; *ManLRC Report*, 51, which referred to the requirement as leading to "detailed and speculative arguments". Neither commission recommended the inclusion of a predominance requirement.

[194] Eg: *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158 (BCSC) [53] ("[The American] approach has been rejected in our statute, which reduces the question of predominance to one of several factors for consideration . . . In my view, the intention behind these provisions of the Act is to put more emphasis on the goal of access to justice than on that of judicial economy"). Also: *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [44], [67]; *Wong v Silkfield Pty Ltd* (16 Jan 1998) ("There is no requirement in Pt IVA of the FCA Act similar to r 23(b)(3) of the [FRCP], namely, that the common issues of fact or law predominate. Pt IVA is meant to be a flexible procedure to advance the interests of justice").

[195] *OLRC Report*, 346, and see Draft Bill, cl 4(a).

[196] CPA (BC), s 4(1)(c).

[197] *Rumley v BC* [2001] SCC 69, 205 DLR (4th) 39 (SCC) [33].

[198] *Tiemstra v Insurance Corp of BC* (1996), 22 BCLR (3d) 49 (SC) [14], aff'd: (1997), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA). Also: *Hoy v Medtronic Inc* (2003), 14 BCLR (4th) 32 (CA) [44].

[199] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) [28].

the ALRC.[200] Hence, its insertion by the legislature was perceived by one court to carry significance in narrowing the availability of a class action: "The imposition of this requirement demonstrates a clear intention on the part of the parliament to restrict the wider availability of the representative procedure recommended by the [Australian Law Reform] Commission, the better to achieve the objectives of the new procedure."[201] However, this judicial view that substantiality was meant to restrict the availability of class actions has been overruled by the Australian High Court.

The word "substantial" which appears in s 33C(1)(c) is an "inherently imprecise word", and its application involves "an element of evaluation."[202] Not surprisingly, there has been a vigorous debate and disagreement in the higher courts of Australia as to how substantiality of the common issues should be determined. No less than three interpretations have been accorded it over the life of the provision's operation: a greater number of common than individual issues (ie, numerical predominance); the common issues have a "major impact" on the litigation; and as the High Court has established ultimately, that the common issues are "real and substantial". The conundrum indicates the difficulties inherent in any case where Parliament's adoption of a reform body's package is modified without any, or adequate, explanation.[203] The comment that "in the early period following amendment of Rule 23 in 1966, courts struggled to find the proper focus of the predominance test for Rule 23(b)(3) class actions"[204] could apply equally to the interpretation accorded to a "substantial" issue of law or fact under Australia's federal regime, where courts have also had trouble identifying just what the test does entail.

2. Judicial Divergence and Convergence of Views

Despite the differences in legislative wording described above, over the years, courts across the focus jurisdictions have found some significant areas of practical agreement on just how to define "how big" the common issues must be to warrant class treatment. Several possible interpretations will be considered in this section.

[200] *ALRC Report*, [138], and see Draft Bill, cl 12(1)(a).

[201] *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 (Full FCA) 167 (O'Loughlin and Drummond JJ). The objectives contained in the *ALRC Report* may be taken into account when seeking to determine the meaning of s 33C(1)(c): Acts Interpretation Act 1901 (Aus), s 15AA.

[202] *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 (Full FCA) 166 (O'Loughlin and Drummond JJ), 155 (Foster J); *Milfull v Terranora Lakes Country Club Ltd* (FCA, 16 Jun 1998) 7, and see: M Wilcox (the Hon), "Representative Proceedings in the Federal Court of Australia: A Progress Report" (1997) 15 *Aust Bar Rev* 91, 93.

[203] See Drummond J in *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723 (FCA) 731, and his reference to a similar sentiment expressed in V Morabito, "Class Actions: The Right to Opt Out" (1994) 19 *Melbourne U L Rev* 615, 623.

[204] *Newberg* (4th) § 4.25 p 169; CA Wright *et al*, *Federal Practice and Procedure* (2nd edn, St Paul, Minn, West Publishing Co, 1992) § 1778, 522–26 ("Exactly what is meant by 'predominate' is not made clear in the rule").

(a) Whether the common issues could *dispose of the litigation entirely*

According to the dispositive test,[205] the common questions will be said to predominate if their determination would resolve the mass of disputes or determine the defendant's liability. As explained previously,[206] such a test is inappropriate in each focus regime by reason of the very manner in which the schemas have been drafted. Individual issues are specifically contemplated. However, notwithstanding that the dispositive test itself is not a definitive test of predominance or substantiality in any of the focus jurisdictions, there remains the prospect that a common issue, if decided against the class, would thereby dispose of all class members' claims.

This type of dispositive test has been acknowledged under FRCP 23(b)(3) case law as being significant. For example, in *State of Minnesota v US Steel Corp*,[207] the common issue of conspiracy was certified, in circumstances where individual damage and fraudulent concealment would require individual determination. The court noted that "if defendants are upheld in their current posture of denying any conspiracy, then this is clearly the only issue that ever will be tried and certainly it cannot then be gainsayed but that such is the predominant question." Similarly, in the *In re Agent Orange Product Liability Litig*,[208] in which the Second Circuit affirmed class certification of members of the United States, Australian and New Zealand armed forces for injuries that were claimed to have resulted from exposure to Agent Orange in Vietnam, the dispositive test also appeared to play a significant role in permitting certification. It was of considerable influence on the court that the success of the common issue, the military contractor defense, would end the entire litigation, while its failure would not affect the subsequent individual trials.[209]

An application of the test also occurred in the Ontario case of *Lau v Bayview Landmark Inc*,[210] concerning "a real estate deal gone sour". All class members entered into a standard conveyancing agreement with the developer. They each paid deposit monies to the developer's solicitors, but the project was never completed. The deposit monies were released by the solicitors to the developer, and were dissipated and never refunded to the purchasers. The class purported to sue, amongst others, the developer and its solicitors. The plaintiffs contended that the terms of a trust provision in the agreement required that the trust funds be used only for the construction of the condominium development (they were undisputably used for other purposes). If they were indeed the terms of the trust (that being the common issue), that would result in the defendants' liability. On the other hand, if the use made of the trust funds was found to be proper, then

[205] Called the "outcome-determinative" test in *OLRC Report*, 339.
[206] See pp 167–70.
[207] 44 FRD 559, 569 (D Minn 1968).
[208] 818 F 2d 145 (2nd Cir 1987).
[209] *Ibid*, 166–67.
[210] (1999), 40 CPC (4th) 301 (SCJ).

the litigation with respect to the breach of trust claim would end. Thus, either outcome of the common issue, depending upon the finding, could ultimately dispose of the action against the solicitors and the principals of the developers, and could render the remainder of the action unnecessary.[211] This was a strong factor favouring commencement of the class action. Other authority has supported a finding of commonality where the common issue, if decided against the class, would end the litigation once and for all.[212]

This test also garnered some support under Australia's Pt IVA regime, but under the name of the "major impact" test. In *Silkfield Pty Ltd v Wong*,[213] the majority considered that class proceedings would be validly commenced where the determination of the common issue was likely to have "a major impact on the litigation because it is at the core of the dispute", or where litigation of the common issue would be "likely to resolve wholly or to any significant degree" the claims of all class members.[214] This interpretation enjoyed considerable judicial endorsement under Pt IVA,[215] although a differently constituted Full Federal Court did not agree with it.[216] In light of this division of views at appellate level, the "major impact" test was ultimately overruled by the High Court, who criticised it on the basis that it was too peremptory, and that any evaluation of whether a purported common issue is at the core of the dispute between the defendant and class members extends "well beyond the threshold at which s 33C operates".[217] As noted later, the replacement test postulated by the High Court may be criticised on the basis that it sets a threshold for the common issues which appears significantly lower than that which the legislators envisaged.

The facts of the Australian decision in *Johnson Tiles Pty Ltd v Esso Australia Ltd*[218] are convenient to illustrate the contention that (were it to be permitted as a key indicator of substantiality and predominance), the "major impact" test

[211] (1999), 40 CPC (4th) 301 (SCJ), [57].

[212] Eg: *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496 (Div Ct) [131] (Moldaver J); *Ormrod v Hydro-Electric Comm of the City of Etobicoke* (2001), 53 OR (3d) 285 (SCJ) [35]; *Canadian Imperial Bank of Commerce v Deloitte & Touche* (2003), 33 CPC (5th) 127 (Div Ct) [41].

[213] (1998) 90 FCR 152 (Full FCA).

[214] *Ibid*, 168. Also: *Zhang v Minister for Immigration, Local Govt and Ethnic Affairs* (1993) 45 FCR 384, 405, cited with approval in *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 (Full FCA) 168.

[215] Eg: *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) ATPR ¶41–679 (FCA) [49]–[50] (trial), where Merkel J noted that it would be "unfortunate" if the court were to adopt an "overly legalistic approach" to the substantiality requirement of s 33C(1)(c). See also: *Zhang*, *ibid*; *Milfull v Terranorra Lakes Country Club Ltd* (FCA, 16 Jun 1998) 7; *Johnson Tiles Pty Ltd v Esso Aust Ltd* [1999] FCA 636 (Full FCA) [13]–[18]; *Dinning v Commissioner of Taxation* (1999) 42 ATR 299 (FCA) [18].

[216] *Finance Sector Union of Australia v Commonwealth Bank of Aust* (1999) 94 FCR 179 (Full FCA) [10] (Wilcox, Ryan and Madgwick JJ) ("With respect, we do not see the justification for limiting the word 'substantial' in s 33C(1)(c) by the use of non-statutory terms like 'major impact on the litigation' and 'core of the dispute'. These considerations may be relevant to a question whether the proceeding ought to be allowed to continue as a representative proceeding: see s 33N . . . But we do not think they affect the question whether the proceeding was well-commenced").

[217] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) [26].

[218] (1999) ATPR ¶41–679 (FCA); aff'd: [1999] FCA 636 (Full FCA).

appears to be particularly effective where there are a large number of putative class members but one principal cause of action. The class claim for negligence arose out of the explosion and fire that occurred at the Longford gas facility owned and operated by Esso in the state of Victoria. Esso argued that there was no "substantial common issue of law or fact" because the common issues of fact—whether the fire and explosion were caused or contributed to by a negligent act or omission of Esso—were outweighed by the huge (over one million) individual enquiries that the court would have to undertake in order to determine whether a duty of care was owed to the class members. Esso contended that so much of the court's time would be taken up with determining the existence and scope of any duty that might be owed, that it would diminish and "swamp" the issue of whether Esso caused or contributed to the explosion and fire.[219] It was certainly arguable that, on a strict comparative basis, the common issues were not substantial. However, that was not decisive under the major impact test. As the Full Court noted,[220] if it was held that no act or omission of Esso caused or contributed to the fatal explosion and fire (that is, the decision went against the class), then it would not then matter how the duty question was answered, that enquiry would be useless if causation could not be made out. The cause of action in negligence would fail, and there would be no need to consider individual issues of duty or damage whatsoever. That potential was enough to authorise a class action, even if a determination the other way would have meant that the claims of the class members (in excess of one million) could only be finally resolved by investigation of their individual circumstances. The common issues in *Johnson Tiles* were "substantial" because they had the potential to determine the outcome of the litigation.[221] This view accords with the type of analysis evident in *US Steel Corp* as the test of predominance under FRCP 23(b)(3). However, as noted above, the "major impact" test did not eventually meet with High Court approval.

(b) Literal comparison of common issues and individual issues

(i) Number of common issues > number of individual issues

The earliest meaning of "substantial" under the Pt IVA regime equated the requirement with predominance in the sense of a quantitative comparison test. In *Connell v Nevada Financial Group Pty Ltd*,[222] it was suggested by Drummond J that the correct approach was to compare or balance the extent of the common and non-common issues; one could not answer whether the common issues were "substantial" by focusing solely on the common issues.[223] It required a comparison. It followed in that case that one common issue of fact

[219] *Ibid* (Full FCA), [13].
[220] *Ibid* (Full FCA), [18].
[221] *Ibid* (FCA), [48], [53], [55], aff'd: [1999] FCA 636 (Full FCA) [13], [18].
[222] (1996) 139 ALR 723 (FCA).
[223] *Ibid*, 731.

amongst the class members (whether a particular representation was made to all class members) was not sufficient to establish a "substantial" common issue of fact, and the class action was invalidly commenced. This approach of comparing common and individual issues did not subsequently find broader judicial acceptance.[224] In particular, it received extra-curial and critical analysis by Wilcox J[225] on the basis that it did not seem necessary to undertake a comparison to determine the question whether the common issues were themselves substantial. His Honour added that to adopt that approach might result in defendants' raising artificial non-common issues to "swamp" the common ones.[226] The High Court subsequently agreed that the comparative-number-of common-versus-individual-issues test was not the operative one by which to assess "substantiality" under s 33C(1)(c).[227]

The comparative approach of listing common and non-common issues has also been downplayed in the very jurisdiction which enacted the requirement of "predominance". In *Deutschman v Beneficial Corp*,[228] it was reiterated that the predominance test under FRCP 23(b)(3) "is not a numerical test and does not require the court to add up the common issues and the individual issues and determine which is greater." As Newberg confirms, predominance does not require the courts to "examin[e] the resulting balance on the scale."[229] However, that is not to say that the shopping list approach is of complete irrelevance: whilst it is possible for a single common issue to be the overriding one in the litigation and thus base a class action (despite numerous remaining individual questions), US courts still refer to the number of individual issues outnumbering the common issues as one reason for denying certification.[230]

(ii) Time taken to decide common issues > time taken to decide individual issues

The approach of comparing the time that it is estimated would be required to dispose of the common issues with the time required to resolve the individual issues, whilst deriving early judicial support,[231] has been also discarded under FRCP 23(b)(3).[232] In accordance with the court's observations in *State of*

[224] As noted in *Schanka v Employment National (Admin) Pty Ltd* (1998) 86 IR 283 (FCA) 287.

[225] M Wilcox (the Hon), "Representative Proceedings in the Federal Court of Australia: A Progress Report" (1997) 15 *Aust Bar Rev* 91, 93.

[226] *Ibid*.

[227] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) [28].

[228] 132 FRD 359, 375 (D Del 1990). Also: *Life Ins Co of Southwest v Brister*, 722 SW 2d 764, 772 (Tex App 1986) ("The test for predominance is not whether common issues outnumber uncommon issues but . . . 'whether common or individual issues will be the object of most of the efforts of the litigants and the court'").

[229] *Newberg* (4th) § 4.25 p 172.

[230] Eg: *In re Visa Check/MasterMoney Antitrust Litig*, 280 F 3d 124, 140 (2nd Cir 2001) (4 common issues capable of proof on class-wide basis compared to 2 issues that might require individualised enquiry).

[231] *B and B Investment Club v Kleinert's Inc*, 62 FRD 140, 145 (ED Pa 1974), and cited in *Newberg* (4th) § 4.25 p 172 with disapproval.

[232] Note, "Developments in the Law—Class Actions" (1976) 89 *Harvard L Rev* 1318, 1506; *OLRC Report*, 339; *Newberg*, *ibid*, 171–72.

Minnesota v US Steel Corp,[233] the approach may be criticised both on the basis that it tends to ignore the possibility of requiring the common issues to be adjudicated—duplicatively—in individual suits by class members; and "it seems specious and begging the question to say that if . . . 500 law suits were brought into a class so that proof on the issues of conspiracy need be adduced only once and the result then becomes binding on all 500, that thereby the common issue of conspiracy no longer predominates because from a total time standpoint, cumulatively individual damage proof will take longer." The comparative test of the estimated time to adjudicate the common and individual issues has never been considered a factor pointing to the substantiality or otherwise of the common issues under Pt IVA,[234] nor has it been determinative in the Canadian regimes.[235]

(c) Where multiple causes of action would be advanced

If the determination of the common issue would assist in resolving more than one cause of action against the defendant, then that has been significant under Pt IVA in pointing to a substantial common issue. This is illustrated by *Milfull v Terranora Lakes Country Club Ltd*,[236] where Kiefel J permitted a class action in circumstances where the common issues "would go a considerable distance towards resolving questions of liability" with respect to causes of action in negligence, breach of contract, and those based on contraventions of the Trade Practices Act 1974 and the Companies Code. Since determination of the common issues was capable of achieving resolution of all or a significant part of the issues of liability raised by these causes of action, the class proceeding was allowed. Kiefel J held that the common issues were, on the basis that they advanced more than one cause of action, "substantial".[237]

(d) Focusing on the common issues—are they significant?

In Ontario, where no predominance or substantiality requirement has been referred to by statute, it has been judicially espoused that if the determination of the common issue/s "has significance for the course of the litigation", will be necessary to resolve each class member's claim, and will "move the litigation

[233] 44 FRD 559, 569 (D Minn 1968).

[234] Some suggestion of relative court hearing time was adverted to in *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [27] but not ultimately commented upon by the appellate court.

[235] *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [40] ("Where there are common issues which would take up a considerable amount of any individual case against the defendants, it is obvious that there will be judicial economy if these common issues need only be determined once, not many or as here hundreds of times. . . . Even if individual issues have to be separately and individually determined, the amount of time required will be in the aggregate substantially reduced").

[236] FCA, 16 Jun 1998.

[237] *Ibid*, 8, referring to s 33C(1)(c).

forward", then class proceedings are justified.[238] Said to be more flexible than the US predominance requirement,[239] the underlying question is a practical one, in the sense that allowing the action to proceed as a class proceeding "will avoid duplication of fact-finding or legal analysis".[240] On the one hand, the courts have said that they are wary of setting the bar too high on the common issues factor,[241] but on the other, the courts have rewritten the statutory wording of Ontario's commonality provision by stating:

> The question on a motion for certification is not simply whether there are common issues raised by the claims advanced. Any proposed class action that has any chance of being certified will, virtually by definition, have common issues. Rather, the issue is whether the resolution of the proposed common issues is going to move the litigation forward to a sufficient degree so as to justify the certification.[242]

Certification will not be allowed, for example, where it is "virtually impossible to embark on a trial of the common issues until the facts which form the basis for all of the individual claims have been presented."[243]

Similarly, in British Columbia, the predominance requirement has been held to exist when determination of the common issues would advance the claims to "a significant degree",[244] or would "advance the claims to an appreciable extent . . . In other words, the common issues predominate over those affecting only individual claims."[245] The British Columbia Court of Appeal has also noted that the verb "predominate" has shades of meaning, and that, in s 4(2)(a) of that province's statute, it has the meaning, "stronger, main or leading element" (*Shorter Oxford English Dictionary*, p. 1653).[246] This approach tends to focus attention upon the common issues and ask how important are the common issues in the overall context of the action.

[238] Eg: *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) [30]; *Ormrod v Hydro-Electric Comm of the City of Etobicoke* (2001), 53 OR (3d) 285 (SCJ) [33]; *Wilson v Servier Canada Inc* (2001), 52 OR (3d) 20 (Div Ct) [14]; *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [40], and at the highest appellate level: *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [32].

[239] *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [44], [67]. See also, for notation of the difference in the US approach: *Bunn v Ribcor Holdings Inc* (1998), 38 CLR (2d) 291 (Gen Div) [21], citing the *OLRC Report* in that regard; *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [28].

[240] *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534, [39], cited in *Kumar v Mutual Life Ass Co of Canada* (2003), 226 DLR (4th) 112 (Ont CA) [44].

[241] *Carom v Bre-X Minerals Ltd* (2001), 196 DLR (4th) 344, 51 OR (3d) 236 (CA) [40] (MacPherson JA). Until *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC), this was probably the most influential and liberal interpretation of the "common issues" criterion under the CPA (Ont): EM Stewart, "Defending against Certification" (2001) 24 *Advocates' Q* 428, 443.

[242] *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [25].

[243] *Fehringer v Sun Media Corp* (2002), 27 CPC (5th) 155 (SCJ) [16] (sexual harassment case), denial of certification aff'd: Div Ct, 30 Sep 2003.

[244] *Hoy v Medtronic Inc* (2003), 14 BCLR (4th) 32 (CA) [49], citing trial judge with approval.

[245] *Ibid*, [50].

[246] *Ibid*, [79].

After various earlier attempts by the Federal Court to imbue the term with definition and meaning, the Australian High Court ultimately confirmed, in *Wong v Silkfield Pty Ltd*,[247] that a substantial issue for the purposes of s 33C(1)(c) is one that must be "real", "one of substance", and not trivial or ephemeral.[248] The High Court upheld the trial judge's decision[249] that, whilst the only issue of fact which could be common to all members of the postulated class was whether the conveyancing statement was true or false, that was substantial in the relevant sense because "the allegations involved were serious and significant and detrimental misrepresentations were claimed."[250] Accordingly, the quantitative comparison and "major impact" tests have been overruled under Pt IVA.[251] The non-trivial interpretation has since been judicially applied,[252] and has received strong academic support.[253] Courts continue to mention the requirement of "substantial", but in reality, appear to pay it little heed in determining compliance with s 33C(1)(c). Indeed, since the High Court decision, it has certainly been sufficient for representative plaintiffs to point to a sole common question of fact or law.[254] These cases raise considerable doubt as to what purpose "substantial" in s 33C(1)(c) serves at all now in that regime. It has also been clarified that it is not to the point for the defendant to allege that the class action would require the court to embark on a wide-ranging enquiry akin to a Royal Commission[255]—the question under s 33C(1)(C) is whether the

[247] (1999) 199 CLR 255 (HCA).

[248] *Ibid*, [23], [27].

[249] FCA, 16 Jan 1998, 17 (Spender J).

[250] (1999) 199 CLR 255 (HCA) [30].

[251] *Ibid*, [28], [30].

[252] Eg: *Murphy v Overton Investments Pty Ltd* [1999] FCA 1673, [4]; *King v GIO Aust Holdings Ltd* (2000) 100 FCR 209, [47], [51] ("the threshold requirement in s 33C should not be viewed as operating in a narrow or unduly limiting way"); *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [52] (common question was whether the cartel arrangements alleged against the vitamin manufacturer defendants were made and given effect to by them), this point aff'd: *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153, [133]; *Vasram v AMP Life Ltd* [2000] FCA 1676, [13] ("the 'substantial' element of the s 33C(1)(c) requirement is easier to meet since the decision of the High Court in *Wong v Silkfield Pty Ltd*").

[253] W Pengilley, "What is a Class Action?" (1999) 15 *Trade Practices L Bulletin* 69, 73; IF Turley, "Group Proceedings" (2001) 75 *Law Institute J* 44, 44; V Morabito, "Class Action Against Multiple Respondents" (2002) 30 *Federal L Rev* 295, 328. Cf: S Stuart-Clark and C Harris, "Multi-Plaintiff Litigation in Australia: A Comparative Perspective" (2001) 11 *Duke J of Comp and Intl Law* 289, 319.

[254] Declared in *Patrick v Capital Finance Corp (Australasia) Pty Ltd* [2001] FCA 1073, [6], and demonstrated in, eg: *Jonsandi Transport v Paccar Aust Ltd (No 2)* [1999] FCA 1788, [7] (one common issue of fact about allegedly defective chassis); *Batten v CTMS Ltd* [2001] FCA 1493, [13] (one common issue about whether representation misleading and deceptive). Common issues also narrowly defined, but acceptably so, in *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153, [133].

[255] Although courts have been keen to distance the class action from the conception that it is a Royal Commission which does not advance the class members toward the proper object of obtaining financial compensation or other remedy: eg: *Hollick v Metropolitan Toronto (Municipality)* (2000), 181 DLR (4th) 426, 46 OR (3d) 257 (CA) [23], reiterated in *Cotter v Levy* (SCJ, 24 Mar 2000) [22] (both mass pollution cases). Point also emphasised in: *Silkfield Pty Ltd v Wong* (1998) 90 FCR 152 (Full FCA) 169 (O'Loughlin and Drummond JJ); *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [53].

claims of the group members give rise to a common issue of law or fact which is "real or of substance".

The approach of focussing upon the importance (or otherwise) of the common issues is also practised under FRCP 23(b)(3) to test the predominance requirement:

> [I]n finding that common questions do predominate over individual ones in particular cases, courts have pointed to such issues that possess the common nucleus of fact for all related questions, have spoken of a common issue as the central or overriding question, or have used similar articulations. One court has construed this test as determining whether there is an essential common link among class members and the defendant for which the court provides a remedy.[256]

The finding of a common nucleus of operative fact, postulated early in case law decided under the amended rule,[257] has been a popular test by which to satisfy the predominance requirement,[258] while other courts have been willing to find predominance based upon a test of whether common issues will be "the object of most of the efforts of the litigants and the court."[259]

This particular approach tends to concentrate upon the common issues, and follows the lines that the common issues are more weighty and important than the individual issues, no matter how few of the former there may be. Of course, this is ultimately a subjective assessment, and all the more uncertain for that. In the words of Gensler, "While this conceptualization is certainly more meaningful than counting issues or trial hours, it also is . . . less predictable."[260] It is evident, however, that under each of the focus jurisdictions, focusing upon the importance of a common issue to the claims of all class members is simply *not* sufficient. Within each jurisdiction, the case law demonstrates that the court must adequately consider how it would handle any individualised enquiries and issues that could require resolution for each class member's claim. In this respect, it is apparent that any analysis of whether the common issue is significant enough upon which to base a class action is inextricably woven with an enquiry into the manageability of the action as a whole, as discussed in the following section.

(e) Difficulty of managing the individual issues

Under FRCP 23(b)(3), there is some disparity of view as to whether the burden of proving individual issues in respect of each class member (such as reliance) on

[256] *Newberg* (4th) § 4.25 p 173 (footnotes omitted).

[257] *Siegel v Chicken Delight Inc*, 271 F Supp 722, 726 (ND Cal 1967); *Esplin v Hirschi*, 402 F 2d 94, 99 (10th Cir 1968), also cited in *OLRC Report*, 338.

[258] Eg: *In re Asbestos School Litig*, 104 FRD 422, 432 (ED Pa 1984); *Owner-Operator Independent Drivers Association v Mayflower Transit Inc*, 204 FRD 138, 145 (SD Ind 2001).

[259] *Republic National Bank of Dallas v Denton and Anderson Co*, 68 FRD 208, 215 (ND Tex. 1975).

[260] SS Gensler, "Class Certification and the Predominance Requirement Under Oklahoma Section 2023(B)(3)" (2003) 56 *Oklahoma L Rev* 289, 295.

a class-member-by-class-member basis should sound the deathknell of any finding of predominance. On the one hand is the hard-line view, according to which proof of individual reliance automatically precludes (b)(3) class certification. As Gensler points out,[261] "the Fifth Circuit, for example, has adopted an almost *per se* rule that the need to establish reliance on an [individual] basis precludes a finding of predominance."[262] On the other hand is the more liberal approach, which says that the presence of individual issues that will need to be proven by each class member is an important factor, but not necessarily an absolute barrier. In this regard, some courts have indicated that predominance does not require that class members be "identically situated upon all issues"[263] (after all, certification would largely be impossible otherwise[264]), but "[t]he individual differences, however, must be of lesser overall significance and they must be manageable in a single class action".[265]

The fact that *some manageable means* of handling individual issues must be available after trial of the common issues, and that the representative plaintiff must have considered this and aimed to develop some sort of "mechanical calculation" in respect thereto, has been judicially emphasised.[266] The Supreme Court further explained in *Amchem Products Inc v Windsor* that:

> Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.[267]

The hard-line approach has not been followed in the other focus jurisdictions, and as explained previously, the hard-line approach was expressly eschewed by the legislative drafters. However, the alternative emphasis under FRCP 23 upon

[261] *Ibid*, 310 and fn 98, contrasting the "hardline" versus "liberal" views in detail.

[262] *Perrone v General Motors Acceptance Corp*, 232 F 3d 433, 440 (5th Cir 2000) ("Since individual reliance is necessary to prove actual damages, a class action may not be certified on this issue"); *Patterson v Mobil Oil Corp*, 241 F 3d 417, 419 (5th Cir 2001) ("Claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best. We have made that plain"); *Castano v American Tobacco Co*, 84 F 3d 734, 745 (5th Cir 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue"), variously cited in Gensler, *ibid*, fn 98. See also: CW Rhodes, "Civil Procedure" (2002) 33 *Texas Tech L Rev* 685, 727–29, for discussion of the slight relaxation in *Bertulli v Independent Assn of Continental Pilots*, 242 F 3d 290 (5th Cir 2001) (damage calculations for class would require some individualised determinations; every issue before damages was common; certification allowed; "prototypical class").

[263] *In re Ford Motor Co Ignition Switch Products Liab Litig*, 174 FRD 332, 340 (1997).

[264] *Cook v Rockwell Intl Corp*, 181 FRD 473, 480 (D Colo 1998). See, for examples of the recognition of individual issues which were not fatal to a finding of predominance: *Bussie v Allmerica Financial Corp*, 50 F Supp 2d 59, 71 (D Mass 1999) (reliance and damages); *Arenson v Whitehall Convalescent and Nursing Home Inc*, 164 FRD 659, 666 (ND Ill 1996) (reliance), cited Gensler, ibid, fn 101.

[265] *In re Ford Motor Co Ignition Switch Prods Liab Litig*, 174 FRD 332, 340.

[266] *Windham v American Brands Inc*, 565 F 2d 59, 68 (4th Cir 1977); *Abrams v Interco Inc*, 719 F 2d 23, 33–34 (2nd Cir 1983).

[267] 521 US 591, 624, 117 S Ct 2231 (1997).

the number of individual questions, and that they be manageable and capable of being efficiently handled in order for the requisite commonality to be found, has been similarly and most certainly emphasised elsewhere amongst the focus jurisdictions.

Even in the absence of a predominance rule, courts in the Ontario jurisdiction[268] have been prepared to disallow class actions where there is such a plethora of individual issues that any resolution of the common issues "would be but the beginning, and not the end of the litigation. . . . certification in this case will result in a multitude of individual trials, which will completely overwhelm any advantage to be derived from a trial of the few common issues."[269] As the Supreme Court of Canada has noted[270] of the Ontario legislation, the question of preferability "must take into account the importance of the common issues in relation to the claims as a whole", and that while the drafters rejected a US predominance requirement, it did not follow that the drafters can have intended the preferability analysis "to take place in a vacuum". Therefore, judicial emphasis has been placed on the manageability of the individual issues, on the basis that it would make no sense to grant certification upon common issues if it is not reasonable to conclude that individual issues are likely to be resolved efficiently and within the resources of the court.[271]

Similarly, the British Columbia Court of Appeal has emphasised[272] that an inquiry into the predominance issue under the preferability matrix in that province's statute "should include a consideration of how a trial on the merits would proceed. The court must look beyond the pleadings and understand the claims, defences, pertinent facts and applicable law so as to make a meaningful determination of the certification issues" (all the while cognisant of what will remain for individual resolution). Again, the predominance assessment ultimately cannot be made in a vacuum.[273] Thus, in a claim by a class of women

[268] Eg: *Controltech Engineering Inc v Ontario Hydro* (1998), 72 OTC 351 (Gen Div) [16], aff'd: (2000), 130 OAC 367; *Millgate Financial Corp v BF Realty Holdings Ltd* (1999), 28 CPC (4th) 72 (Gen Div) [52] ("The fact that the named plaintiffs may prove their reliance on certain representations would not prove the case of the remainder of the class"); *Williams v Mutual Life Ass Co of Canada* (2000), 51 OR (3d) 54 (SCJ) [25]–[32].

[269] *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [30] (Winkler J). Reiterated and applied in *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 360 (SCJ) [62] to deny certification in product liability case ("it is evident that a finding that either or both of the defendants' products are defective does not represent much of a step forward in the overall liability determination. To repeat a prevailing concern in such cases, it would not be the end of the liability inquiry but only the beginning").

[270] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [30].

[271] *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [115]–[128]. See also the "journey metaphor" in *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [32] ("the determination of the accuracy of the statements may start you along the road to the ultimate destination, that is the determination of liability, but it appears that there would be many miles left to travel before arriving there"), decision not to certify aff'd: Div Ct, 31 Oct 2003.

[272] *Harrington v Dow Corning Corp* (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA) [148].

[273] *Rumley v BC* (1999), 65 BCLR (3d) 382 (SC [in Chambers]) 393, cited in *Harrington v Canada (Minister of Health)* 2003 BCSC 1436 [8]. Also: *Bouchanskaia v Bayer Inc* [2003] BCSC 1306, [141]–[143]; *Bittner v Louisiana-Pacific Corp* (1997), 43 BCLR (3d) 324 (SC [in Chambers]) [45].

claiming damages allegedly caused by silicone breast implants, certification was denied on appeal, on the basis that exposure to different products, the development of diseases and physical injury and the history of the product use were individual factual differences that transformed into significant legal differences. The court was satisfied that the combination of the large number of different types of breast implants coupled with the impact of the individual's use of the implant would result in a large number of individual issues which would require individual trials, and which meant that non-common issues predominated over common ones.[274]

The earlier decision of the British Columbia Court of Appeal in *Tiemstra v Insurance Corporation of British Columbia*[275] is also most instructive. The court cited instances from US jurisprudence[276] where the determination of a narrowly defined question about the administration of the insurance contract would, if decided in favour of the class, virtually establish entitlement to benefits. That feature, in the Court of Appeal's view, was not present in circumstances where, even if the plaintiff (who represented the class of plaintiffs whose no-fault claims were rejected as a result of the "no crash–no cash" program instituted by the defendant) succeeded in proving that such a rigid and arbitrary policy amounted to a breach of contract or fiduciary duty, each plaintiff would still have to press his or her separate claim against a reluctant insurer and have it assessed on the merits—"the class action would inevitably devolve into individual disputes".[277] The Court of Appeal was satisfied that, in considering the individual trials that would be subsequently required in order to decide each accident victim's claim, the trial judge[278] did not misread the Act or focus unduly upon the individual issues.

The Australian regime, which does not require certification, has evolved, by judicial reasoning, to now present a similar scenario. The predominance of individual issues over common issues is not a prerequisite for the commencement of class proceedings as a threshold criterion under s 33C(1)(c) for commencement of the class action. However, this *is* a relevant factor under s 33N(1) whereby the action can be later discontinued as not being preferable or in the interests of justice. In *Murphy v Overton Investments Pty Ltd*, Emmett J noted:

> I would expect that there would be some circumstances where, notwithstanding that there were substantial common issues thrown up by an application and statement of claim or affidavits in support, the Court may nevertheless, *having regard to the proportionality involved between the common issues and other issues*, conclude that it was not appropriate that a proceeding continue under Pt IVA.[279]

[274] *Harrington v Dow Corning Corp* (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA) [149].
[275] (1998), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA) [16].
[276] The BCCA cited: *Cambanis v Nationwide Ins Co*, 501 A 2d 635 (Penn SC 1985); *Kromnick v State Farm Ins Co*, 112 FRD 124 (ED Penn 1986).
[277] (1998), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA) [16].
[278] *Tiemstra v Ins Corp of BC* (1996), 22 BCLR (3d) 49 (SC).
[279] [1999] FCA 1673, [31] (emphasis added).

Thus, a legislative instruction that the common issues be "substantial" has been converted into a two-part process requiring a mandatory "non-trivial" common issue, and then a consideration of predominance if discontinuance proceedings are brought. In *Murphy*, the court was eventually satisfied that the common issue, although not a substantial common issue when applying the "major impact" test,[280] probably did satisfy the wider "non-trivial" test of commonality proposed by the High Court in *Wong*.[281] However, individual issues—whether oral representations were made to class members in identical terms or at the same time, how they were understood and acted upon by the class members, if at all—predominated over the common issue, and the class action was discontinued on the basis that separate proceedings would be preferable.[282]

3. Conclusion

Any evaluation of whether the individual issues are sufficiently manageable requires some initial assessment by the court of the means and devices available by which to handle those individual issues. The parties' arguments as to the possible alternatives by which to resolve the individual morass of claims—and there are a number of options available—will, according to the case law canvassed above, inevitably influence whether the common issues are sufficiently significant to warrant the class action treatment. Further consideration of how individual issues within class litigation may validly and feasibly be exercised will be deferred to a later chapter.[283]

There will always be a large degree of judicial evaluation concerning commonality and non-commonality of issues in class litigation. The legislatures have sought to provide some yardsticks by which to measure the requisite commonality: mandatory predominance under FRCP, a substantial issue under Pt IVA, predominance as one of the factors when assessing the preferability of class proceedings under the British Columbia regime, and a mere common issue of fact or law in Ontario.

Yet, by judicial repositioning and interpretations, the reality is that the case law of these focus jurisdictions has each raised the same types of issues concerning whether the common issues are significant/predominant/substantial enough to warrant class action treatment. First, there has been sporadic support for the one-way dispositive test, and the comparative shopping list of common versus individual issues, and whilst it appears that in no jurisdiction are these

[280] [1999] FCA 1123, [96]. The decision was handed down before *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) was determined.

[281] [1999] FCA 1673, [25].

[282] [1999] FCA 1673, [113]–[114], [122]. Thus, although his view of "substantial" issue changed, Emmett J did not consider that his view that the class action be discontinued under s 33N should be varied in light of *Wong* (HCA): at [40].

[283] See ch 7 pp 257–69.

tests determinative, they each are relevant and of assistance to the ultimate question: are the common issues significant enough?

Secondly, whilst a strict comparison of court time needed to adjudicate common issues, weighed against the time needed to dispose of individual issues, is not determinative either, the focus jurisdictions have demonstrated that the efficiency and manageability with which the remaining individual issues can be handled *is* most certainly relevant. No matter how significant the common issues may be, if resolution of the leftover individual issues is going to degenerate into an "unmanageable monster", those common issues will not be "big enough" to sustain a class action. In this respect, the requirements of a significant common issue and that the class proceeding is the superior method of resolving the dispute are closely interrelated.

Thirdly, the focus jurisdictions have all shown the importance of *also* focussing upon the common issues themselves, and to consider whether the resolution of the common issue will advance the litigation for all class members. In this sense, "predominance", "substantiality", or "significance" of the common issues has assumed both a comparative and stand-alone/insular meaning. Certainly, the "shades of meaning" alluded to by the British Columbia Court of Appeal[284] have been very evident in the jurisprudence.

This juxtapositioning of views has inevitably lead to some criticisms and room for disagreement. For example, is it possible to say that all of the statutes which do not mandate predominance over individual issues (ie, the non-FRCP 23 statutes) actually place greater emphasis upon the common issues, and that by focusing on the individual issues and their manageability, the courts actually apply the wrong test? One commentator[285] argued along these lines following the decision in *Tiemstra v Insurance Corporation of British Columbia*,[286] contending that the court went off course in that case by "considering the proceeding as a whole and the resolution of individual claims rather than the determination of the common issues". The High Court also held similarly in *Wong v Silkfield Pty Ltd* that consideration of the individual issues was not the correct approach under its statute and that an assessment that the common issues are "real and of substance" is all that is required to overcome the initial commonality threshold. These are not merely academic tensions. An issue such as whether a rigid policy threshold for motor vehicle plaintiffs was a breach of fiduciary or contractual duty by the insurer (*Tiemstra*), or whether a misrepresentation occurred about the availability of parking spaces in a condominium development (*Wong*), may leave a substantial number of individual questions to be resolved, yet the resolution of these issues may well advance each class member's claim when the issues are looked at in isolation. It is a difficult conundrum,

[284] See p 202.

[285] J Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Toronto, Butterworths, 1997), cited in *AltaLRI Report*, [163] fn 209.

[286] (1998), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA), affirming: (1996), 22 BCLR (3d) 49 (SC).

but if a purposive approach to class actions legislation is to be adopted, then a consideration of the proceeding as a whole and the ultimate resolution of the class members' claims seems the better view.

Moreover, the comparatively recent Australian approach to commonality carries with it a lesson for class action design. There is little point in a court "simply substituting different words for the words of the statute."[287] The entire treatment of "substantial" in Australia's Pt IVA regime serves to illustrate the division of opinion which has occurred at the most senior judicial level concerning the meaning of a word which Parliament saw fit to insert into legislation entirely of its own volition. The issue degenerated into one of terminology under Pt IVA, all the more unfortunate, given the judicial experience which had preceded under FRCP 23(b) (3)concerning the various meanings capable of being attributed to the word "predominate". Ultimately, the High Court in *Wong* has rendered the meaning of a "substantial common issue" virtually otiose, by attributing to it a standard of "non-trivial". As the solicitor for Mr Wong pointed out, repetitive and costly litigation about the interpretation of one word of imprecise meaning does not do much for the certainty and confidence which litigants have in the legal process.[288]

D WHETHER CLAIMS HAVE TO BE COMMON

1. Lack of Legislative Clarity

It is expressly provided under the US federal rule that "the claims . . . of the representative parties are typical of the claims . . . of the class".[289] This has been construed to mean that proof of the rights of the representative plaintiffs and the class members depends substantially on the "same legal theory"[290] or arises from a "common nucleus of operative facts".[291] That there is required to be a matching of claims is plain from the Supreme Court's statement that "[t]he typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiffs' claims."[292] According to the Ninth Circuit, the test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct."[293] Where

[287] *Murphy v Overton Investments Pty Ltd* [1999] FCA 1673, [16].

[288] W Cull, "High Court Ruling Opens Gate for Class Actions" (1999) 19(10) *Proctor* 28.

[289] FRCP 23(a)(3).

[290] *Ridgeway v International Brotherhood of Electrical Workers, Local No 134*, 74 FRD 597, 604 (ND Ill 1977), commenting upon the phrase "same grievance" used in *White v Gates Rubber Co*, 53 FRD 412, 415 (D Colo 1971).

[291] *In re Asbestos School Litig*, 104 FRD 422, 429 (ED Pa 1984).

[292] *General Telephone Co of the Northwest Inc v EEOC*, 446 US 318, 330, 100 S Ct 1698 (1980).

[293] *Hanon v Dataproducts Corp*, 976 F 2d 497, 508 (9th Cir 1992); *Schwartz v Harp*, 108 FRD 279, 282 (CD Cal 1985).

claims are matched in this sense, then the interests of the representative plaintiff should be "squarely aligned" with the interests of the class members.[294]

The statutes of the other focus jurisdictions raise, by their wording, a slightly different, and very important, question. Typicality is not an express requirement. Nor does any language in the statutes of these other jurisdictions seek to match the claims of the representative plaintiffs and the claims of the class members in any sense whatsoever. In Ontario, the class only has to prove that "the claims . . . of the class members raise common issues".[295] Under the Australian schema, the class action can be commenced where "the claims of all [class members] give rise to a substantial common issue of law or fact".[296] The statutes do not say whether the "claims", used here in the sense of "the causes of action", have to be the same amongst the class members (including representative plaintiffs) or not. In the great majority of cases, the causes of action upon which the class members hope to obtain relief *will* be the same, but this will not always be the case.

Therefore, the final commonality conundrum is whether, under the class action regimes of Australia and the Canadian provinces, the common issues of fact or law must arise out of the *same* cause of action (or same "claim") which is alleged by the class members against the defendant/s, or whether the common issues may arise from different causes of action. The limited judicial analysis to date indicates that the positions may have developed differently between Australia and Ontario. The question of whether all the class members (including representative plaintiffs) have to assert the same claims against the defendant has proceeded by cautious (often obiter) judicial statement. Of course, whatever the answer to this conundrum, the statutory requirement that the claims give rise to a common issue of law or fact is unaltered.

2. Divergent Jurisdictional Views

(a) The Ontario view

Until 2002, there had been very few obiter references whether the same cause of action was necessary on the part of all class members against a defendant under Ontario's class action regime. In *Williams v Mutual Life Assurance Co of Canada*,[297] a number of alternative causes of action were pleaded,[298] but each class member asserted all of them against the defendant. The proceedings were

[294] B Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)" (1967) 81 *Harvard L Rev* 356, 387 fn 120; *Newberg* (4th) § 3.13.

[295] CPA (Ont), s 5(1)(c).

[296] FCA (Aus), s 33C(1)(c).

[297] (2000), 51 OR (3d) 54 (SCJ). Also see: *Pearson v Inco Ltd* (SCJ, 14 Dec 2001) [11].

[298] Negligent misrepresentation; breach of the Competition Act RSC 1985, c C-34; and deceit.

dismissed as invalidly commenced because "the fact of a common cause of action does not in itself give rise to a common issue",[299] given that one or more elements of a cause of action may give rise to individual issues amongst the class members. Further, in the Divisional Court in *Hollick v Metropolitan Toronto (Municipality)*,[300] O'Leary J (as obiter) interpreted s 5(1)(b) to require that "there be a class that can all pursue the same cause of action" against the defendant. This observation was cited by the Supreme Court of Canada on appeal without comment.[301]

However, the issue arose squarely for consideration in *Boulanger v Johnson & Johnson Corp*,[302] in which Nordheimer J had to decide whether a representative plaintiff and her class members could assert different claims against the same defendant, such that each had an alleged claim but not the same claim. The representative plaintiff instituted a class action claiming damages relating to the use of the drug Prepulsid, manufactured and distributed by the defendants. The representative plaintiff's claim sought to assert rights of subrogation not only on behalf of the Ontario Health Insurance Plan ("OHIP") but also on behalf of other provincial health insurance plans, pursuant to similar provincial legislation in their respective provinces.

The defendant opposed this on the grounds that at least one representative plaintiff must be personally entitled to assert each statutory claim or cause of action against the defendant, and that this was impossible in this case. Since the representative's healthcare needs occurred in Ontario, all of her healthcare costs must have been paid by the OHIP, and as a result, she had no entitlement to coverage for healthcare services pursuant to the statutory health insurance plans in force in other provinces. Thus (argued the defendant), only a member of the class who was resident in a particular province had a claim pursuant to that province's health insurance plan and could advance a representative claim on behalf of that plan. Could a class action be valid where the representative plaintiff did not share the same claims as the class members that she purported to represent?

Note that (as Nordheimer J explained) this was *not* a *Ragoonanan*-type scenario[303] discussed previously.[304] In that case, certain tobacco defendants were named in an action although the representative plaintiff did not have an actual claim against them because their cigarette was not involved in the fire that caused the death of the representative's relatives. That case stands for the proposition that, "for each defendant who is named in a class action, there must

[299] *Williams* (2000), 51 OR (3d) 54 (SCJ) [39].
[300] (1999), 168 DLR (4th) 760, 42 OR (3d) 473 (Div Ct) [15].
[301] 2001 SCC 68, [2001] 3 SCR 158, 205 DLR (4th) 19 (SCC) [8].
[302] (2002), 14 CCLT (3d) 233 (SCJ), leave to appeal allowed: (SCJ, 28 May 2002), and original decision aff'd: (2003), 226 DLR (4th) 747, 64 OR (3d) 208 (Div Ct).
[303] *Ragoonanan Estate v Imperial Tobacco Canada Ltd* (2000) 51 OR (3d) 603 (SCJ).
[304] See pp 145–50.

be a representative plaintiff who has a valid cause of action against that defendant."[305] In *Boulanger*, on the other hand, the representative plaintiff *did* assert a valid cause of action against the named defendant. However, the representative could not assert *all* statutory claims/causes of action against that defendant that were asserted by the class members. For her part, the representative argued that she represented all class members, whether entitled to insured services pursuant to healthcare legislation in Ontario or in other provinces; that they all had issues in common if not the same statutory cause of action; and that she was entitled to plead causes of action in a representative capacity, which meant that she was entitled to plead causes of action which were not personal to her.

Nordheimer J agreed with the representative, and held that "insofar as claims for relief arise consequent on legislation existing in the other provinces and territories, the representative plaintiff is not precluded from advancing . . . those claims on behalf of the members of the putative class."[306] The decision has since been upheld on appeal, where, in the words of the Divisional Court,

> the scheme of the CPA demonstrates the legislature's intention to permit a representative plaintiff, prior to the certification motion, to plead causes of action which are not the representative plaintiff's personal causes of action but which are the causes of action of members of the class, asserted by the plaintiff in a representative capacity.[307]

Effectively, the representative plaintiff was permitted to have a different claim from those of some of the class members whom she represented. Nordheimer J approached the issue from first principles—a construction of the legislative wording—and decided that different causes of action among the class members and representative was implicitly permitted by the commencement provisions of Ontario's statute. His Honour considered that "[w]hile different remedies [permitted by s 6(3)] might arise from the same cause of action, equally they could arise from different causes of action but again the Act implicitly accepts that that state of affairs may arise in a class action."[308] Interestingly, it took ten years to the month for this issue to be explicitly considered under Ontario's statute.

[305] As phrased by Nordheimer J in *Boulanger* when explaining *Ragoonanan*: (2002), 14 CCLT (3d) 233 (SCJ) [21]. Also see: *Hughes v Sunbeam Corp (Canada)* (2002), 219 DLR (4th) 467, 61 OR (3d) 433 (CA) [15] ("if the representative plaintiff does not have a cause of action against a named defendant, the claim against that defendant will be struck out").

[306] *Ibid*, [28].

[307] *Boulanger v Johnson & Johnson Corp* (2003), 226 DLR (4th) 747, 64 OR (3d) 208 (Div Ct) [33]. Leave to appeal from the decision of Nordheimer J was granted in: *Boulanger v Johnson & Johnson Corp* (SCJ, 28 May 2002); but appeal from Nordheimer J's judgment on this point dismissed by the Divisional Court. The court expressly concluded (at [29]) that the ratio in *Ragoonanan* did not apply to the circumstances of this case, and that the ratio in *Ragoonanan* was not properly applied in *Andersen v St Jude Medical Inc* [2002] OTC 53 (SCJ) and that, as a result, *Andersen* was not correctly decided. A further appeal to the Ont CA did not concern this particular issue of different claims by representative and class members: *Boulanger v Johnson & Johnson Corp* (5 Jun 2003).

[308] *Boulanger* (SCJ), *ibid*, [27].

Since then, the Superior Court of Justice has also indicated that common causes of action among class members against the defendant will not be necessary, suggesting that the legislation was intended more broadly than that:

> It does not follow that common issues cannot be described in terms that also indicate that there are common causes of action. However, they need not do this as section 1 of the CPA defines common issues much more broadly: . . . (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.[309]

Therefore, once again as a matter of statutory interpretation, the Ontario view seems to be that the class members and representative plaintiffs need not share a common cause of action against the defendant. The representative plaintiff can validly assert a cause of action against a defendant on behalf of other class members which he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact.

(b) The Australian view

In Australia, there has also been relevant, albeit cautious, discussion of this point about causes of action, in the absence of clear legislative wording. Any suggestion that all class members must share precisely identical claims against a defendant was rejected in *King v GIO Australia Holdings Ltd*.[310] Instead, Moore J contended that if *one* claim is brought that is maintainable by all representative plaintiffs and all class members, then the proceeding may be brought under Pt IVA, even if a representative plaintiff cannot maintain one of the causes of action pursued in the proceeding by other representative plaintiffs and members of the class.[311] One common claim or cause of action amongst the class members was held to be sufficient.

This is borne out by the decision in *Finance Sector Union of Australia v Commonwealth Bank of Australia*.[312] The defendant sought to have the class action struck out on the basis that it was not well- commenced because it did not comply with s 33C(1)(a). As Figure 6.1 shows, the representative plaintiffs and class members did indeed share certain common claims against the defendant bank, but one of the applicants, the FSU, had no contract claim against the bank. Therefore, whilst it was impossible to say that each applicant and class member had identical causes of action against the defendant, the question for the court was whether s 33C(1)(a) required that.

[309] *Macleod v Viacom Entertainment Canada Inc* (2003), 28 CPC (5th) 160 (SCJ) [23].
[310] (2000) 100 FCR 209.
[311] *Ibid*, [34]–[37], aff'd: [2000] FCA 1543 (Full FCA) [13].
[312] (1999) 94 FCR 179 (Full FCA), affirming the earlier decision of O'Connor J: [1999] FCA 824.

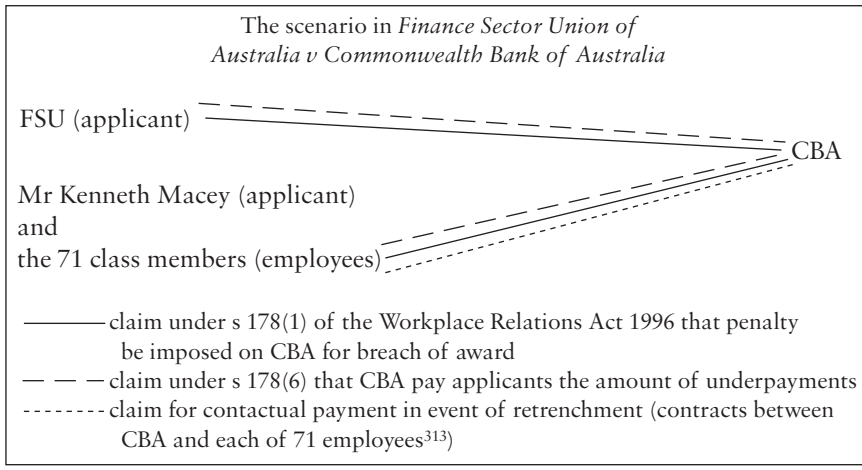

Figure 6.1 ***Common claim: sole defendant***

It was held that each applicant and class member did indeed have at least one common cause of action against the defendant, and that common issues arose out of the common claims, and that was sufficient to satisfy s 33C(1)(a).[314] Although that does not match the liberality of the view which Nordheimer J adopted in *Boulanger*, Moore J cautiously went a little further in obiter in *King*, and said:

> It may be that the word 'claim' in s 33C(1)(a) is not to be treated as a reference to one common cause of action or one common '(any)thing that might lawfully be brought before the court for a remedy'. That is, members of a group who have different causes of action or 'things' against the same respondent can be involved in a proceeding against the respondent under Pt IVA as long as the other requirements of s 33C are met. Section 33C(1)(a) does not speak of seven or more persons having 'the same claim' against the same person and the language of the section does not warrant some narrow view of what is a claim.[315]

His Honour did not have to explore the question further, as each representative plaintiff and class member did indeed have at least one identical claim against each of the defendants in that case.[316]

However, this statement coincides with the *Boulanger* view, and raises the possibility of the following hypothetical scenario in Figure 6.2 (provided that there was a common issue, for example, a common issue of fact as to whether

[313] It will be recalled that the fact that each class member has a separate contract with the defendant is no bar to a class action: s 33C(2)(b)(i), and reiterated by O'Connor J: [1999] FCA 824, [33], [35].

[314] (1999) 94 FCR 179 (Full FCA) [21]–[24].

[315] (2000) 100 FCR 209, [35]. The obiter points raised by Moore J were not considered on appeal: *King v GIO Aust Holdings Ltd* [2000] FCA 1543 (Full FCA), because interim repleading meant that the representative and class members claimed the same four causes of action against each defendant: at [8].

[316] For a declaration pursuant to Trade Practices Act 1974 (Aus), s 163A.

the defendant interfered with the class members' enjoyment of their land, where proof of such interference was required both for common law nuisance and under a relevant statute).

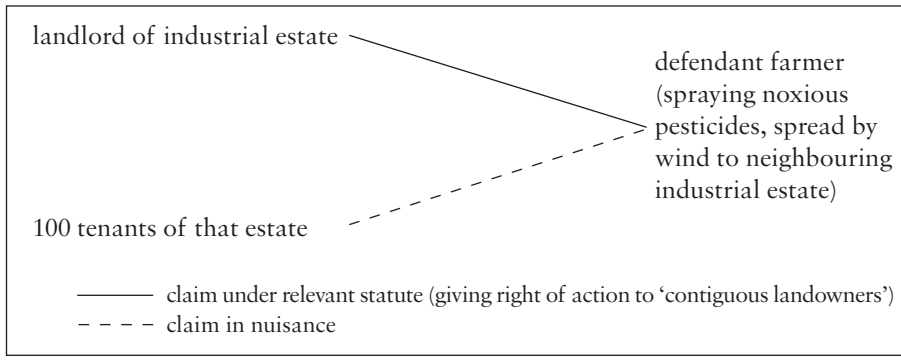

Figure 6.2 ***Common issue: hypothetical scenario***

There has been no class action instituted yet under Pt IVA that reflects this hypothetical case, but in the author's view, it would indeed fulfill the requirements of the legislation, as drafted.

Of course, if at least one common claim is required under s 33C(1)(a), and were "claims" to be interpreted as something wider than simply causes of action, then it would appear that the *Boulanger* view would easily follow. For example, if a "claim" included a type of relief, then it would be feasible for all class members to be claiming the same relief against the defendants, even if the cause of action underlying that right to relief was not the same amongst the class members. The statement of Moore J reproduced above indicates that his Honour did not consider that the noun "claim" ought to be necessarily restricted to mean 'causes of action', and indeed, that view received further support in *Bray v F Hoffmann-La Roche Ltd*.[317] In that case, Carr J expressly confirmed that, in his view, "the word 'claim' is not to be construed as limited to 'cause of action'. It should be construed as *including* a cause of action, in the sense of a (stated) basis of one's right to something, and also a demand for what is due by virtue of that right, whether it be damages, an injunction or any other relief."[318] On the other hand, in *Hoffmann-La Roche*, Finkelstein J seemingly preferred the view that "claims" where appearing in s 33C(1) meant "causes of action", and not the remedy or relief sought in the action.[319]

Notably, this judicial development and disagreement in the interpretation of s 33C(1)(a) is typical of the cautious and incremental steps that have charac-

[317] [2003] FCAFC 153 (15 Jul 2003).
[318] *Ibid*, [113] (original emphasis).
[319] *Ibid*, [245].

terised the application of Australia's class action regime, and indeed, reflects the type of cautious progress evident in all the focus jurisdictions when applying the literal words of the governing statute or rule.

3. Conclusion

To permit *a* claim, rather than *the same* claim, to be asserted by class members against a defendant—provided that the claims give rise to a common issue of law or fact—would considerably open up the availability of the class action regimes considered in the previous section. The reasoning contained in the judicial statements as to why that should be permitted by virtue of the legislative drafting under both Australia's Pt IVA federal regime and Ontario's statute is cogent and convincing. It is notable that both of the focus jurisdictions have cautiously come to the same conclusion on this issue almost a decade after the respective schemas were introduced. This has occurred by incremental judicial opinion which has not always concurred with earlier views. It highlights the constantly evolving nature of class action litigation, in which parties and courts are exploring the boundaries of what will fall within the commonality rubric and what will fall outside it.

7

The Requisite Superiority

A INTRODUCTION

THIS CHAPTER ADDRESSES a crucial category of commencement criteria, that is, whether a class action is superior to other means of resolving the dispute between class members and the defendant. Although a superiority requirement is a common criterion in the class action regimes of the focus jurisdictions, the manner of its implementation in each regime is diverse, reflective of the detail of the drafting designs from a mere two lines to explicit terminology.

It has been said that superiority is where a court "exercises its broadest discretion" when determining whether a class action should commence,[1] and that it is "a balancing exercise".[2] So subjective is the assessment on the part of the court that some US commentators have disparaged the utility of the superiority assessment as adding nothing to the previously discussed criteria, or as simply another way for courts to avoid certification.[3] Be that as it may, none of the factors discussed in this chapter appears to be controlling or decisive, although several of the factors, such as manageability and the provision of access to justice to those with small claims, are accorded great weight in this balancing exercise.[4] Experience certainly demonstrates that cases which are certified, generally also have numerous factors which indicate that they should have been dealt with by some means other than a class action; and cases which lose their certification battle are ordinarily not bereft of positive factors which indicated that a class action would have had a number of advantages to the litigants and to the court. Ultimately, it is a question of balance and of the court's discretion (always assuming, of course, that the other three criteria of suitability, the representative and commonality have been met).

Further, the superiority criterion in a certification matrix must at all times be decided independently of the other certification criteria. As one experienced

[1] WK Winkler (the Hon), "Advocacy in Class Proceedings Litigation" (2000) 19 *Advocates' Society J* 6, 8.

[2] *In re Prudential Ins Co of America Sales Practices Litig*, 148 F 3d 283, 316 (3d Cir 1998) (superiority inquiry "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication"), cited by Ryan, n 3 below, fn 22.

[3] SR Bough & AG Bough, "Conflict of Laws and Multi-State Class Actions: How Variations in State Law Affect the Predominance Requirement of Rule 23(b)(3)" (1999) 68 *U Missouri at Kansas City L Rev* 1, 12, cited by R Ryan, "Uncertifiable?: The Current Status of Nationwide State Law Class Actions" (2002) 54 *Baylor L Rev* 467, 474 and fn 24 (who also notes importance of "judge's personal views" on the question).

[4] *Newberg* (4th) § 4.45 pp 335–36.

class actions judge in Ontario has observed, it certainly does not follow that, if the plaintiff class establishes the commonality, representative and suitability criteria discussed elsewhere, the class action will be preferable or superior.[5] Winkler J notes that the first three broad bands of criteria do not establish the fourth, and it remains at all times a separate criterion for commencement of class proceedings.[6] Similarly, Ryan explains[7] that "superiority is irrelevant until the other FRCP 23 certification requirements are met", and that, whilst a court may consider that a class action is the superior method to resolve the dispute, the judge is compelled first to carefully examine both the four Rule 23(a) requirements and the Rule 23(b)(3) predominance requirement (which the rule's drafters also emphasised[8]).

Following a discussion of the important differences in wording in the superiority criteria of each of the focus jurisdictions' statutes (section B), the range of factors which a court may possibly weigh up (having regard to the jurisprudence surrounding the superiority assessment across the focus jurisdictions) will be examined and critiqued (section C).

B DIFFERENCES IN STATUTORY WORDING

A vast array of similar factors have manifested across the focus regimes under the superiority rubric. Some of these have arisen as a result of legislatively prescribed factors, intended to direct the exercise of judicial discretion under the rubric of "superiority", which are summarised per jurisdiction in Table 7.1.

Table 7.1 ***The superiority criteria compared***

Jurisdiction	Essentials of its superiority criterion
Australia[9]	Court may order discontinuance where it is in the interests of justice to do so because: (a) the costs incurred as a class action > the costs if each class member sued individually; (b) all the relief sought can be obtained by proceeding other than a class action;

[5] These terms will be used interchangeably, as the precise difference is not clear: noted also in *ManLRC Report*, 52.

[6] W Winkler (the Hon), "Advocacy in Class Proceedings Litigation" (2000) 19 *Advocates' Society J* 6, 8.

[7] Ryan, n 3 above, 473–74, citing: *General Telephone Co of South West v Falcon*, 457 US 147, 161, 102 S Ct 2364 (1982).

[8] See also the Advisory Committee's Notes on rule 23(b)(3): "That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages": (1966) 39 FRD 69, 104.

[9] FCA (Aus), s 33N(1).

Jurisdiction	Essentials of its superiority criterion
	(c) the class action will not provide an efficient and effective means of dealing with the class members' claims; (d) it is "otherwise inappropriate" that the claims be pursued by class action.
Ontario[10]	The court must find that a class action would be the "preferable procedure for the resolution of the common issues".
British Columbia[11]	As for Ontario above,[12] and when determining preferability, the court must consider: (a) whether common questions of fact or law predominate over individual questions; (b) whether a significant number of class members have valid interest in individually controlling actions; (c) whether the class action would involve claims presently being litigated in another action; (d) whether other means of resolving the claims are less practical or less efficient; (e) whether a class action would be more difficult to administer than if relief were sought by other means.
United States[13]	The court must find that a class action is superior to "other available methods for the fair and efficient adjudication of the controversy." Pertinent matters include: (A) the interest of class members in individually controlling prosecution of separate actions; (B) the extent and nature of any litigation already commenced by class members; (C) the desirability of concentrating the class litigation in the particular forum; (D) the difficulties likely to be encountered in the management of the class action.

From this table, four significant points of difference are immediately apparent. Perhaps the most striking is that, in all jurisdictions bar Australia, an examination of superiority comprises part of the court's responsibility in the certification hearing. In the absence of a certification hearing, an Australian federal court may order that the class action *no longer continue* because it is not in the interests of justice to do so.[14] Nevertheless, the factors to which an

[10] CPA (Ont), s 5(1)(d).
[11] CPA (BC), s 4(2).
[12] CPA (BC), s 4(1)(d).
[13] FRCP 23(b)(3).
[14] Actually, the legislature took it upon itself to include more of these indicators than the ALRC had recommended. The only recommended criterion was that the court have express power to stop the proceedings if the costs were likely to exceed those of unitary proceedings: *ALRC Report*, [150], and cl 20 of the Draft Bill.

Australian court has had regard under this provision have mirrored, to a notable extent, the factors which are either legislatively or judicially espoused in the other focus jurisdictions. It is said that those factors "raise practical questions which require that the Pt IVA proceeding be compared with other proceedings that are available to the [representative plaintiff] and [class] members as a means of resolving their claims",[15] that is, a superiority/comparison assessment.

As a second point of distinction, it is also apparent that none of the lists of relevant matters reproduced in Table 7.1 is meant to be all-inclusive. The drafters of Rule 23 expressly stated that they did not mean their list to be exhaustive;[16] the last of the Australian criteria is clearly a catch-all phrase and "in the interests of justice" in the opening line is extremely wide;[17] Ontario does not specify a list of relevant criteria at all; and the British Columbia statute expresses its language in inclusive rather than in definitional terms, leaving a broad discretion vested in the certification court.[18] Morever, in this last-mentioned jurisdiction where a list is prescribed, it is apparent that no single factor "trumps" the others or is solely determinative,[19] although some are accorded more weight than others.

To the extent that the superiority criterion has largely been left to courts to determine, as an undefined matter by which to allow or disallow a class action to proceed, that has drawn academic criticism. Ontario is, of course, the "odd jurisdiction out" in this respect. Despite a recommendation by the OLRC to the contrary,[20] the Ontario legislation does not provide *any* express guidance as to how "preferability" is to be determined, and recourse must be had entirely to judicial factors enumerated in case law for that assessment. In contrast, at least all other jurisdictions (including British Columbia[21]) set out certain matters which are said to be relevant to the question. That complete omission of guiding factors in Ontario's statute drew vehement criticism from the Canadian Bar Association:

> [W]e believe that judges should be given detailed guidance by the drafters of the legislation as to what factors should be taken into account by them as they determine the issues involved in the crucial question of certification. The fact that the Ontario Act lacks specific guidelines on the issue of determining whether a class action is the

[15] *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [74].

[16] Rules Advisory Committee, "Notes to 1966 Amendments to Rule 23" (1966) 39 FRD 69, 104: "Factors (A)–(D) are listed, non-exhaustively, as pertinent to the findings [on superiority]".

[17] *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [152].

[18] *Hoy v Medtronic Inc* (2003), 14 BCLR (4th) 32 (CA) [41] ("The BC legislation . . . details a non-exhaustive list of factors to be considered in the preferability analysis"). Also: *Harrington v Dow Corning Corp* (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA) [53]; *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) [64].

[19] *Reid v Ford Motor Co* [2003] BCSC 1632, [88]; *Elms v Laurentian Bank of Canada* (2001), 90 BCLR (3d) 195 (CA) [51]; *Bouchanskaia v Bayer Inc* [2003] BCSC 1306, [137].

[20] *OLRC Report*, 416, which proposed a list of 5 superiority factors for the court to consider.

[21] The difference was noted by the Supreme Court of Canada in *Rumley v BC* [2001] SCC 69, 205 DLR (4th) 39 (SCC) [35], and represents yet a further example of how the BC legislature followed the OLRC's recommendations more closely than did the Ontario legislature.

> preferable procedure has, in our view, led to a lack of consistency in the first series of certification cases in that province.[22]

In the absence of legislative guidance, the Supreme Court of Canada has stated that the preferability inquiry in Ontario "should be conducted through the lens of the three principal advantages of class actions—judicial economy, access to justice and behaviour modification."[23] The Australian legislature's permission to the courts to discontinue a class action where it is "otherwise inappropriate" has also drawn adverse comment,[24] with one Australian judge noting that: "the legislature has not given much assistance as to the criteria for determining the appropriateness or inappropriateness of pursuing claims by means of a representative procedure".[25]

A third distinction concerns the question: superior for what? The Canadian statutes require only that a class action be the preferable procedure for "the resolution of the *common issues*" (emphasis added). In comparison, the US rule requires that the class action be the superior method to resolve the "controversy" (as opposed to just the common issues), and the Australian schema also contemplates, on a broader basis, whether the "the claims of group members" or the "relief sought" would be better achieved by other means. The differences, however, seem greater in terminology than in effect—the Supreme Court of Canada has said[26] that it "would not place undue weight" on the difference with the US regime, and that it is still crucial to have regard to the litigation as a whole when seeking to answer the question: is the class action superior to other procedures.

A final point of distinction between the jurisdictions revolves around the question: superior to what? Under FRCP 23(b)(3), the court must compare a class action with "other *available* methods" for the resolution of the dispute. Whatever the method, it has to be feasible. The US Supreme Court has indicated that if the amount recoverable by each potential litigant is so small that the court considers that it would be "economically infeasible" that individuals would pursue their claims by individual proceedings, then the alternatives are not "available", and it will therefore be improper to compare a class action to one

[22] Canadian Bar Association, BC Branch, Committee on Class Action Legislation, *Submission to the Ministry of the Attorney General of British Columbia on Proposed Class Action Legislation* (1994) 8 cited in *Man LRC Report*, 54, and prompting that Commission to include factors.

[23] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19(SCC) [27], citing *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct), and also Ontario Attorney-General's Department, *Report of the Attorney-General's Advisory Committee on Class Action Reform* (1990) 32.

[24] *VLARC Report*, [6.17], [6.19] (particularly commenting upon s 33N(1)(d)'s wide terms); and V Morabito, "Dinning v Federal Commissioner of Taxation—The Dawn of a New Era in Tax Litigation in Australia?" (2000) 7 *Canterbury L Rev* 487, 503 ("there was no meaningful explanation in either the Explanatory Memorandum or the Second Reading Speech as to the intended ambit of s 33N and, in particular, s 33N(d)").

[25] *Murphy v Overton Investments Pty Ltd* [1999] FCA 1123, [115] (Emmett J).

[26] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [29], citing with approval: WK Branch, *Class Actions in Canada* (Vancouver, Western Legal Publications, 1996) § 4.690.

of these alternatives.[27] Under the express language of FRCP 23, a class action cannot be inferior to an alternative that is simply not available to the class members. The other jurisdictions are not quite so plain in their express terminology, although judicially, the same position appears to apply. Under the Australian schema, courts have indicated[28] that economic and non-economic barriers are relevant, and that a class action must be "compared with other proceedings that are available". Ontario[29] and British Columbia's[30] courts have held similarly that the procedure which is preferable to a class action has to be realistically feasible. However, for the avoidance of doubt, the drafting suggestion that the action procedure must be "preferable to any other *available* procedure for the fair, economic and expeditious determination" of class members' claims is most attractive.[31]

Under the US rule, apart from several individual proceedings, Newberg notes that the alternative methods can comprise: joinder, intervention, consolidation, a test case, or an administrative proceeding.[32] Ontario has similarly embraced a wide variety of alternatives. In *Brimner v Via Rail Canada Inc*,[33] Brockenshire J held, in a hearing prior to certification,[34] that "procedure" meant a "court procedure", and not a procedure completely outside the court system. However, the Divisional Court[35] overruled that, and opined that the term had a wider meaning. All alternative processes to resolve the dispute or as a means of pursuing

[27] *Phillips Petroleum Co v Shutts*, 472 US 797, 809, 105 S Ct 2965 (1985); *Deposit Guaranty National Bank Jackson Miss v Roper*, 445 US 326, 339, 100 S Ct 1166 (1980).

[28] *Zhang v Minister for Immigration, Local Govt and Ethnic Affairs* (1993) 45 FCR 384; *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [74].

[29] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [31] ("the preferability analysis requires the court to look to all *reasonably available* means of resolving the class members' claims, and not just at the possibility of individual actions") (emphasis added); *Andersen v St Jude Medical Inc* (SCJ, 16 Sep 2003) [67] ("I was not referred to evidence that provincial health authorities are likely to commence proceedings"); *Olar v Laurentian University* (2003), 37 CPC (5th) 129 (SCJ) [42].

[30] *Reid v Ford Motor Co* [2003] BCSC 1632, [105] (alternative of Transport Canada prosecuting on class members' behalf not feasible; "Transport Canada has not engaged in any prosecutions for the last ten years"); *Gregg v Freightliner Ltd* (2003), 35 CCPB (BC SC) [77]; *Dalhuisen (Guardian ad litem of) v Maxim's Bakery Ltd* [2002] BCSC 528 (SC [in Chambers]) [21] ("The best gauge of the failure of the procedure advocated by the Defendant is the fact that, of the 48 potential members of the Plaintiff Class, only one settlement has been reached to date despite liability being admitted").

[31] *SLC Report*, [4.33] (emphasis added).

[32] *Newberg* (4th) § 4.27 p 246.

[33] Certified by Brockenshire J on 17 Jul 2000: (2000), 50 OR (3d) 114 (SCJ), leave to appeal allowed: (SCJ, 31 Jan 2001) on the basis that it concerned matters of importance for the public and for conduct of class actions in Ontario, certification aff'd: (2001), 15 CPC (5th) 27 (Div Ct).

[34] This pre-certification motion was only to determine the meaning of "procedure" in s 5(1)(d): (2000), 47 OR (3d) 793n (Brockenshire J, 12 Nov 1999) 799, leave to appeal granted by Thomson J: 4 Jan 2000. Via Rail had proposed a two-stage process as an alternative to a class action: (i) it would pay each passenger $1,000 in exchange for a release; and (ii) passengers wanting more would provide claim particulars (including claims of family members) and efforts would be made to reach settlement, failing which the claims would be arbitrated, with Via Rail paying the costs. Ultimately, Brockenshire J held that this was not a preferable alternative, and that certifying a class action was simpler and more straightforward: (2000), 50 OR (3d) 114 (SCJ) [15].

[35] (2000), 47 OR (3d) 793n (O'Leary, Swinton and McNeely JJ, 7 Apr 2000) 794.

compensation had to be considered. This approach has since been endorsed by the Supreme Court of Canada.[36] As one commentator has since noted,[37] it "opens the door for creativity in devising dispute resolution processes", especially those that take the proceedings outside the ambit of the courtroom.

The legal position with respect to alternative procedures to class actions appears to vary under Australia's Pt IVA regime, however, with the consequence that it is harder for defendants in Australian actions to argue that another process is preferable to the class action. Under Pt IVA,[38] it is open to the defendant to argue (and for a court to consider) that another method of litigation is a better alternative to the class action which the plaintiff class wishes to institute in order to obtain the relief sought. The provision, however, has been little used.[39] It requires alternative *litigation*, in the sense of "a proceeding in court", not an alternative dispute resolution method. The volume of litigation in which the defendant has propounded the possibility of an alternative to class litigation is much greater in the counterpart focus jurisdictions than in Australia, arguably as a direct derivative of their less restrictive legislative drafting.

C LEGISLATIVELY- AND JUDICIALLY-ESPOUSED FACTORS

An analysis of the case law reveals that there is a high degree of correlation between the focus jurisdictions with respect to the array of factors which determine whether a class action is the superior device. The following discussion will proceed upon the basis that the requirements of commonality, suitability and an adequate representative have been fulfilled, and the only remaining question for the court is whether the class action should be permitted to proceed because it is superior to other means of resolving the dispute between the class members and the defendant.[39a]

[36] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [31].

[37] JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, [22].[38] FCA (Aus), s 33N(1)(b), in which use of the term "proceeding" presumably means "a proceeding in court . . .", pursuant to s 4.

[39] *Soverina Pty Ltd v Natwest Aust Bank Ltd* (1993) 40 FCR 452, 456 (plaintiffs could join as parties to other litigation on foot); *ACCC v Giraffe World Aust Pty Ltd (No 2)* (1999) 95 FCR 302, [226] (plaintiff could proceed under Trade Practices Act 1974 (Aus), s 87(1A), notwithstanding the "administrative inconvenience and cost" of its opt-in regime). Cf: *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [74] (individual proceedings in several courts not a feasible alternative).

[39a] The categorisation adopted in this section has been compiled by grouping various legislative and judicial factors that have arisen across the focus jurisdictions into "related bundles" of criteria. Other secondary sources have also been of assistance in this task—sources such as *AltaLRI Report*, [164], citing MA Eizenga, MJ Peerless and CM Wright, *Class Actions Law and Practice* (Toronto, Butterworths, 1999); WK Branch, *Class Actions in Canada* (Vancouver, Western Legal Publications, 1996) [4.820]ff; *OLRC Report*, 379–95; and *Newberg* (4th) § 4.27–4.43, have all adopted different and very useful categorisations and labels by which to analyse superiority factors.

1. Whether Class Members Wish to Sue Individually Rather Than by Class Action

The first factor listed by FRCP 23(b)(3) as pertinent to the superiority issue is "the interests of members of the class in individually controlling the prosecution . . . of separate actions". As Table 7.1 above shows, the factor was also listed by the legislature of British Columbia as being relevant to the issue. Presumably, as has been noted in all North American focus jurisdictions, the factor is aimed toward whether the *majority* of the class have an interest in maintaining separate suits; for if only a small number of class members wished to do so, then they could validly opt out, for example, leaving the majority of the class members to pursue the class action.[40] Although the factor is not enumerated in either Ontario or Australia's regime, it is plain that several of the factors that have been mentioned under FRCP 23 as being relevant to the issue have been considered by courts in these jurisdictions also.

The types of factors which may indicate that "[t]he interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action"[41] are several.

(a) Many individual suits already pending

Evidence that class members have been willing to litigate the issues in dispute either by individual actions or in other forums is relevant to the court's discretion as to whether to authorise a class action, but the factor suffers from a number of inherent tensions. Whilst it demonstrates the ability to attain access to a dispute resolution forum regardless of a class action, a multiplicity of law suits can be considered inimical to judicial economy. Moreover, the same multiplicity may indicate to one court that there is an interest in individually controlling proceedings, and to another court that a class action is needed.[42] Certainly, if the other litigation in which the claims have been canvassed is close to conclusion, the commencement of a class suit may be denied.[43] For example, the class action in *Soverina Pty Ltd v Natwest Australia Bank Ltd*[44] was discontinued, partly on the basis that the claims could be determined in a state court,

[40] This assumption is pointed out by *Newberg* (4th) § 4.29 p 256, *OLRC Report*, 379, and in respect of the BC provision, the SCC noted in *Rumley v BC* [2001] SCC 69, 205 DLR (4th) 39 (SCC) [37] ("there is little evidence here to suggest that any *significant number* of class members would prefer to proceed individually") (emphasis added).

[41] This was the wording used by the Rules Advisory Committee to explain the terms of FRCP 23(b)(3)(A).

[42] These various competing factors are noted by *Newberg* (4th) § 4.30 pp 257, 265, also citing: Rules Advisory Committee, "Notes to 1966 Amendments to Rule 23" (1966) 39 FRD 69, 104.

[43] *OLRC Report*, 381; *Newberg*, *ibid*, 266, citing, eg: *Mitchell v Texas Gulf Sulphur Co*, 446 F 2d 90, 107 (10th Cir 1971).

[44] (1993) 40 FCR 452.

where similar proceedings had been issued two years previously, and in which considerable progress had been made.[45]

The factor's second problem is that rarely operates on its own. Certainly, the willingness of plaintiffs to pursue individual relief can demonstrate an interest that the individuals have in controlling their separate actions, rather than through a class representative.[46] One of the points made by the Australian federal court in *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd*,[47] in which class proceedings were discontinued, was that there was evidence before the court to indicate that individual proceedings had been instituted by a variety of large public body plaintiffs against the defendant. The court noted[48] that these particular well-financed plaintiffs expressed no interest in joining a class of possibly thousands of consumers and builders who may have purchased products the subject of alleged price-fixing (although the existence of such a class was held to be speculative in any event). Similarly, in *Sutherland v Canadian Red Cross Society*,[49] the court noted that 84 individual lawsuits were pending in Ontario, although the action failed certification for other significant reasons. The existence of other suits also indicated to the Third Circuit in *Daye v Com of Pa*[50] that there was a strong interest in individual control, negating a class action. Thus, the factor has obviously been significant in each of the focus jurisdictions, although it is fair to say that in each of the aforementioned decisions the class action failed upon numerous other grounds.[51] Pendency of other law suits could not be said to have been conclusive in any of those scenarios, and indeed, whether it should ever be a governing factor in an era where the court has a responsibility to allocate its resources among all potential court users and promote judicial efficiency by use of the class action device is most debatable.

[45] *Ibid*, 456 (Hill J). Cf *ACCC v Internic Technology Pty Ltd* (1998) ATPR 99 41-646 (FCA) (commencement of law suit against same defendant in US not persuasive one way or the other in relation to exercise of discretion under s 33N).

[46] The argument has successfully defeated a class action in British Columbia: *Tiemstra v Insurance Corp of BC* (1997), 22 BCLR (3d) 49 (SC) [18], aff'd (1998), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA).

[47] FCA, 9 Jul 1997 (defendants already fined over $21 million for unlawful cartel activities prior to the class action: R Davis, "Gold Coast City Commences Consumer Class Action" (1997) 12 *Trade Practices L Bulletin* 130).

[48] *Ibid*, 7.

[49] (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div) [37]. Also: *Cloud v Canada (A-G)* (2003), 65 OR (3d) 492 (Div Ct) [31] ("Several former students of the Institute have already commenced individual actions claiming damages for sexual assault. . . . In the circumstances, individual actions by former students are a feasible, reasonable and preferable alternative to a class action").

[50] 344 F Supp 1337, 1343 (ED Pa 1972).

[51] In *Sutherland v Canadian Red Cross Soc* (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div): subjective class definition; atypical representative; no common issues across the class; third party joinder likely; in *Pioneer*: no willing class; impossible damages quantification; absence of superiority; in *Daye*: inadequate representative; death and personal injury claims: too many individual issues.

(b) Wealthy and sophisticated class members

If there is no evidence to suggest that the cost of individual litigation is prohibitive to the individual plaintiffs, then it has on occasion been judicially opined in Ontario[52] and in the US[53] that access to justice is not furthered by permitting them to form a class. If it is economically feasible for the plaintiffs to pursue their individual claims, then some courts have appeared to almost assume that they would wish to do so. In those circumstances, whilst not necessarily fatal to an order for certification, the absence of otherwise uneconomically feasible claims "will certainly weigh in the balance against certification."[54] It has been said that the legitimate purpose of enabling members of the public to gain access to justice which, but for class actions, would be impossible, "cannot be overstated."[55]

The factor, again, is by no means conclusive. The argument was raised in the US decision *In re Revco Securities Litig*,[56] but the court noted, in response to the defendant's contention that each class member was a wealthy investor capable of instituting its own action without the use of a class action: "Rule 23 has no restriction on wealth".[57] Or, in the words of another court: "I do not agree that Rule 23(b)(3) class actions are available only to the poor or in circumstances where numerous small claims would otherwise go unredressed."[58] Academically, it has been noted[59] that the argument has attracted little discussion under FRCP because class actions under r 23(b)(3) have usually involved large classes. A healthy financial status of class members has not been regarded as particularly significant in Australia[60] either. In Ontario also, the factor has not necessarily been regarded as one to preclude a class action. In *Mont-Bleu Ford Inc v Ford Motor Co of Canada*,[61] the proposed class of car dealerships was comprised of economically advantaged and sophisticated business people who admitted that they could have sued the defendant independently of a class

[52] In an early decision: *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [122]–[124] (Moldaver J).

[53] *Primavera Familienstiftung v Askin*, 178 FRD 405, 411 (SD NY 1998); *Liberty Mutual Ins Co v Tribco Construction Co*, 185 FRD 533, 542 (ND Ill 1999).

[54] *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [125]. Also: *Primavera*, *ibid* (financial resources of the potential class member investors and their ability to institute individual lawsuits militated against certification; consolidation appropriate).

[55] *Abdool* (Div Ct), *ibid*, [124].

[56] 142 FRD 659 (ND Ohio 1992).

[57] *Ibid*, 669. Also, eg: *Lubin v Sybedon Corp*, 688 F Supp 1425 (SD Cal 1988).

[58] *Fulco v Continental Cablevision Inc*, 1990 WL 120688 at 4 (D Mass 1990).

[59] The suggestion has "received little discussion" in US case law, probably because class actions have usually involved large classes where, regardless of economic status, joinder was impracticable: *Newberg* (4th) § 3.6 p 257; § 4.29 p 257.

[60] The financial status of several of the class member victims of the cartel was referred to in *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (FCA, 9 Jul 1997), but without much importance being attached to it (mainly because they were likely to opt out). The action was discontinued on other grounds.

[61] (2000), 48 OR (3d) 753 (Div Ct). Originally, this class action was not certified by Manton J: SCJ, 15 Feb 2000, but that was overruled.

proceeding. Refusal to allow the proposed class action would not have amounted to a denial of their access to justice.[62] Nevertheless, certification was permitted. Other factors, such as judicial economy and preventing a multiplicity of proceedings, were considered more significant.

The argument that the class members' financial status should be relevant when determining whether a class action is superior to individual proceedings attracts certain difficulties. As Watson notes, it is hardly self-evident, notwithstanding that the litigants may be financially able to do so, that they will necessarily pursue their claims in the absence of a class action.[63] It is probable that many class members, despite their level of wealth or sophistication, may have no incentive to sue alone, but would be willing to join a class. Along the same lines, another Ontario court has been equally dismissive of the suggestion that, because class members had individually retained the same law firm to provide advice, individual rather than class proceedings were "preferable".[64] The fact that individual class members may be wealthy or contact the same law firm for advice does not import that all such class members would litigate individually, absent a class action. To reiterate, any evidence that individuals may proceed individually if a class proceeding is not permitted has, as its corollary, that litigation is likely to multiply if class proceedings are denied.

(c) Very sizable individual claims

Where each individual claim is made for very large sums, an inference may arise that access to justice can be obtained through unitary proceedings, that such actions could be pursued outside the context of a class action, indeed, that the class members might wish to pursue their own proceedings to recover the large amounts involved, and that class proceedings are otiose.[65] Such an argument has indeed been judicially supported in Ontario[66] and British Columbia[67] where the size of the individual claims advanced was large. For example, in the Ontario decision in *Abdool v Anaheim Management Ltd*,[68] the fact that each claim was in the order of $300,000 plus exemplary damages was significant in

[62] *Mont-Bleu* (Div Ct), *ibid*, [6]–[7].

[63] See: G Watson, "Initial Interpretations of Ontario's CPA" (1993), 18 CPC (3d) 344, 347 (discussing *Abdool*).

[64] *Pearson v Inco Ltd* (2002), 22 CPC (5th) 167 (SCJ) [15], and later uncertified on various grounds: *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ).

[65] Eg: RB Smith, "Class Actions and Financial Institutions" (1998) 17 *National Banking L Rev* 35, 37.

[66] *Millgate Financial Corp v BF Realty Holdings Ltd* (1999), 28 CPC (4th) 72 (Gen Div) [56]. Also see: *Tampa Hall Ltd v Canadian Imperial Bank of Commerce* (1998), 37 OR (3d) 150 (Gen Div) [33]–[34]; *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [39]; *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [130].

[67] *Griffith v Winter* (2003), 15 BCLR (4th) 390 (CA) [18] (obiter only; each individual claim likely to be in the region of $150,000 if successful; class action certified). Also discussed by certifying court: *Griffith v Winter* [2002] BCSC 1219, 23 CPC (5th) 336 (BCSC) [38].

[68] (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct).

the denial of certification.[69] Moldaver J considered that a class action "should have at its root a number of individual claims which would otherwise be economically unfeasible to pursue. . . . the absence of this important underpinning will certainly weigh in the balance against certification."[70] Subsequently, however, Charbonneau J refuted a defendant's arguments along these lines, although without reference to the abovementioned and contrary authority.[71] Clearly, this is a matter upon which judicial opinion will differ. The Supreme Court of Canada has indicated its support for the argument, however, by stating that class members in *Hollick v Metropolitan Toronto (Municipality)* might have individual claims "so large as to provide sufficient incentive for individual action."[72]

Similarly, the factor has received mixed treatment under FRCP 23(b)(3). Whilst some courts have denied certification on the basis, inter alia, of large individual claims that rendered an interest in individually controlling separate proceedings manifest (and joinder practicable),[73] the argument that a class action is not superior when the individual claims are large has been refuted on several bases. It has sometimes been held that a large claim by the representative plaintiff means that that party "may be expected to pursue the case diligently and thoroughly",[74] that the alternative of using a test case is inappropriate when the typical claim is large,[75] or that it is unclear that *all* class members had sustained such large damages that he or she could pursue his or her own action.[76]

Just as with the financial status of the class members, it appears by no means clear that the mere fact that an individual claim is large should imply that the litigant would choose to commence individual proceedings rather than the class action alternative. Whilst a series of small, non-recoverable, claims is a strong factor to consider in certification, it is surely evident that the converse is not

[69] It was not the total amount of the claim against all defendants—$100,000,000—which was important, it was held on appeal, but the size of *each* individual claim: (1995), 121 DLR (4th) 496 (Div Ct) 506 (O'Brien J), overruling the earlier statements of Montgomery J: (1994), 15 OR (3d) 39 (Gen Div) [29].

[70] *Abdool* (Div Ct), *ibid*, [125]. For criticism of the decision by Montgomery J, see: G Watson, "Initial Interpretation of Ontario's CPA' (1993), 18 CPC (3d) 344, 347.

[71] *Isaacs v Nortel Networks Corp* (2001), 16 CPC (5th) 69 (SCJ) [42]. The argument also did not impress Brockenshire J in *Olar v Laurentian University* (2001), 17 CPC (5th) 353 (SCJ) [39]–[40] (*obiter* only; no suitable representative plaintiff); this decision was overturned on appeal: (Ont CA, 16 Oct 2002), and reheard; *Olar v Laurentian University* (2003), 37 CPC (5th) 129 (SCJ) [44], on which occasion, the court *did* attribute significance to the large individual claims, up to $75,000: "Given that the potential claim of each proposed class member is substantial and potentially sustainable on an individual basis, there is no evidence that the size of the claims would be a deterrent to the commencement of individual proceedings").

[72] 2001 SCC 68, 205 DLR (4th) 19 (SCC) [33].

[73] *Primavera Familienstiftung v Askin*, 178 FRD 405 (SD NY 1998) (30–40 investor class members; each invested in excess of $1M; minimum investment over $100,000; "the principle of protection for weaker plaintiffs which underlies Rule 23 cannot be invoked"); *Ford v Nylcare Health Plans of Gulf Coast Inc*, 190 FRD 422, 427 (SD Tex 1999), and see further: *Newberg* (4th) § 4.29 p 260.

[74] *State of Illinios v Harper & Row Publishers Inc*, 301 F Supp 484, 486 (ND Ill 1969).

[75] *In re Folding Carton Antitrust Litig*, 75 FRD 727, 732 (ND Ill 1977).

[76] *Scholes v Moore*, 150 FRD 133, 138 (ND Ill 1993).

true. Judicial economy, the need for proportionality in the use of judicial resources, and promoting access to justice even for the "wealthy unwilling", all seem to dictate that the existence of large claims *per se* should not govern judicial discretion as to whether access to justice would be facilitated by a class action.

(d) Other factors indicating class members want to control their own litigation

Under FRCP, it is apparent[77] that (apart from the two aforementioned scenarios) the discretion to permit individual proceedings has most often been exercised in two instances—where there was a strong psychological anguish driving the litigation, or where there was a range of strategies and tactics of litigation open to different class members (for example, separate causes of action against different defendants with varying prospects of success). In a case that arose out of a fatal airline crash,[78] a US court noted that "[n]ot only do the claims vitally affect a significant aspect of the lives of the plaintiffs . . . but there is a wide range of choice of the strategy and tactics of the litigation."[79] The latter of these factors has been applied in Ontario[80] to deny certification—in an environmental pollution case where the court was concerned "that a significant component of the alleged claims includes the possibility that diseases and conditions will manifest themselves at some future time." Nordheimer J continued: "[i]t is arguably unfair for future sufferers, who have no current way of knowing who they are or what their conditions may eventually manifest themselves to be, to be put to the requirement of prosecuting their claim at a time which is not of their choosing."[81] His Honour was of the view that, tactically, some of these proposed class members would appear to have a substantial interest in controlling their own litigation so as to sue at a time that was not dictated by the class proceeding. Although the opt-out rights of each class member could feasibly have been exercised to overcome the potential difficulties identified in these cases, the courts chose (in combination with other factors) not to permit certification of the actions at all.

In both instances of emotionally wrenching litigation and tactical manoeuvring, it may seem particularly inappropriate to reduce the litigants to the role of inactive class members, although again, such elements are not conclusive. In a case of alleged sexual abuse of children in foster care homes over a lengthy period, the British Columbia Court of Appeal, whilst acknowledging the "difficult and potentially traumatic" litigation ahead for class members,

[77] *Newberg* (4th) § 4.29 p 260.

[78] Eg: *Hobbs v Northeast Airlines Inc*, 50 FRD 76 (ED Pa 1970) (action on behalf of persons injured or survivors of persons killed in plane crash).

[79] *Ibid*, 79.

[80] *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ).

[81] *Ibid*, [132].

considered that this was not a sufficient factor to find that they would wish to control their own individual proceedings.[82] The class action was permitted to proceed.

2. Costs Comparison Between One Class Action and Several Unitary Actions

Proof that a class action is likely to cost more than a series of unitary actions commenced by the class members is an express test of superiority under Pt IVA.[83] It is one of the four separate and independent grounds upon which the Federal Court may order that a proceeding under Pt IVA should no longer continue. The provision does not have an equivalent in the counterpart focus jurisdictions. It was prompted by the ALRC's concern that 'where the claims are so divergent or complex that the overall costs to the parties and to the administration of justice may be more than the combined cost of separate proceedings", then the proceedings should be separated.[84]

As a superiority factor, the Australian provision has not proven to be particularly effective for defendants, with only one action having been discontinued on this basis to date, and that was in circumstances where the court was not actually comparing a class action to several unitary actions at all. That occurred in *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd*,[85] in which a cartel of collusive pricing and tendering by producers and suppliers of pre-mix concrete was alleged. Drummond J described the case as one of "unusual circumstances".[86] The proceedings were likely to be complex and expensive. Disclosure would probably be lengthy and difficult. Non-party disclosure was also likely. In the light of all this:

> [I]f these proceedings continue, the benefits to be derived, which are very likely to be confined to benefits to the applicant, will be very greatly outweighed by the costs burdens inflicted on the respondents. The applicant is fully entitled to pursue the respondents for its own losses in an action brought for its sole benefit. Such an action will, in my opinion, be significantly less costly to all parties than the proceedings as presently framed.[87]

Otherwise, defendants have failed in their attempts to employ a cost comparison as an escape hatch from a class action. Occasionally, it has been intimated that the factor requires speculation about costs evidence which the court does not wish to entertain at the outset of the action.[88] In other scenarios, the court

[82] *Griffith v Winter* (2003), 15 BCLR (4th) 390 (CA) [18].
[83] FCA (Aus), s 33N(1)(a).
[84] *ALRC Report*, [150].
[85] FCA, 9 Jul 1997.
[86] *Ibid*, 7.
[87] *Ibid*.
[88] *Murphy v Overton Investments Pty Ltd* [1999] FCA 1123, [111] ("[i]t is essentially a matter of speculation at the present time as to which course, if any, would result in any cost saving").

has simply assumed (in the absence of any detailed discussion about likely comparative costs) that the costs of unitary proceedings will be greater.[89] On other occasions, the court has pointed out that, if the court (and defendant, and quite possibly, the representative plaintiff) does not know the number of unitary actions that could be brought (because the number of class members is unknown), it is impossible then to say that one class action would cost more than many actions, when it does not know the number of actions with which the comparison is being made.[90] Whatever the reason, it has been relatively easy for a class to convince the court that, in respect of a cost comparison, a class action was preferable to separate proceedings. Moreover, where defendants have successfully disproved superiority, there have been reasons other than relative costs between the class action and a series of unitary actions which have justified that conclusion.[91] Finally, if the claims were as divergent as the ALRC postulated, therefore requiring the proceedings to be separated, it would probably be difficult to find the requisite substantial common issue in any event.

Thus, and in spite of the hopes which the ALRC had for this provision as a means of ensuring the cost-effectiveness of the class proceedings vis-à-vis a number of unitary proceedings, it appears to have been favourably construed towards class plaintiffs, and in the absence of much detailed costs analysis. In the event that the number of class members is not known, it is difficult to see how the provision could have much utility at all.

3. Whether Class Members' Characteristics Particularly Suit Class Litigation

Although not noted to be a relevant criterion under any of the focus jurisdictions' regimes, it is clear that both economic characteristics of the class members (such as their financial status, and the size of their claims), and non-economic characteristics, are vital in the superiority matrix. The US rule does, however, specifically draw the court's attention to the extent of other litigation already commenced by the class members.

[89] *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 534 ("The costs which would be incurred on the (minimum of) seven proceedings [in the Small Claims Tribunal] would exceed the costs that would be incurred if the present proceeding continued under Pt IVA, because . . . many matters would need to be established seven times in separate courts, such as the value of the Ion Mat and the illegality of the scheme"). *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [76] also referred to the need to speculate as to relative costs, given the absence of any evidence from the parties on this issue.

[90] *Bright*, *ibid*, [156].

[91] Eg: *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (FCA, 9 Jul 1997) (doubts about existence of a class; and if the unitary action continued, injunctive relief likely to benefit all class members in any event); *ACCC v Internic Technology Pty Ltd* (1998) ATPR ¶ 41-646 (FCA) (numerous individual issues of reliance).

(a) Many small claims

The most obvious reason why defendants may be insulated from any determination of liability, absent a class action, is where the plaintiffs can point to many relatively modest claims which would be uneconomic to litigate on an individual basis, or for which individual class members would not consider it worth their time, effort and money to commence proceedings on their own. Courts in all focus jurisdictions have readily justified the commencement of class actions so as to provide the putative class members with some chance of remedy which, in the absence of class proceedings, would not exist—where "economic reality dictates that [they] proceed as a class action or not at all".[92] In response to a game argument by the defendant that prejudice to their interests was being caused by a multiplicity of plaintiffs, Heerey J pithily pointed out:

> To the extent that respondents have lost the advantage which would have accrued if all investors had brought separate proceedings, with . . . the possibility that some might not be able to afford proceedings, that is a forensic advantage to respondents which Pt IVA seems designed to remove.[93]

Indeed, such is the emphasis that has been put upon small claims as being appropriate for class action litigation that any judicial indications[94] that small damages are not worth the cost of pursuing the class action entreat upon a cost–benefit analysis which, ironically, none of the legislatures of the focus jurisdictions (with the exception of Australia, which has a limited cost–benefit test) has actually sanctioned on its face.

Occasionally, it would seem that courts have been reluctant to overstate this factor. One of the most intriguing decisions under Pt IVA which demonstrates this concerned the alleged failure of the sterilisation procedure known as the Filshie clip. At first instance, it was doubted whether a class action regime should necessarily accommodate groups of people with small individual claims who

[92] Eg, US: *Eisen v Carlisle and Jacquelin*, 417 US 156, 161, 94 S Ct 2140 (1974) ("A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all"). Also: *Phillips Petroleum Co v Shutts*, 472 US 797, 809, 105 S Ct 2965 (1985); *Deposit Guaranty National Bank, Jackson, Missouri v Roper*, 445 US 326, 339, 100 S Ct 1166 (1980). Eg, Ontario: *Nantais v Telectronics Proprietary (Canada) Ltd* (1996), 129 DLR (4th) 110, 25 OR (3d) 347 (Gen Div) [8]; *Robertson v Thomson Corp* (1999), 171 DLR (4th) 171, 43 OR (3d) 161 (Gen Div) [35]; *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada* (1998), 160 DLR (4th) 186, 40 OR (3d) 83 (Gen Div) [3]. Eg, Australia: *Ryan v Great Lakes Council* (1998) 155 ALR 447 (FCA) 456; *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 534; *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) [135]; *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [158]. Eg, British Columbia: *Halvorson v BC (Medical Services Comm)* (2003), 227 DLR (4th) 644, 13 BCLR (4th) 205 (CA) [34].

[93] *Patrick v Capital Finance Corp (Australasia) Pty Ltd* [2001] FCA 1073, [11].

[94] Eg: *Nelson v Hoops LP* [2003] BCSC 277, [34] ("Certifying this action would require substantial efforts to be made to locate and notify a large group of people, only a very small minority of whom are likely to be able to pursue any realistic claim. I note, as well, that those members of the class who might have a claim are also likely to have suffered only very minimal damages").

otherwise would have no access to individual judicial relief. Stone J noted of Pt IVA in *Bright v Femcare Ltd*[95] that whilst it is true that defendants should not benefit from the fact that class members might not consider it worth their while to commence proceedings individually, that was "just one aspect of a complex policy". Other factors, such as the extent of non-common issues, the possibility of alternative case management procedures, and of further litigation between the defendants and others not bound by the proceedings, contributed to the decision at first instance that a class action was inappropriate. However, that was ultimately overturned on appeal[96]—on the basis that these were exactly the circumstances in which Pt IVA was appropriate: small individual damages assessments, a likelihood that most of the women would not pursue individual claims because the potential gains would not justify incurring the risk of legal costs, and a finding that it would be contrary to the interests of justice to stop the class action.

(b) Relatively unsophisticated or disadvantaged class members

For some plaintiffs, a class action may be their only alternative. Many of the barriers which may render litigation simply out of reach are not necessarily associated with economic disadvantages. Rather, individual proceedings may be rendered extremely unlikely due to non-economic factors, whether social or psychological.[97]

Case law in Canada,[98] Australia[99] and the US[100] indicates that class proceedings have been sanctioned for commencement in circumstances in which the

[95] (2001) 188 ALR 633 (FCA) [74].

[96] *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [158].

[97] Eg: MD Kirby, "Class Actions: A Panacea or Disaster?" [1978] *Aust Director* 25, 33; *ALRC Report*, [15]; *AltaLRI Report*, [101]; Public Interest Advocacy Centre, *Representative Proceedings in New South Wales—A Review of the Law and a Proposal for Reform* (1995) 21; *OLRC Report*, 127–31; *Newberg* (4th) § 3.6 pp 258–60; *VLRAC Report*, [2.5], [2.8].

[98] Eg, Ontario: *Andersen v St Jude Medical Inc* (SCJ, 16 Sep 2003) [69] (class members' physical condition as result of alleged defective heart valves could prevent them from conducting litigation). Eg, British Columbia: *Rumley v BC* 2001 SCC 69, 205 DLR (4th) 39 (SCC) [39] ("The individual class members are deaf or blind or both. Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members' with respect to communications").

[99] Particularly, class actions for review of refusal of refugee status by "boat people" against, in each case, the Minister for Immigration and Ethnic Affairs: *Zhang* (1993) 45 FCR 384; *Lek* (1993) 43 FCR 100; *Chen* (1994) 33 ALD 441 (FCA); *Trong* (1996) 66 FCR 239; *Wu* (1996) 185 CLR 259 (HCA); *Capistrano* (1997) 50 ALD 108 (FCA), or for failing an English test: *Fazal Din* [1997] FCA 780. In *Trong,* Merkel J described the class members as "having little command of the English language and, I assume, even less knowledge and understanding of the Australian legal system": at 244. Cf: the argument by class's counsel in *Nixon v Philip Morris (Aust) Ltd* (HCA, SL application, 21 Jun 2000) 5, that the class members suffered from terminal disease, and were unlikely to see the outcome of individual proceedings, failed to convince the court that a class action should be allowed. Also: *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [49] (class action comprised "a disproportionate number of aged or infirm people").

[100] *Leyva v Buley*, 125 FRD 512, 515 (ED Wash 1989) (limited knowledge of US legal system, lack of English skills); *Committee of Blind Vendors of District of Columbia v District of Columbia*, 695

plaintiffs as a group were immigrants, socially isolated, extremely ill, aged, disabled, unaware of wrongdoing or of their legal rights, suffered language barriers, or were unwilling to assert their rights for fear of backlash. It has been judicially recognised that a class action also offers anonymity to persons who may fear publicity by reason of a fear of ostracism or stigmatising disability (given that only the representative plaintiff is named on the pleading)[101] or because of fear of retaliation if they individually were to sue the defendant,[102] although not all courts have been persuaded by this anonymity argument.[103] In a novel point, one US court upheld certification of a class action on the basis that the class members, all individual owner-operators of truck tractors, were absent on average about 300 nights of the year, and therefore, even had they wanted to prosecute individual actions, it was unlikely that many "could marshall the time to do so."[104]

However, disadvantaged characteristics of class members are not the only circumstance which has motivated courts to favour a class action in preference to other possible dispute resolution mechanisms. For example, class proceedings were certified in *Webb v K-Mart Canada Ltd*,[105] not only on the basis that the CPA provided the best, and crucially, "perhaps the only opportunity",[106] for a class of ex-employees to mount a claim against large corporate employer K-Mart for wrongful dismissal, but also because of the "very active defence"[107]

F Supp 1234, 1242 (DDC 1988) (blind class members with meagre financial resources); *Brown v Giuliani*, 2000 WL 869491 at 6 (SD NY 2000) (proposed class members, nursing home residents, frail, elderly and disabled individuals; because of their age and health, possible they might not survive until the action was completed).

[101] Eg: *Brogaard v Canada (A-G)* (2002), 7 BCLR (4th) 358 (SC [in Chambers]) [121] (plaintiffs sought anonymity on basis of sexual orientation, so as to avoid discrimination and ostracism); or for the mentally ill: L Pierce, "Class Actions in Canada" (2000) 6 *Appeal* 22, 22.

[102] Eg: actions by employees against employers who fear dismissal: *Rodriguez v Berrymore Farms Inc*, 672 F Supp 1009 (WD Mich 1987) (migrant workers) and *Jenson v Eveleth Taconite Co*, 139 FRD 657 (D Minn 1991) (sexual harassment); and actions by nursing home residents against their caretakers: as argued in, K Intagliata, "Improving the Quality of Care in Nursing Homes: Class Action Impact Litigation" (2002) 73 *U Colorado L Rev* 1013, 1030; LK Abel and DS Udell, "Judicial Independence: If You Gag the Lawyers, Do You Choke the Courts?" (2002) 29 *Fordham Urban LJ* 873, 885, 886. Even in securities litigation, institutions may prefer anonymity: J Chapman, "Class Proceedings for Prospectus Misrepresentations" (1994) 73 *Canadian Bar Rev* 492, 503.

[103] *Febringer v Sun Media Corp* (2002), 27 CPC (5th) 155 (SCJ) [29] ("Class actions should not be used for the purpose of cloaking members of the plaintiff class with anonymity. It is also not a practical objective. At some point, all members of the class are going to have to identify themselves because they will have to prove their individual claim to damages"). The second argument is clearly inapplicable if the class loses on the common issues.

[104] *Owner-Operator Independent Drivers Assn v Mayflower Transit Inc*, 204 FRD 138, 149 (SD Ind 2001).

[105] (2000), 45 OR (3d) 389 (SCJ) [54]. The significance of this decision has also been academically emphasised: C Reeve, "Case note" (1999) 9 *Employment and Labour L Reporter* 72; KJ McKinney, "The Use of Class Actions in Wrongful Dismissal Cases" (2000) 10 *Windsor Rev of Legal and Social Issues* 149, 159–60.

[106] *Webb*, *ibid*, [46].

[107] KJ McKinney, "The Use of Class Actions in Wrongful Dismissal Cases" (2000) 10 *Windsor Rev of Legal and Social Issues* 149, 157, notes that defence tactics involved extensive enquiries and examinations of the proposed representative plaintiff, and an attempt to shift the place of hearing.

which had been undertaken in the case up to the certification hearing. In light of litigation tactics to that stage, Brockenshire J noted that "it is easy to visualize the defence discouraging individual litigants through procedural complications and delay."[108] This contributed toward potential insulation of K-Mart from any judicial consideration of its liability. Or, as one other court put it: "A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear".[109] In this respect, courts in the focus jurisdictions have had regard to the sophisticated, influential or wealthy nature of the defendant when determining whether a class action would indeed be the superior device for the class members,[110] and academic commentary supports the validity in doing so.[111]

(c) Lack of individual actions pending

Two of the focus jurisdictions consider the absence of individual actions sufficiently important for it to be expressly mentioned. FRCP 23(b)(3)(B) indicates that the court must consider the extent of any litigation already commenced by the class members, and the British Columbia statute also requires the court to note whether the claims have been or are the subject of any other proceedings.

The lack of any other law suits or claims on foot has occasionally been a factor negating a class action in the US,[112] and the Supreme Court of Canada also endorsed this approach in *Hollick v Metropolitan Toronto (Municipality)*:

> The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern.[113]

If there is an absence of any litigation whatsoever in respect of the issues which the putative class members now wish to litigate, that can of course, indicate one of two things: no prior interest in suing, or no ability or knowledge to sue. The former cannot be assumed, for lack of individual suits may be due to a variety of factors—an unawareness of a cause of action,[114] lack of time in which to have

[108] *Webb v K-Mart Canada Ltd* (2000), 45 OR (3d) 389 (SCJ) [38].

[109] *Bouchanskaia v Bayer Inc* [2003] BCSC 1306, [152], citing with approval numerous advantages to class actions for plaintiffs put forward by the plaintiffs' solicitor.

[110] Eg: *In re Badger Mountain Irrigation District Securities Litig*, 143 FRD 693, 701 (WD Wash 1992).

[111] Eg: M Evans, "Products Liability in Ontario" (1998) 8 *Windsor Rev of Legal and Social Issues* 113, 135–37, when discussing the position of tobacco defendants operating in an industry which had previously enjoyed positive publicity and an absence of damaging scientific studies.

[112] Eg: *Bentkowski v Marfuerza Compania Maritima SA*, 70 FRD 401, 404, fn 10 (ED Pa 1976) ("dearth of other suits" indicated lack of interest in individual prosecution of claims).

[113] 2001 SCC 68, 205 DLR (4th) 19 (SCC) [33].

[114] Eg, because no one had ever linked the plaintiffs' types of injuries to the defendant's product, activity, etc: C Mauro, "Class Actions: The Defendant's Perspective" (1995) 5 *Canadian Insurance L Rev* 27, 39.

filed individual proceedings,[115] lack of awareness of the availability of legal assistance, or hesitancy to incur legal fees in respect of rights of which the litigants are aware.[116] In this regard, the *Hollick* reasoning seems somewhat doubtful. It does not follow from a lack of individual claims that class members living in proximity to the waste disposal site in *Hollick* did not have grievances. A lack of individual claims against the Trust Fund may have arisen for one or more of several reasons. In any event, to draw such an inference in circumstances where the court was prepared to find "an identifiable class"[117] appears somewhat illogical.

Whilst the decision in *Hollick* was undoubtedly correct because of the overwhelming individuality of the claims in nuisance,[118] this basis as to why class proceedings were not preferable is arguably open to question. In *Harrington v Dow Corning Corp*,[119] the British Columbia Court of Appeal took quite the opposite view of the very small number of individual proceedings then on foot against the manufacturers of breast implants (there were only three), noting that a probable reason for this was that many women who wanted to press their claims were frightened off by the burdens of time and money that individual litigation would involve.

The articulation of this particular factor in FRCP 23 has drawn the following comment from Newberg: "Just as the four items enumerated in the rule for consideration of the superiority requirement are not intended to be exhaustive, so too not every factor, itemized or not, is expected to be of significance in this superiority determination."[120] Certainly, the small size of the individual claims, or non-economic disadvantages on the part of class members, have been accorded far more consistent weight in each of the focus jurisdictions than the lack of pending litigation.

4. Whether There is Any Need for a Class Action

The Australian schema expressly requires the court to ask, under s 33N(1)(b), whether the relief sought could be obtained by means other than a class action. It is apparent that this "no-need" argument has been postulated elsewhere by judiciaries, together with a number of other judicially espoused factors which may indicate that a class action is not the superior device. On the other hand, a

[115] *Newberg* (4th) § 4.29 p 257.

[116] *SALC Paper*, [1.3]–[1.4].

[117] A contentious issue under CPA (Ont), s 5(1)(b) decided in favour of the class in this appeal.

[118] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [37], [39].

[119] (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA) [66]. Also: *Reid v Ford Motor Co* [2003] BCSC 1632, [101].

[120] *Newberg* (4th) § 4.30 p 266 (also noting that the next factor in r 23(b)(3), "the desirability or undesirability of concentrating the litigation of the claims in the particular forum" also adds little to the superiority analysis. It will not be considered further herein.)

class action may confer particularly important benefits upon the class members that are not available via other procedures, such as the binding nature of any judgment rendered on the merits, and the avoidance of inconsistent outcomes.

(a) The 'no need' arguments

(i) Better and cheaper dispute resolution procedures available

The decision in *Chin v Chrysler Corporation*[121] presents a leading US example of how a class action may be "trumped" by a cheaper and more advantageous administrative remedy. In this case, a class of car buyers and lessees of Chrysler vehicles containing allegedly defective ABS systems sought certification of a class proceeding against the car manufacturer. Certification was denied, and one of the several reasons provided was that there were administrative remedies that were available that could be superior to the remedies sought in a nationwide class action. The Motor Vehicle Safety Act[122] gave a governing authority the power to investigate complaints concerning motor vehicle defects and to order a recall for inspection and/or repair where appropriate. The court considered that the administrative remedy provided was "more appropriate than civil litigation seeking equitable relief and damages in a federal court", and that there was "insufficient justification to burden the judicial system with the plaintiffs' claims while there existed an administrative remedy that had been established to assess the technical merits of complaints" and that could handle or enforce recalls and replacement of the braking systems, where appropriate. It would appear that deference to an administrative agency has not been particularly common when suits are brought under FRCP 23.[123] Occasionally, however, US courts have expressly regretted the absence of any alternative administrative regime that would provide a fair and efficient means of compensating victims of a widespread alleged wrong, especially where the class action regime is not considered able to cope with the class complaints.[124]

Under the Canadian provincial regimes also, numerous procedures laid down by other statutes have been mooted to be preferable to class actions, including proceedings before rent tribunals,[125] the Competition Bureau,[126] employment

[121] 182 FRD 448, 464 (DNJ 1998).

[122] 49 USCA § 30101 *et seq*.

[123] *Newberg* (4th) § 4.33 p 291.

[124] See, eg: *Amchem Products Inc v Windsor*, 521 US 591, 595, 117 S Ct 2231(1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution").

[125] *Ziegler v Sherkston Resorts Inc* (1996), 30 OR (3d) 375 (Gen Div) ("As an issue of public policy, it may well be that proceedings of this kind be submitted to the specialized tribunal created by the Rent Control Act. It may establish standards which could be applicable throughout the Province so that all informed persons may know, in advance, what is fish or fowl (foul)").

[126] *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) (although complaints investigated and discontinued), aff'd: (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA), leave to appeal refused: SCC, 17 Jul 2003.

standards officers,[127] or a valuation process for minority shareholders.[128] In addition, judicial review,[129] professional arbitrators employed under an ADR programme established by the defendants to handle complaints,[130] a settlement compensation procedure put in place by the defendant,[131] a government compensation package for those infected with HIV[132] through the national blood bank, an internal dispute resolution procedure administered under the industry Commission,[133] and unitary actions in the Small Claims Court[134] have all been considered "preferable procedures" by Canadian courts, giving grounds for refusing certification. On the other hand, where the defendant has inserted into its contract with the class members an arbitration clause,[135] the effect of that upon class action certification has received mixed views in Ontario, both judicially[136] and academically.[137]

Writing extra-curially, Winkler J has noted that the alternative must have the characteristics of "independence, impartiality, and appearance of fairness, to displace a class proceeding as the preferable procedure".[138] Judicially, it has also been said that a "preferable procedure" truly has two aspects: first, it must be a fair and efficient way of determining the common issues; second, it must advance

[127] *Halabi v Becker Milk Co* (1998), 39 OR (3d) 153 (Gen Div) [6] (Employment Standards Act, RSO 1990, c E14), although this decision has been criticised on the basis that certain claims of the employees could not be pursued under the Act, but the decision could not be appealed because "the class members ran out of money": quoted in D Lundy, "Labour and Employment" (1999) 23(4) *Canadian Lawyer* 47, 47. Further, the reasoning in *Halabi* was expressly not followed in: *Kumar v Sharp Business Forms Inc* (2001), 5 CPC (5th) 128 (SCJ) [41].

[128] *Rogers Broadcasting Ltd v Alexander* (1994), 25 CPC (3d) 159 (Gen Div) [33] (Canada Business Corporations Act, RSC 1985, c C–44).

[129] *SR Gent (Canada) Inc v Ontario (Workplace Safety and Ins Board)* (2000), 45 OR (3d) 106 (SCJ) [15].

[130] *Williams v Mutual Life Ass Co of Canada* (2000), 51 OR (3d) 54 (SCJ) [49].

[131] *Bittner v Louisiana-Pacific Corp* (1997), 43 BCLR (3d) 324 (SC [in Chambers]) [66]–[67]; *Grace v Fort Erie (Town)* (2003), 42 MPLR (3d) 180 (SCJ) [156]. Cf: *Chace v Crane Canada Inc* (1996), 26 BCLR (3d) 339 (SC [in Chambers]) [24].

[132] *Sutherland v Canadian Red Cross Soc* (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div) [38] ("These potential class members are not denied access to justice absent class status, as referenced in *Bendall*. Here, a provincial compensation package exists subject to election by affected persons by March 15, 1994").

[133] *McKay v CDI Career Development Institutes Ltd* (1999), 64 BCLR (3d) 386 (SC [in Chambers]) [46].

[134] *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [33]; *Huras v Com Dev Ltd* (2000), 36 CPC (4th) 31 (SCJ) [28]; *Fehringer v Sun Media Corp* (2002), 27 CPC (5th) 155 (SCJ) [30], denial of certification aff'd: Div Ct, 30 Sep 2003.

[135] That is, an "arbitration agreement" within the definition in s 1 of the Arbitration Act 1991, SO 1991, c 17.

[136] *Rosedale Motors Inc v Petro-Canada Inc* (1999), 42 OR (3d) 776 (Gen Div) [19], issue not considered in successful appeal: Div Ct, 22 Oct 2001; *Robertson v Thomson Corp* (1999), 171 DLR (4th) 171, 43 OR (3d) 161 (Gen Div) [41]–[43]; *Huras v Primerica Financial Services Ltd* (2000), 137 OAC 79, [8]–[10]; *Kanitz v Rogers Cable Inc* (2002), 58 OR (3d) 299 (SCJ) [51]–[53].

[137] T Heintzmann and S Chong, "Certification in a Product Liability Class Action" (2001) 24 *Advocates' Q* 399, 427; EM Stewart, "Defending against Certification" (2001) 24 *Advocates' Q* 428, 430.

[138] WK Winkler (the Hon), "Class Proceedings and ADR" (2001) 20 *Advocates' Society J* 3, 8. Also discussed in respect of the Ontario Walkerton Compensation scheme in *Smith v Brockton (Municipality)* (SCJ, 17 Feb 2003) [11], [14], [26].

the three policy objectives of the legislation, viz access to justice, judicial economy and behaviour modification.[139] Thus, if an alternative procedure involves steps which, in the court's view, "fall well short of litigation on the merits",[140] or if it consists of the defendant's in-house technical services department which "lacks any meaningful form of independence",[141] then a class action will be preferable.

In this regard, it has also been academically questioned in Ontario by Watson[142] whether a defendant ought to be able to defeat a certification order and stop a class action by proposing a private programme of compensation to class members, given the various benefits that certification provides (notification to class members, court supervision of the process, and ensuring that class counsel are properly compensated such that there is sufficient incentive to launch class actions). Notwithstanding, as Kleefeld points out, the reality is that if the procedure advocated by the defendant simply "will not enhance access to justice, promote judicial economy, or go any way towards modifying its own alleged or admitted wrongful behaviour, the procedure will not likely be seen as preferable", and this has no doubt curbed to some extent the ability of defendants to get around class action certification via their own compensation proposals and packages.[143]

In addition to the overriding requirement of fairness and impartiality, if a court is to find that an alternative procedure for dispute resolution is preferable to a class action, then the case law of the focus jurisdictions has demonstrated that a number of factors require consideration. For example, if the proposed alternative to class proceedings does not itself allow for consolidation of claims, then economy of proceedings will grant favour to the class action.[144] The comparable duration between class proceedings and the alternative is a relevant factor, so that if the alternative is expeditious, and saves the time of notifying

[139] Eg: *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219 (SCJ) [119]–[120].

[140] *Wicke v Canadian Occidental Petroleum Ltd* (1999), 40 OR (3d) 731 (Gen Div) [13] (claim for employees' overtime dismissed by Ministry of Labour without reasons or full consideration); *Dalhuisen (Guardian ad litem of) v Maxim's Bakery Ltd* [2002] BCSC 528 (SC [in Chambers]) [23] (court concerned that possibility of an unequal bargaining position and the potential for inequality and inequity of settlements is such that a class proceeding preferable).

[141] *Olsen v Behr Processing Corp* (2003), 17 BCLR (4th) 315 (SC [in chambers]) [35]. Also see: *Chace v Crane Canada Inc* (1997), 44 BCLR (3d) 264 (CA) for a dispute resolution process suggested in that case of defective toilet tanks; *Brogaard v Canada (A G)* (2002), 7 BCLR (4th) 358 (SC [in Chambers]) [123].[142] GD Watson, "Annual Survey of Recent Developments in Civil Procedure" in GD Watson and M McGowan, *Ontario Civil Practice 2001* (Scarborough, Carswell Thomson, 2000) vol I, survey 14–16. The same problem is discussed from a different viewpoint by JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, [23]–[25].

[143] JC Kleefeld, *ibid*, [26].

[144] Eg, Ontario: *Kumar v Sharp Business Forms Inc* (2001), 5 CPC (5th) 128 (SCJ) (complaints about pay by class of employees and ex-employees of defendant certified, in preference to individual determination by standards officers under statute). Eg, BC: *Dalhuisen (Guardian ad litem of) v Maxim's Bakery Ltd* [2002] BCSC 528 (SC [in Chambers]) [21] (no method for adjudicating disputes that might arise other than by the commencement of separate actions by the 48 individuals). Eg, US: *Dolgow v Anderson*, 43 FRD 472, 488 (ED NY 1968) (enforcement activities of the Securities and Exchange Commission meant that investors individually would have to pursue individual remedies; often economically impracticable).

potential class members so that they may exercise their opt-out rights, then the alternative will be preferable.[145] If the form of relief which the class members are seeking may not be available in another forum which would otherwise suit the monetary amounts involved in the dispute, then in that case, the class action is the superior device so as to ensure that, if liability is established, the class members can obtain the type of relief sought.[146] Also, if the other procedure has further limitations, such that it limits the recovery of any one complainant to a maximum ceiling, or does not permit complainants to be represented by counsel before the panel,[147] or would expose the plaintiff to a more adverse costs award than a class proceeding would, then it cannot be said to be an adequate alternative to a class proceeding.[148]

Moreover, the underlying objective of class actions—proportionality, not perfection—applies to the non-curial alternatives to which a court must have regard, as the Divisional Court in *Brimner v Via Rail Canada Inc* made plain:

> a judge . . . must consider whether a compensation scheme created by statute or a dispute resolution procedure that would compensate *most of those who might be included* in a class action is more preferable than a class action for resolving common issues.[149]

(ii) One action will benefit all putative members

Courts have indicated under Pt IVA that commencement of a class action is not warranted if the seeking of injunctive relief by only one member of the class would, if granted, automatically inure to the benefit of all class members. If unitary relief would be class-wide, then no useful purpose would be served by permitting the case to proceed as a class action. For example, in *ACCC v Giraffe*

[145] *SR Gent (Canada) Inc v Ontario (Workplace Safety and Ins Board)* (2000), 45 OR (3d) 106 (SCJ) [15]–[16] (judicial review far more expeditious).

[146] Eg, Ontario: *Ormrod v Hydro-Electric Comm of the City of Etobicoke* (2001), 53 OR (3d) 285 (SCJ) [38] (plaintiff class member employees' claims against defendant employer less than $4000; but conjunctive declaratory relief not available in Small Claims Court). Eg, Aust: *Poignand v NZI Securities Aust Ltd* (1992) 37 FCR 363, [30]. Eg, US: *County of Stanislaus v Pacific Gas & Electric Co*, 1994–2 Trade Cas (CCH) ¶70782 at 6 (ED Cal 1994), cited in *Newberg* (4th) § 4.27 (California Public Utilities Commission had only a limited ability to issue the injunctive relief sought by the class, and no direct jurisdiction over the defendant). Eg, BC: *Reid v Ford Motor Co* [2003] BCSC 1632, [105] (determination by Transport Canada upon receipt of a complaint about car defects not binding or governing in any civil proceeding, and it had no power to award damages).

[147] *Scott v TD Waterhouse Investor Services (Canada) Inc* (2001), 94 BCLR (3d) 320 (SC) [148] (adverse costs orders in arbitration; not likely under the CPA (BC)).

[148] *Rumley v BC* [2001] SCC 69, 205 DLR (4th) 39 (SCC) [38].

[149] *Brimner v Via Rail Canada Inc* (2000), 47 OR (3d) 793 (Div Ct) [2] (emphasis added). Cf certification denial in *Crawford v City of London* (2000), 47 OR (3d) 784 (SCJ) [10] (defects with wood-burning fireplace in 999 units; proceedings under alternative statute did not permit recovery for significant proportion of disaffected owners). As Green notes, this was even in circumstances where the CPA (Ont) would not allow the applicant to claim damages to common areas under the class action but only for damages to units: M Green, "Class Actions by Condominium Owners" (2000) 14 *Condo Law* 153.

World Australia Pty Ltd,[150] Lindgren J was satisfied that the representative plaintiff and consumer watchdog, the ACCC, would pursue injunctive relief to restrain the defendant from operating a pyramid selling scheme, whether or not the proceedings continued under Pt IVA.[151] The class action was discontinued, and there was no need for the complexity of a class action (with opt-out notice requirements, for example) where a plaintiff has already taken the initiative to obtain beneficial class-wide relief. Similarly, in the British Columbia case of *Tiemstra v Insurance Corporation of British Columbia*,[152] an application for certification for persons who were refused insurance coverage on the "no crash-no cash" policy of the defendant was denied on the basis, inter alia, that one unitary declaratory action addressing the validity of the blanket policy was the preferable procedure.[153]

Interestingly, whilst the "no need" argument has been postulated by defendants under FRCP 23 where injunctive relief has been sought, there are also plenty of decisions in which courts have expressly rejected defendants' contentions that, for various reasons, there was no need for a class to be formed.[154] That prevailing view has been described by Newberg as "sound",[155] for the reasons that FRCP 23 does not express a "need requirement",[156] and that such a view would render otiose category 23(b)(2) class actions which are predicated on injunctive relief. Of course, it is also feasible that advantages may accrue to class members even though only injunctive relief is claimed.[157] For example, the effect of the judgment as *res judicata* binding all class members,[158] or the fact that an injunctive order may benefit from a full picture of the manner in which illegal behaviour has affected class members,[159] may impact upon the court's discretion when deciding whether a class action is "needed". Whatever the circumstances, judicial assessment of the "need" for a class action has comprised one of the superiority criteria under these focus jurisdiction regimes.

[150] (1998) 84 FCR 512.

[151] *Ibid*, 536.

[152] (1998), 49 DLR (4th) 419, 38 BCLR (3d) 377 (CA). See also: *Nelson v Hoops LP* [2003] BCSC 277, [44] (claim for punitive damages capable of being made just as easily in an individual action as in a class proceeding).

[153] One unitary action for declaratory relief also held to be preferable to a class action in: *Larcade v Ontario (Minister of Community & Social Services)* (2003), 65 OR (3d) 289 (SCJ) [61].

[154] Eg: *Berland v Mack*, 48 FRD 121, 125 (SDNY 1969) (need for class action "less apparent here because the SEC has already taken up the cudgel and obtained injunctive relief. But these weapons are cumulative").

[155] *Newberg* (3rd) § 4.70, and *Newberg* (4th) § 4.19 p 144.

[156] The US Supreme Court in *General Telephone Co of South West v Falcon*, 457 US 147, 161, 102 S Ct 2364 (1982) held that the court should strictly apply the tests in FRCP 23(a).

[157] Noted by JA Jolowicz, "Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation: English Law" (1983) 42 *Cambridge LJ* 222, 234.

[158] Eg: *John v Rees* [1970] Ch 345 (representative action crucial to prevent later actions to decide correct officers).

[159] M Cappelletti and B Garth, "Finding an Appropriate Compromise" (1983) 2 *Civil Justice Q* 111, 138–39; PH Lindblom and GD Watson, "Complex Litigation—A Comparative Perspective" (1993) 12 *Civil Justice Q* 33, 75.

(iii) Small class size justifies unitary proceedings

It may be recalled that this section's discussion is predicated on the basis that the other requirements for class action commencement have been satisfied. The present point, however, is that a class may feasibly satisfy the minimum numerosity requirement, and still be so small that naming each of the members would be a simpler procedure than, and just as judicially efficient as, a class action. The compromise is between, potentially, a small number of individual proceedings, and embarking upon the complete range of procedural requirements concomitant with a class proceeding (certification, notice to class and opting out rights, class definition, specialised pleadings, restrictions on discovery rights, court supervision of settlement, approval of the representative), merely for the purpose of determining the claims of a small group of proposed class members. Which would actually achieve the better judicial economy? Commencement of class actions in both Ontario[160] and Australia[161] has been denied because of a relatively small class size which would make it preferable to manage the proceedings through separate actions rather than via the more procedurally complex device of a class action. Note, though, that these decisions expressly failed the superiority test rather than the numerosity requirement, given the relatively undemanding nature of that requirement in each jurisdiction. In British Columbia too, it has been acknowledged that the class may not be too small for numerosity, but that a small class size was a factor to be considered again under the preferability test.[162]

Of course, given the structure of the US numerosity requirement—"so numerous that joinder is impracticable"[163]—that test already invokes a superiority assessment, and if the class is less than 25, for example, the numerosity criterion probably will not be satisfied under that regime in any event. Thus, it is evident that, by differing drafting designs, the focus jurisdiction regimes ultimately achieve the same result—a class that is small enough to justify individual proceedings will not be permitted to proceed by way of class action.

(iv) Re-litigation of the same point likely

If, despite any successful outcome for the plaintiffs in their class action, the defendant could, by lawful means (and other than by appeal), overrule the positive effects of that outcome for the class litigants, then any judicial efficiency from a class action will be undermined. This is particularly so where the defend-

[160] Eg: *R v Nixon* (SCJ, 12 Mar 2002) [8] (less than 35; also, suitable class definition difficult—individual proceedings would obviate that problem, and would be manageable). Cf: *Ward-Price v Mariners Haven Inc* (2002), 36 CPC (5th) 189 (SCJ) [39]–[40] (maximum class 24; court prepared to find judicial economy and hence preferability, despite some doubts); *Lau v Bayview Landmark Inc* (1999), 40 CPC (4th) 301 (SCJ) [26].

[161] *Dinning v Commissioner of Taxation* (1999) 99 ATC 4621 (FCA) [18], [21] (group of 8), critiqued in: V Morabito, "Dinning v Federal Commissioner of Taxation—The Dawn of a New Era in Tax Litigation in Australia?" (2000) 7 *Canterbury L Rev* 487, 498.

[162] *Griffith v Winter* (2003), 15 BCLR (4th) 390 (CA) [17].

[163] FRCP 23(a).

ant's subsequent challenge would re-litigate precisely the same points as the class proceedings. If that were to occur, then the greater expense and complexities associated with class litigation would be unnecessary—unitary litigation by one class member, re-traversed by the defendant's challenge, would presumably suffice.

The Ontario decision in *Ziegler v Sherkston Resorts Inc*[164] provides a classic instance of why judicial economy will not be enhanced by a class action in this scenario. The plaintiff class wished to sue the defendant landlord for illegally increasing rents and having allegedly failed to comply with statutory notice requirements. Crane J considered what would occur if the plaintiffs were to succeed in their action. The defendant would apply for a retroactive increase in the rents in subsequent proceedings as it was permitted to do, which would require determination by a tribunal set up under that statute. That would require the parties to relitigate substantially the same territory as that which would be covered by the class proceedings. His Honour held that the prospect of such relitigation, at the risk of conflicting decisions, was abhorrent to judicial economy.[165] The application to certify the class action failed.

(b) The 'need' arguments

(i) Binding effect of class action judgment

By virtue of a class action, all members of the class who do not opt out of the proceedings are bound by the judgment on the common issues.[166] So too is the defendant bound to all class members who do not choose to opt out. It has been judicially reiterated that no public statement or admission of liability on the part of the defendant will achieve the same result for the proposed class or for the court as a class action:

> an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed class. . . . If the proposed class members are not parties to the proceedings, the admission of liability, as it relates to them, is no more than a bare promise.[167]

Any proposed alternative to the class action must, in the court's view, be likely to resolve the issues class-wide and in a binding manner so as to avoid a multiplicity of proceedings.

If the use of a test case, for example, will not benefit the class members other than the litigant directly involved in the test case, a class action may be considered the superior procedure for that reason. This was one of the factors which

[164] (1996), 30 OR (3d) 375 (Gen Div).
[165] *Ibid*, [10].
[166] CPA (Ont), s 27(3); FCA (Aus), s 33ZB(b).
[167] *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [14] (Winkler J). Also see: *Webb v K- Mart Canada Ltd* (1999), 45 OR (3d) 389 (SCJ) [29]; *Brimner v Via Rail Canada Inc* (SCJ, 4 Jan 2000) [11].

convinced the Divisional Court of Ontario to overrule the earlier decision[168] in *Mont-Bleu Ford Inc v Ford Motor Co of Canada*[169] and allow certification of a class action by various car dealers against the Ford Motor Company of Canada, rather than use a test case for interpretation of a contract.[170] The court noted that there was little judicial efficiency to be gained for the issue to be settled or determined for proposed test plaintiff dealers and for no-one else. Putative class members required the certainty of a binding judgment. Naturally (said the court), it was the defendant's entitlement to refuse to be bound by a test case or like order with respect to other dealers in the proposed class if it considered that the evidence given at the trial of the test case would not be consistent with the evidence presented by any other class member. In this case, only a class action would bind the class and Ford, and any other test proceeding would be "cold comfort" to the class members if Ford refused to be bound by it.[171]

The position was even more marked in the British Columbia case of *Chace v Crane Canada Inc*,[172] wherein the negligence of the defendant in manufacturing faulty toilet tanks had been determined in two decided cases, but the defendant refused to accept those cases as test cases with general application—class proceedings were, in the circumstances, considered preferable. By contrast, if some procedure (such as judicial review[173]) does indeed have the effect of binding the defendant towards all putative class members, then efficiency is served by that other procedure, and is one factor *against* the commencement of a class action.

For similar reasons, the prospect of separate arbitration of each of thousands of shareholders' claims held no prospect of joy for the court in *In re Baldwin-United Corp Litigation*:

> The fairness and completeness of class litigation, in contrast to the scattered and fairly random solution suggested by individual arbitration, persuades this Court that fraud claims such as these are often best resolved by class action. Not only are interests of consistency, efficiency and completeness served, but there is also the assurance that most if not all potential claimants will be apprised of their rights and of the named plaintiff's comparatively inexpensive efforts to vindicate them. . . . At least under the circumstances of this case, arbitration cannot be regarded as a serious alternative to the class action.[174]

[168] SCJ, 15 Feb 2000.

[169] (2000), 48 OR (3d) 753 (Div Ct).

[170] Permitted under r 14.05(3)(d) of the Ontario Rules of Civil Procedure, RRO 1990, Reg 194.

[171] *Mont-Bleu Ford Inc v Ford Motor Co of Canada* (2000), 48 OR (3d) 753 (Div Ct) [17]. Also: *Canadian Imperial Bank of Commerce v Deloitte & Touche* (2003), 33 CPC (5th) 127 (Div Ct) [42], where the court disagreed with the motion judge's suggestion that a test case might be a viable alternative.

[172] (1996), 26 BCLR (3d) 339 (SC [in Chambers]), aff'd (1997), 44 BCLR (3d) 264 (CA).

[173] Eg: *SR Gent (Canada) Inc v Ontario (Workplace Safety and Ins Board)* (2000), 45 OR (3d) 106 (SCJ) [15] (class action against Board by employers denied; judicial review would bind Board and class members). However, note the criticisms of this decision in GD Watson, "Annual Survey of Recent Developments in Civil Procedure" in GD Watson and M McGowan, *Ontario Civil Practice 2001* (Scarborough, Carswell Thomson, 2000) vol 1, survey 13.

[174] 122 FRD 424, 429 (SD NY 1986).

(ii) Risk of inconsistent results avoided

If class proceedings will give rise to a greater uniformity in the decision-making process than alternative methods of dispute resolution (such as unitary proceedings in which another court might not be bound by the first decision[175]), so that the risk of inconsistent or varying adjudications is negated, then judicially, it has been pronounced that class proceedings will be preferable.[176] As the ALRC observed,[177] inconsistent adjudications in unitary proceedings may establish incompatible standards of conduct or even conflicting judgments on liability for the defendant.

Consistency of findings is particularly possible (and hence, class proceedings have been judicially stated to be more attractive) in specific circumstances. One of these is where the interpretation of a standard form agreement is at issue.[178] For example, in both Ontario[179] and Australia,[180] class actions have readily been permitted to proceed in circumstances where the court had to adjudicate upon a standard form conveyancing agreement (or aspects of that contact) between all class members and the developers. Another circumstance in which class proceedings have been acknowledged as useful to avoid inconsistency of result, and hence promote judicial economy, is where a disaster or accident occurs which affects a group of people, and the complex facts that surround that disaster require to be determined. For example, in *Bywater v Toronto Transit Commission*,[181] which arose out of a Toronto subway fire, Winkler J held that "[e]vidence of the circumstances surrounding the fire, the general background of events on August 6, 1997, . . . the manner in which TTC staff reacted to the emergency", were expedient to be dealt with as common issues of fact in class proceedings.[182]

However, there is some contention as to whether this factor can be rendered irrelevant by successful counter-arguments. It has occasionally been suggested under FRCP 23 that where individual suits of potential class members are so economically unviable that they are not likely to be brought against the defendant,

[175] Eg, the *ALRC Report* (at [66]) cites asbestos litigation pre-Pt IVA where the verdicts as to liability differed in state courts: *CSR v Rabenalt* (Vic SC, 18 Dec 1987); *Joosten v Midalco Pty Ltd* (1979) AILR 449 (WA SC).

[176] Applied in: *Lau v Bayview Landmark Inc* (1999), 40 CPC (4th) 301 (SCJ) [58]; *Mont-Bleu Ford Inc v Ford Motor Co of Canada* (2000), 48 OR (3d) 753 (Div Ct) [16]. In *Canadian Imperial Bank of Commerce v Deloitte & Touche* (2002), 25 CPC (5th) 188 (SCJ) [43], it was held that inconsistency was unlikely when only a limited pool of expert evidence available to plaintiffs; however, the decision that a class action was not the preferable procedure was reversed on appeal: (2003), 33 CPC (5th) 127 (Div Ct).

[177] *ALRC Report*, [109].

[178] As Kell notes, the English representative rule was also particularly suited to this: D Kell, "Renewed Life for the Representative Action" (1995) 13 *Aust Bar Rev* 95, 96.

[179] Eg: *Lau v Bayview Landmark Inc* (1999), 40 CPC (4th) 301 (SCJ) [54] (development project never completed; deposit monies dissipated and not refunded).

[180] Eg: *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 (HCA) (conveyancing statements allegedly inaccurate).

[181] (1999), 27 CPC (4th) 172 (Gen Div).

[182] *Ibid*, [16].

absent a class action,[183] then the risk of inconsistent decisions is unlikely in any event (reducing the need for a class action), or that if a defendant is "apparently willing to accept any risk, no matter how imaginary, of such varying adjudications", it can offer to the court to waive class proceedings.[184] It seems unlikely that the former argument would be likely to garner widespread success,[185] where the very objective of a class action is to provide the opportunity to litigate small individual claims which otherwise go without redress, and the waiver argument seems equally unlikely, being directly contradictory to the aim of furthering judicial efficiency by the use of class actions across the focus jurisdictions.

5. Whether Behaviour Modification is More Likely to Follow a Class Action

For those focus jurisdictions in which the deterrent effect of class suits has been judicially acknowledged to be important (Australia being the notable exception to this view), then a number of factors have emerged as relevant to the superiority determination. Although not mentioned on the face of any of the class action regimes, these factors include: whether the certification of the class action would be likely to have any deterrent effect upon other potential defendants, whether such deterrent effect could be achieved by another mechanism more cheaply and efficiently, and whether entire industry regulation would be likely to flow from class certification in the event of the class's success.

(a) Likely effect of class suit upon actual or potential defendants

The prevention of a possible windfall to the defendant the subject of the class action suit may constitute an important consideration when considering whether to allow a class action.[186] Equally, the fact that the class members are unlikely to know about the defendant's allegedly wrongful conduct because of the nature of that conduct, such that a class proceeding provides notice of the allegations to clients of the defendants, giving them the right to opt out if they wish, has been considered significant at times.[187] If the actual defendants to the

[183] For articulation/criticisms, see: *Newberg* (4th) § 4.32 p 279, and for the most famous small claim case: *Eisen v Carlisle and Jacquelin*, 391 F 2d 555, 564 (2nd Cir 1968) (maximum individual claim $70, and the total class claims were up to $60M); also reiterated in: *Eisen v Carlisle and Jacquelin*, 417 US 156, 161, 94 S Ct 2140 (1974).

[184] Eg: *Kenney v Landis Financial Group Inc*, 349 F Supp 939, 951 (ND Iowa 1972); *Alsup v Montgomery Ward & Co*, 57 FRD 89, 92 (ND Cal 1972).

[185] The argument was unsuccessful in, eg: *Korn v Franchard*, 456 F 2d 1206, 1214 (2nd Cir 1972); *Deposit Guaranty National Bank, Jackson, Missouri v Roper*, 445 US 326, 339, 100 S Ct 1166, 1174 (1980), also disfavoured in *Newberg* (3rd), § 4.17, 4.20–4.24.

[186] Eg: *Gregg v Freightliner Ltd* (2003), 35 CCPB 31 (BC SC) [92].

[187] *Scott v TD Waterhouse Investor Services (Canada) Inc* (2001), 94 BCLR (3d) 320 (SC) [143].

purported class action have already had to account for their actions in some fashion, that factor conversely mitigates against a class action.[188]

However, US and Canadian case law demonstrates that it is not only the *actual* defendant's conduct which is crucial to the superiority assessment. Class proceedings are likely to be considered preferable if modification of the behaviour of *potential* defendants can be furthered by certifying the proceedings for the benefit of the wider public. The potential deterrent effect of a class action upon those other than the defendant has comprised a relevant factor under these focus jurisdiction regimes, notwithstanding the instant defendant's level of culpability. For example, in *Nantais v Telectronics Proprietary (Canada) Ltd*, in which pacemaker leads were allegedly defective, Brockenshire J stated:

> there is no evidence of wilful or intentional wrongdoing, . . . the defendants are cooperating fully with the health authorities and individual doctors and hospitals, and are searching anxiously for the cause of the problem, and therefore, feel that . . . behaviour modification is of little direct importance in this litigation. I note however, that the policy is to generally inhibit misconduct by those who might be tempted to ignore their obligations.[189]

The benefit of certifying a class action as a means of ensuring that the public's interest in seeing that statutes are obeyed has been judicially cited under FRCP 23.[190] As the court stated in *State of Illinois v Harper & Row Publishers Inc*,[191] "[u]pholding the national class action will facilitate private antitrust litigation and will discourage future conspiracy violations."

Interestingly, this factor has not, however, been treated entirely consistently. There is authority from the focus jurisdictions[192] to the effect that an absence of deliberate culpability on the part of the actual defendant may weigh against authorising what has been perceived as the "penalty" of a class action.

[188] *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 360 (SCJ) [74] (defendant's products long since been removed from the market and, through settlement procedures in the US, defendants already having to bear costs of their conduct); *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [40] (Ontario Securities Commission had already imposed financial and other penalties on the defendants); *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (FCA, 9 Jul 1997) (penalties already imposed upon participants in cartel operation).

[189] (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div) [42]. Also: *Webb v K-Mart Canada Ltd* (1999), 45 OR (3d) 389 (SCJ) [43]–[46] in which Brockenshire J specifically eschewed any need to punish the defendant by exemplary damages.

[190] Eg: *Walton v Franklin Collection Agency Inc*, 190 FRD 404, 413 (ND Miss 2000).

[191] 301 F Supp 484, 493 (ND Ill 1969).

[192] Eg, Ontario: *Franklin v U of Toronto* (2002), 56 OR (3d) 698 (SCJ) [58] (class action not warranted when University had proactively adjusted scheme of pay/promotion for female employees some years prior to class action); *Tampa Hall Ltd v Canadian Imperial Bank of Commerce* (1998), 37 OR (3d) 150 (Gen Div) [35]. Eg, Australia: *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 535 (class action discontinued because, inter alia, defendants had cooperated with the ACCC from the outset of the proposed pyramid scheme, and had genuinely sought to prevent contravention of relevant statutes by its activities).

(b) Whether alternative and cheaper methods of modification available

If appropriate behaviour modification is likely to be achieved by some method other than a class action, then that mitigates against the latter being the preferable method of resolution of the class members' claims. Alternative procedures which have been decided to offer a better-suited method of achieving behaviour modification have included: the regulatory provisions of a relevant statute;[193] and the mechanism of judicial review of the activities of the alleged wrongdoer institution.[194] Indeed, it may be arguable that normal unitary court proceedings and remedies granted thereunder are likely to be sufficient to rectify any misbehaviour by the defendant.[195] Moldaver J admitted as much in *Abdool v Anaheim Management Ltd*, in which he foreshadowed that if the actions continued on an individual basis and were successful, "the court will be in a position to modify the behaviour of the defendants in its award of damages."[196] Thus, any better-suited alternative than the class action by which to achieve behaviour modification / deterrence has been a relevant factor under the focus regimes of Ontario and the US.

(c) Whether industry regulation probable

If a class action has the potential (if liability is indeed proven or admitted) to provide guidance and behaviour modification across an industry, then it will be the preferable procedure. Due to the media exposure which such actions can garner, the litigation may increase public awareness of the issues, may instigate public or political support for reform,[197] and may provide heightened awareness in an industry of the standards of behaviour which are expected of a reasonable

[193] Eg, US: *In re Ford Motor Co Ignition Switch Prods Liab Litig*, 174 FRD 332, 340 (NHSTA's remit under the Motor Vehicle Act). Eg, Ontario: *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) (Securities Act, re the wrongful investment transaction alleged); *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) (same); *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) (Competition Act, under the auspices of the Competition Bureau, re the price-fixing cartel alleged), aff'd: (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA), leave to appeal refused: SCC, 17 Jul 2003; *Price v Panasonic Canada Inc* (2002), 22 CPC (5th) 379 (SCJ) [49] (Competition Bureau, responsible for administration and enforcement of the Competition Act and the Combines Investigation Act, which were allegedly violated in this case); and, at the most senior appellate level, *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [35] ("While the existence of [environmental] legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification"); followed in *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [133] (defendant had already taken steps under instruction to remedy problems).

[194] *SR Gent (Canada) Inc v Ontario (Workplace Safety and Ins Board)* (2000), 45 OR (3d) 106 (SCJ) [17].

[195] RB Smith, "Class Actions and Financial Institutions" (1998) 17 *National Banking L Rev* 35, 37.

[196] *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496 (Div Ct) [144].

[197] L Pierce, "Class Actions in Canada" (2000) 6 *Appeal* 22, 23.

person or corporation. Indeed, if the proceedings contemplated are likely to achieve a "more sensitive corporate conscience",[198] and would also be attractive to corporations and manufacturers who strive for predictability and certainty in their business dealings—to know the standard of liability to meet wherever they market their products[199]—then the class proceeding may have substantial social and economic benefits.

These considerations have manifested in several Ontario and US decisions. It has been judicially stated, in support of an action under FRCP 23(b)(3), that "the effectiveness of the securities laws may depend in large measure on the application of the class action device".[200] In *Wilson v Servier Canada Inc*,[201] Cumming J upheld a motion for certification of a weight loss pill action. In respect of behaviour modification, he stated:

> If a drug is defective and liability attaches to a manufacturer or seller, a significant incidental result is that the pharmaceutical industry is more likely to take greater care in the development and testing of new products to ensure their safety before marketing them. The thalidomide catastrophe is illustrative of the public interest in ensuring safe drugs. . . . The CPA serves to assist in regulating the pharmaceutical industry for an important public policy objective through class proceedings commenced in the private sector.[202]

In the same way, the possible impact of the outcome in *Webb v K-Mart Canada Ltd*[203] upon dismissal policies of employers in general was significant in the decision to certify the action. Indeed, Dye alleges that this certification of a class of employees—the first occasion on which it had occurred—thereafter changed the thinking of employers and their counsel in relation to termination strategies, especially in respect of mass terminations.[204] Similarly, industry-wide impact of a class action determination in the fields of publishing;[205] securities dealings;[206]

[198] MJ Peerless and MA Eizenga, "Class Actions in Breast Implant Litigation" (1996) 16 *Health Law in Canada* 78, 78.

[199] SJ Page, "Class Actions in Canada" (2000) 21 *Health Law in Canada* 1, 3.

[200] *Kahan v Rosenstiel*, 424 F 2d 161, 169 (3d Cir 1970).

[201] (2001), 50 OR (3d) 219 (SCJ), leave to appeal refused: (2002), 52 OR (3d) 20 (Div Ct), and by SCC: 6 Sep 2001.

[202] *Ibid* (SCJ), [126].

[203] (1999), 45 OR (3d) 389 (SCJ) [46].

[204] J Dye, "Short-Circuiting the Employee Class Action" (2000) 8 *Canadian Labour and Employment LJ* 355, 356; E Harnden, "Judge Certifies Class Action in Wrongful Dismissal Suit" (1999) 4(1) *Focus* 8.

[205] *Robertson v Thompson Corp* (1999), 171 DLR (4th) 171, 43 OR (3d) 161 (Gen Div) (whether submission of article as printed work implies right of publisher to distribute in electronic form as a "contractual norm" of importance to publishing industry and freelance authors). Also: A Kardash, "Case Comments" (1999) 3 *Info and Tech L* 40.

[206] *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [40] (plaintiffs alleged loss by fraud in various investment schemes: "[s]ecurities dealers are operating in a regulated industry in which there are certain duties and obligations. The determination of those duties and obligations in this case will assist others similarly situate in knowing where the lines are drawn").

and conveyancing,[207] contributed significantly to the certification of each of these respective Ontario class action suits.

6. Whether the Defendant Would be Adversely Affected by a Class Action

Case law analysis shows that fairness of class proceedings to the defendant is a judicially created and relevant factor under the regimes of Ontario,[208] Australia[209] and the US[210] when determining whether a class action is superior. More particularly, an allegation that a defendant would be "hurt" by a class action in comparison with other means of dispute resolution (such as unitary proceedings) has variously been argued on three bases in these jurisdictions—the effect of the opt-out notice on the defendant's business; the burden of fulfilling its disclosure obligations and the likely effect of the proceedings on the defendant's procedural right to disclosure; and the economic impact of an adverse class decision on the defendant's business. Whilst notice and disclosure considerations technically do not arise until after the class action commences, these matters have arisen as part of the court's consideration of fairness at the commencement stage.

(a) Effect of the opt-out notice

Courts have occasionally had regard to the effect of a forthcoming opt-out notice upon the defendant, when considering whether or not it is preferable to permit the commencement of class proceedings. The issue arises in circumstances where publicity, and consequential prejudice upon the defendant's business, may accompany an opt-out notice.

In *ACCC v Giraffe World Australia Pty Ltd*,[211] Lindgren J discontinued the Pt IVA class action on this basis.[212] His Honour reasoned that it would inform readers of the fact that the defendants were being sued by the consumer watch-

[207] *Vitelli v Villa Giardino Homes Ltd* (SCJ, 20 Jul 2001) [31](method of calculating floor area of condominiums by including wall area rather than "actual living space" important to conveyancing practices of Ontario).

[208] Eg: *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (SCJ) [69]; *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) [18]; *Febringer v Sun Media Corp* (2001), 54 OR (3d) 31 (SCJ) [17] (motions by defendants for order quashing three summonses to witness in aid of pending motion for certification of class action granted). Fairness also relevant when defining the common issues, because that impacts upon the evidence and discovery which the defendant would require of the plaintiffs if the issues were determined in separate proceedings: *Anderson v Wilson* (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) [27].

[209] Eg: *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512 (cooperation of defendant with investigations and their consent to Mareva injunctions pending further hearing militated in favour of discontinuing the class action).

[210] Eg: *Marks v San Francisco Real Estate Board* 69 FRD 353, 355 (ND Cal 1975); *In re Northern District of California Dalkon Shield IUD Products Liab Litig*, 526 F Supp 887, 907 (ND Cal 1981).

[211] (1998) 84 FCR 512.

[212] Such a notice is required by FCA (Aus), s 33J and governed by s 33X.

dog, and the nature of those allegations (that their pyramid selling scheme was illegal). Even if the notice made clear that the contraventions had not yet been proven, and that only one member had complained to date, the notice could have a disastrous effect on the scheme and on the financial interests of the members of it, especially if it caused members to cease introducing new participants.[213] In those circumstances, his Honour noted that he would be keen to look for a solution which avoided shutting down the defendants' business before there was a final hearing on the issue. Moreover, Lindgren J concluded that, presuming that the ACCC intended to pursue its application on a unitary basis for injunctive relief whether or not the proceedings continued under Pt IVA, an opt-out notice would obviously then not be required.[214]

A more pragmatic approach has also been demonstrated. In *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd*,[215] Wilcox J dismissed the argument that extensive advertising necessary to inform class members of the case would cause the defendants to suffer real commercial damage. His Honour stated that, whilst notice of a pending class claim would often be commercially disadvantageous for a defendant, it was clearly contemplated by the legislation that such notice was appropriate; that Parliament obviously thought that possible prejudice to the defendant "was outweighed by the advantage of providing an effective remedy for consumers damaged by conduct contravening federal law"; and that if the argument was to succeed, that would "defy Parliament's judgment."[216] In any event, upon any reasonable reading, a mere notice cannot be taken to indicate the successful establishment of a claim.[217] It does not vindicate the class members' rights, it is merely an early step in the action.[218] The *Tropical Shine* approach, whereby the effect of an opt-out notice upon the defendant's business is an irrelevant factor in the superiority assessment, seems the preferable view, although there have been academic intimations to the contrary.[219]

(b) Disadvantages in disclosure

Interestingly, the relationship between class litigation and the right of disclosure has manifested at the commencement of class litigation by two separate arguments concerning the fairness of the class action upon the defendant. The first of these concerns the scope of disclosure expected of the defendant, and the second concerns the defendant's right to disclosure against class members other than the representative plaintiff.

[213] *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 536.

[214] For similar concerns about the "anxiety or gratuitous denigration" of the defendant vendor which publication of an opt-out notice would cause, see the trial decision in *Wong v Silkfield Pty Ltd* (FCA, 16 Jan 1998) 13.

[215] (1993) 45 FCR 457.

[216] *Ibid*, 463.

[217] *Churchman v Alba Gelati Pty Ltd* (FCA, 17 Aug 1998) 3.

[218] *Philip Morris (Aust) Ltd v Nixon* [1999] FCA 1281 (Full FCA) [18].

[219] Eg: R Freeman, "Class Actions the Australian Way" (1999) 10 *Aust Product Liability Reporter* 109, 111.

One reason given for the discontinuance of a class action under Pt IVA is that the circumstances of the class members were so disparate that many of the allegations were hypothetical for some members. Although such a case may well fail because the claims of the class members are not sufficiently common, it is important to note that a dual attack on the class action is that the scope of potential disclosure required on the defendant's part may also render the proceedings unfair. Thus, the proceedings may fail both on commonality and superiority. This test of superiority was strongly proposed by Hill J, one of the appellate judges who decided the tobacco litigation in *Philip Morris (Australia) Ltd v Nixon*.[220] In that case, the pleadings alleged certain illegal conduct on the part of three tobacco companies ranging over either 40 years or 25 years, depending upon whether the claims pleaded were common law claims or claims arising under statute. However, clearly many of the claims were only hypothetical for some class members, given that (1) some members were not born 40 years ago; (2) other members would not have commenced smoking until recently; and (3) some members may not have been aware at all of any of the advertising and other conduct of the companies until recently. His Honour considered that to allow the case to continue could well involve considerable injustice to the defendants (in the guise of effort and "enormous costs") in giving disclosure in respect of matters which occurred decades ago which may turn out not to be at all relevant to any actual class representative or member:

> This difficulty would disappear if those applicants who have a genuine case bring individual proceedings where discovery and other interlocutory processes can be limited to what is actually alleged, rather than to what may hypothetically be alleged.[221]

The important argument raised in the previous point is the scope of disclosure of the defendant's own documents. The obverse side of the argument is the defendant's right to disclosure of the class members' documents. Whether the latter should be relevant at all when determining the preferability of class proceedings is a contentious issue.

The OLRC[222] described the tension which exists in class actions with respect to disclosure. On the one hand, the defendant may require information from the plaintiffs, including absent class members, for the effective preparation and conduct of its case. Indeed, a defendant may only be able to vindicate its argument on liability where disclosure against the class is possible.[223] After all, if those absent class members had sued the defendant in unitary proceedings, then the defendant would have been able to avail itself of disclosure, and it would not be right (said the Commission) for that same defendant to be "at a strategic disadvantage because the suit has been brought in class form." On the other hand, if

[220] (2000) 170 ALR 487 (Full FCA).
[221] *Ibid*, [20].
[222] *OLRC Report*, 626.
[223] Suggested, eg, in N Francey, "The Class Actions Debate" [1989] *Aust L News* 23, 24; *Newberg* (4th) § 5.32 p 453.

absent class members are required to respond to a request for disclosure, that requirement could be "burdensome", and possibly discourage class members from further participation in the action.

As a compromise, the OLRC held that the right of the defendant to disclosure should be restricted to the representative plaintiff and that, prior to trial of the common issues, defendants should not be able to seek disclosure of class members, other than the representative plaintiff, as of right. Instead, the leave of the court should be obtained to obtain disclosure against absent class members, and such leave should only be granted after disclosure had been obtained from the representative plaintiff.[224] This was subsequently enacted in Ontario's statute.[225] The procedure of normal disclosure rights as between the representative plaintiff and the defendant, but with limited rights to obtain disclosure against class members, was also recommended by the ALRC,[226] but Pt IVA is silent on the issue. It is left to the courts to determine the extent of disclosure against the class under the Australian regime, and the position is similar under FRCP 23.

For present purposes, however, the important point is that the discussion by the OLRC centred upon whether the defendant ought to have an unfettered right of disclosure against class members, or whether that should be curtailed. The discussion did *not* arise in the context of whether the curtailment of the defendant's right of disclosure should be a factor in deciding whether to certify class proceedings at all, or when determining whether a class action is preferable to individual proceedings. Yet, that is exactly the argument which has been judicially postulated in Ontario.[227] The fact that the defendant may have lesser disclosure rights in a class action than in individual proceedings has been used to justify the conclusion that, notwithstanding common issues, it would be preferable not to allow commencement of class proceedings. In the class action context, it "would therefore be unjust to deprive these defendants of their normal procedural rights, including discovery of each [class member] investor."[228]

As Watson notes,[229] the approach adopted in this crucial decision has grave drawbacks. First, to permit this argument at the stage of determining whether class proceedings ought to be commenced reduces the availability of the regime, and secondly, appears directly contrary to the legislature's purpose. Moreover,

[224] *OLRC Report*, 645–46.

[225] CPA (Ont), s 15(2).

[226] *ALRC Report*, [166]–[167], and cl 16(4) of Draft Bill (discovery against class member only with court's leave).

[227] *Abdool v Anaheim Management Ltd* (1994), 15 OR (3d) 39 (Gen Div) [50]. The point was alluded to briefly on appeal: (1995), 121 DLR (4th) 496 (Div Ct) [131] (Moldaver J). More recently, see the brief mention of individual disclosure and preferability in *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219 (SCJ) [111]. In British Columbia, the defendant's concerns about discovery scope also raised as obiter in: *Elms v Laurentian Bank of Canada* (2000), 73 BCLR (3d) 366 (SC [in Chambers]) [30].

[228] *Abdool* (Gen Div), *ibid*.

[229] GD Watson, "Initial Interpretations of Ontario's Class Proceedings Act" (1993), 18 CPC (3d) 344, 351–52, and exploring the tensions between *Abdool* and the OLRC at 350–51.

it transforms the relevance of disclosure into a commencement criterion, and in so doing, ignores the availability of disclosure that may be granted with leave during the conduct of the action. As the OLRC endeavoured to explain, there is no question of the defendant's being prejudiced by disclosure with leave; it is merely the avenue that was selected in order to balance the class members' "fright" against the defendant's right. Of course, it is open to a court to decide that the extent of the individual issues will entail a right on the part of the defendant to demand the same extent of individual discovery per class member as if a number of individual trials had been instituted, in which case, preferability of the class proceedings will also be an impossible argument to sustain.[230]

(c) Economic impact of a class-wide determination

Class litigation has been held to be inappropriate in certain decisions under FRCP 23(b)(3) where the impact of a successful judgment for damages on the defendant's viability would be harmful.[231] However, numerous decisions have held, to the contrary, that a defendant's possible liability exposure is an improper consideration.[232] Newberg also argues that the financial ramifications upon the defendant of an adverse large judgment should not be relevant to a superiority assessment of class actions:

> When the claims of class members are large enough to justify individual suits, denial of a class on this ground would be likely to result in a multitude of individual suits. The defendant's liability would not be reduced, but the drain on judicial resources would increase dramatically. When the claims of class members are small, denial of the class would probably result in no litigation at all. Defendants could then violate the law with impunity, causing millions of dollars of aggregate damage, provided that no individual's injury exceeded a few hundred dollars.[233]

The argument has yet to receive judicial consideration in Ontario[234] or Australia. However, as others have noted, there seems to be a certain inconsistency about a judicial system in which "a person may be held accountable for causing damage of $500,000 to one person, but may escape liability if damage of $1000 is caused to 500 people", simply because the latter is considered to be "unfair".[235]

[230] Ont, eg: *Millgate Financial Corp v BF Realty Holdings Ltd* (1999), 28 CPC (4th) 72 (Gen Div) [22].

[231] Eg: *Kline v Coldwell Banker & Co*, 508 F 2d 226, 234 (9th Cir 1974) (an antitrust claim where the damages sought against the defendants was $750 million—"such an award . . . would shock the conscience"); *Marks v San Francisco Real Estate Board*, 69 FRD 353, 355 (ND Cal 1975).

[232] Eg: *Macarz v Transworld Systems Inc*, 193 FRD 46 (D Conn 2000); *Turoff v Union Oil Co of California*, 61 FRD 51, 54 (ND Ohio 1973) ("in many fields . . . the courts enforce recoveries which result in bankruptcy"); *Eisen v Carlisle and Jacquelin*, 479 F 2d 1005, 1022 (2nd Cir 1973); *Reiter v Sonotone Corp*, 442 US 330, 99 S Ct 2326 (1979).

[233] *Newberg* (4th) § 4.43 p 331.

[234] Although it was specifically rejected in the *OLRC Report*, 392.

[235] Example from *ALRC Report*, [18]. The Commission was concerned that such a result "brings the law into disrepute." Also: *AltaLRI Report*, [135].

Moreover, one of the alleged[236] economic consequences of class litigation upon defendants is that it can lead to their withdrawing or simply not developing potentially useful products due to litigious rather than scientific considerations. The ALRC disposed of this argument briefly:

> So far as the argument suggests that it is legitimate to cause loss and injury to a large number of people without complying with the liability for compensation that the law already provides, it does not reflect the responsible attitude of most manufacturers whose aim is to produce safe and reliable products or of businesses whose aim is fair dealing.[237]

In any event, as Watson states succinctly, defendants' concerns in this regard are easily answered: "if they are not liable in law, then class actions will not impose liability on them."[238] Australian commentator Pengilley agrees: "There is no new issue of legal principle which makes parties which deal with groups more vulnerable to litigation. It is simply that courts become more accessible to claimants" under a class action regime.[239]

7. Whether Class Action is Likely to be Unmanageable

Somewhat surprisingly, neither statute in the focus jurisdictions of Ontario or Australia expressly requires that the class proceeding be a manageable way of determining the common issues presented by the claims of the proposed class members. However, manageability is judicially implied both within the CPA 1992's requirement[240] that the class proceedings be preferable, and within Pt IVA's requirement that the class action be an "efficient and effective means" of conducting the dispute.[241] By contrast, the US rule[242] and the British Columbia statute[243] specifically direct the court's attention to the requirement of manageability.

Of the US provision, Newberg notes[244] (and courts have confirmed[245]) that manageability has "been the most hotly contested and the most frequent ground

[236] Eg: FG Hawke, "Class Actions: The Negative View" (1998) 6 *Torts LJ* 68, 84.

[237] *ALRC Report*, [348].

[238] GD Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 286.

[239] W Pengilley, "Class Actions: When Can You Bring Them?" (1998) 14 *Trade Practices L Bulletin* 9, 16; *Chevalier v Baird Savings Assn*, 72 FRD 140, 150 (ED Pa 1976) ("it is the fault of the substantive law . . . not the class action").

[240] CPA (Ont), s 5(1)(d). In *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19, the SCC adopted the proposition that "preferable" meant also "whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim": at [28].

[241] FCA (Aus), s 33N(1)(c), and see *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [79] ("it is possible for the present Pt IVA proceeding to be managed by the Docket Judge").

[242] FRCP 23(b)(3)(D) (under the "damages" class action limb).

[243] CPA (BC), s 4(2)(e).

[244] *Newberg* (4th) § 4.32 p 269.

[245] *Buford v H&R Block Inc*, 168 FRD 340, 363 (SD Ga 1996).

for holding that a class action is not superior" under FRCP 23(b)(3). This is in a jurisdiction in which it has variously been said that there is a presumption against dismissing actions for manageability reasons,[246] that such difficulties should not be overly speculated,[247] that there is nothing inherently unmanageable about a very large class,[248] and that novel and difficult issues do not mean that the court can "simply close its doors".[249] Notwithstanding such robust statements, the potential administrative problems of a class action have brought many a class's hopes down both in the US—and across the remaining focus jurisdictions. Various factors have arisen under all the regimes by which defendants have sought to argue that the class action would give rise to too many manageability difficulties to be the superior device.

Before turning to the most prolific of these factors, it is important to bear in mind the question confronting the court when a large recital of management difficulties is put to it by the defendant: a class action may be potentially difficult to manage and administer, but is there any better alternative?[250] None of the regimes actually provides for what the court is to decide if a class action represents the only feasible means of obtaining a remedy for the class members. The problem is manifestly evident under the terminology used in FRCP 23(b)(3) and the British Columbia statute, which requires that the court compare a class action to other (under FRCP, available) means of resolving the dispute, but it also arises in the other jurisdictions by reason of the fact that the provision of access to justice is said to be one of the primary goals of each focus jurisdiction regime.[251] In that event, if a class action is to be denied because it will place too many burdens upon the court, is that, then, justice denied because no other manageable alternative exists for the class members at all? In *In re Antibiotic Antitrust Actions*, the court explained the dilemma as follows:

> It should be noted at the outset that difficulties in management are of significance only if they make the class action a less "fair and efficient" method of adjudication than other available techniques. This perspective is particularly important . . . where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one.[252]

This view seems entirely supportable under each of the focus jurisdictions when providing access to judicial remedy is an important objective of each regime. When considering the following management difficulties which have drawn judicial discussion, however, that other objective of class actions—proportionality rather than perfection—must also be borne in mind.

[246] *In re Potash Antitrust Litig*, 159 FRD 682, 700 (D Minn 1995).

[247] *In re Industrial Diamonds Antitrust Litig*, 167 FRD 374, 382 (SD NY 1996).

[248] *Seidman v Stauffer Chemical Corp*, 1986 WL 9803 (D Conn 1986), cited in *Newberg* (4th) § 4.32 fn 2. Cf: *United Egg Producers v Bauer Intl Corp*, 312 F Supp 319 (SD NY 1970) (class members all consumers of eggs in US; class certification denied for, inter alia, manageability reasons).

[249] *In re Antibiotic Antitrust Actions*, 333 F Supp 278, 289 (SD NY 1971).

[250] As discussed in: *OLRC Report*, 382; *Newberg* (4th) § 4.32 p 269–70, 275–77.

[251] See pp 52–57.

[252] 333 F Supp 278, 282 (SD NY 1971).

(a) Class size

It is acknowledged by courts in Ontario,[253] the US[254] and Australia[255] that large numbers of class members make the proceedings problematic. However, class size alone has not been sufficient to dissuade the courts from permitting class proceedings. In *Johnson Tiles Pty Ltd v Esso Australia Ltd*,[256] where the members of the class exceeded more than one million in number, the Full Federal Court upheld the trial judge's decision[257] that the class proceedings were properly commenced, and sought to point out that a large class does not dilute the commonality that exists among them all:

> It would be a strange result indeed if an issue which was clearly a substantial issue if litigated by one party ceased to be a substantial issue merely by reason of the fact that it was being litigated by many parties. If that were so, the benefits to be derived from Pt IVA . . . namely the saving of court time, the saving of parties' costs, the efficient administration of justice and so on, would be available to a small group in a case such as this, but would be lost if the group were very large. That is not an approach that could have been intended.[258]

With the benefit of hindsight, one US court sought to explain why large classes must never be sufficient in and of itself to deny class certification, for within every large class, a number of litigants may consider individual proceedings otherwise worthwhile, with disastrous effects upon judicial economy:

> In 1966 there was a single suit purporting to be a class action. The entire litigation might have been concluded without further complexity. But defendants successfully opposed the class suit, with the result that lawsuits have blossomed throughout the country. Rather than the original handful of attorneys, lawyers are now so plentiful that the entire courtroom is filled at each pretrial conference. . . . The prospect of further intervention and joinder, combined with the inevitable proliferation of lawsuits, is inimicable to economical adjudication.[259]

As Newberg notes, "[i]ronically, as a class increases in size, the alternative methods for adjudicating the controversy become fewer."[260] Nevertheless, if the class size is accompanied by a very narrow common issue, the resolution of which would mean that virtually all of the issues related to liability would remain unresolved on an individual basis, then manageability concerns are

[253] *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219 (SCJ) [122] (obiter, large class was certified), leave to appeal refused: (2001), 52 OR (3d) 20 (Div Ct). Also: *Bittner v Louisiana-Pacific Corp* (1997), 43 BCLR (3d) 324 (SC [in Chambers]) [68], cited in *Schweyer v Laidlaw Carriers Inc* (2000), 44 CPC (4th) 236 (SCJ) [46].

[254] *In re Antibiotic Ampicillin Antitrust Litig*, 55 FRD 269, 277 (DDC 1972).

[255] *Johnson Tiles Pty Ltd v Esso Aust Ltd* [1999] FCA 636 (Full FCA) [13].

[256] *Ibid*.

[257] (1999) ATPR ¶41–679 (FCA).

[258] [1999] FCA 636 (Full FCA) [16].

[259] *State of Illinois v Harper & Row Publishers Inc*, 301 F Supp 484, 490 (ND Ill 1969).

[260] *Newberg* (4th) § 4.33 p 288.

likely to prevail.[261] As Roosevelt notes,[262] "the superiority determination frequently comes down to the question of whether trial of the contemplated class action would be manageable", and this is especially the case where "the number of required determinations climb into the millions."[263]

For this reason, and unanimously, case law in the focus jurisdictions has shown that class proceedings involving a very large number of persons will be considered to be manageable if it is possible to collect evidence from a few class members only to enable the key issues of fact and law to be determined, where presumptions or legislatively endorsed tools such as statistical sampling can be utilised, or where judicial devices noted previously[264] for the assessment of damages would minimise judicial supervision and involvement. Certainly, class size alone is not sufficient to bar a class action, but the avoidance of the need for extensive individualised enquiries is crucial in determining whether the class action ought to be permitted to proceed.

(b) Managing the individual issues

If class proceedings will inevitably break down into a long series of individual trials because of the number of non-common issues that require determination in order to dispose of the class members' claims, then any potential judicial efficiency will be lost. Hence, there is a close connection between the commonality requirement and the superiority requirement in class action adjudication.[265] As previously discussed,[266] whilst the US and British Columbia regimes expressly refer to predominance of the common issues (the latter in the context of determining the superiority assessment), all regimes have concluded that where the common questions are not "substantial" or "big" enough in relation to the individual issues, then judicial economy will not be served by the class action. In this event, the class action device is not likely to be the superior device because of the manageability problems associated with the individual issues.

[261] *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [31] (class of 17,000 not certified where "the plethora of individual issues . . . would necessitate individual trials for virtually each class member"); cf *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219 (SCJ) [122] (obiter, large class was certified) (class of 155,000 certified, notwithstanding individual issues of causation and damages).

[262] K Roosevelt, "Defeating Class Certification in Securities Fraud Actions" (2003) 22 *Rev Litig* 405, 431.

[263] Roosevelt gives this startling example:

> If calculating a class member's damages requires fifteen minutes, for example (an optimistic estimate in most securities fraud cases, given the need to quantify inflation and show a causal link to the defendant's misrepresentations), and there are twenty million trades during the class period, a court working eight hours a day for five days a week will be done in slightly over 2,403 years. *ibid*.

[264] See pp 202–6.

[265] *Newberg* (4th) § 4.32 p 283.

[266] See pp 190–96.

With respect to such issues which must be adjudicated individually in class action litigation, the most obvious is damages suffered by each class member. In torts which contain as an element of the cause of action the requirement of proof of damage, then some form of assessment will be required if liability is to be established. Certainly, a statutory no-bar factor[267] may assist a finding of *commonality*, notwithstanding that individual proof of damage is required. However, it may not assist a finding of judicial economy, if individual assessment of resultant damages is likely to prove too burdensome for the courts' resources. Another frequent individual issue occurs where the court has to assess a subjective element such as reliance—the effect (if any) of particular actions on the mind of a particular class member.

The unsuitability of class litigation in this scenario has been said to have a "superficial charm."[268] Whether a misrepresentation induced a person to enter a contract is an obvious example.[269] Proof of reliance is dependent upon a host of individual factors. Some class members may have relied on some representations, but not others which they never saw nor heard. Each class member may have relied on the statements to varying degrees; and each may have had disparate levels of experience or qualifications by which to assess the accuracy of the statements. Some may have been legally represented, and others not. Some may have relied upon information of persons other than the defendant, some may have formed their own judgment. It is all a question of fact.

Where individual evidence will need to be given by class members, severance of common from individual issues for all class members in multiple stages of the same lawsuit will be necessary. Bifurcation or some other splitting of the trial in this manner has been practised in class actions in all focus jurisdictions, and entails that the individual issues will be resolved within the class action itself, but in a phase of the litigation which is separate from the common issues trial.[270] Indeed, this construction of the class action has been explicitly authorised by the Australian legislature, for Pt IVA's relevant provisions contemplate that the

[267] CPA (Ont), s 6(1); FCA (Aus), s 33C(2)(a)(iii).

[268] *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [126].

[269] Example cited by *ALRC Report*, [169], further discussed in, eg: JA Campion, "Misrepresentation in Class Proceedings: The Cardozo Nightmare?" (2001) 24 *Advocates' Q* 129, 155–56; JJ Chapman, "Class Proceedings for Prospectus Misrepresentations" (1994) 73 *Canadian Bar Rev* 492, 509.

[270] In Australia: see *McMullin v ICI Aust Operations Pty Ltd (No 6)* (1998) 84 FCR 1, 2 (judgment on liability delivered; following that, some damages claims heard and determined; some settled; for those claims under $100,000, orders made under FCA (Aus), s 33Q(2) for 16 sub-classes and to delegate those to a judicial registrar, with larger claims to be heard by judges); in BC, see: *Harrington v Dow Corning Corp* (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA) [26] ("provision for multi-staged proceedings"). Split trials have been commonly endorsed under FRCP 23 in respect of, for example, antitrust claims: *In re Catfish Antitrust Litig*, 826 F Supp 1019 (ND Miss 1993); securities claims: *Deutschman v Beneficial Corp*, 132 FRD 359 (D Del 1990); employment discrimination: *International Brothers of Teamsters v US*, 431 US 324, 97 S Ct 1843 (1977); mass tort: *Sanford v Johns-Manville Sales Corp*, 923 F 2d 1142 (5th Cir 1991); asbestos claims: *Jenkins v Raymark Industries Inc*, 782 F 2d 468 (5th Cir 1986), with numerous other US authorities/scenarios discussed in *Newberg* (4th) §§ 9.53, 9.58ff.

"individual group member . . . appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member".[271] Ontario's statutory regime endorses this approach by reference to determining the individual issues "in further hearings".[272]

In this respect, it is notable that the particular wording used in FRCP 23(c)(4)(A) and the effect of that provision has given rise to some modern controversy. The provision authorises an action to be "brought or maintained as a class action with respect to particular issues." As Hines points out,[273] this provision, which uses "enigmatic language" at best,[274] has been given both a restrictive and expansive reading, and whichever is chosen has a significant effect on the assessment of whether the common issues are substantial enough to justify class action treatment. That is, the relationship between (c)(4)(A) and the predominance requirement is unclear.

As Hines further explains, according to the expansive reading (which has received both academic[275] and judicial[276] support), "troublesome individual issues [can be] thrown out of the class action altogether, leaving class members to pursue all the unruly individual aspects of their claims in separate trials elsewhere." In other words, the class itself will be restricted to the common issues (an "issues class action"), and absent class plaintiffs "must file individual lawsuits somewhere else after the class trial to resolve all remaining non-class issues related to their claims against the defendant." This expansive interpretation of (c)(4)(A) means that, because all the "particular issues" will be common to the class, "class actions satisfy the (b)(3) predominance requirement by definition."

[271] FCA (Aus), s 33R(1), and also s 33Q. This construction is further supported by the fact that, if an individual issue cannot be properly or conveniently dealt with under either of the aforementioned sections, then the court may give directions relating to the commencement and conduct of a separate proceeding by a class member: s 33S.

[272] CPA (Ont), s 25(1)(a).

[273] LJ Hines, "Challenging the Issue Class Action End-Run" (2003) 52 *Emory LJ* 709, 710, 718, 721.

[274] Eg, see: *Robinson v Metro-North Commuter RR Co*, 267 F 3d 147, 167 fn 12 (2nd Cir 2001) (noting the "alternative understandings of the interaction between (b)(3) and (c)(4)" set forth by various circuit and district courts).

[275] For academic support for this view, see, eg: EH Cooper, "Rule 23: Challenges to the Rulemaking Process" (1986) 71 *New York U L Rev* 13, 58; J Romberg, "Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)" (2002) *Utah L Rev* 249, 281; MJ Davis, "Toward the Proper Role for Mass Tort Class Actions" (1998) 77 *Oregon L Rev* 157, 230; H Stott-Bumsted, "Severance Packages: Judicial Use of Federal Rule of Civil Procedure 23(c)(4)(A)" (2002) 91 *Georgia LJ* 219, 235; *Newberg* (4th) § 4.23 p 154, § 4.27 fn 1 (noting that a (c)(4)(A) class action gives courts the power to "automatically satisfy the predominance test under Rule 23(b)(3)"); CA Wright *et al*, *Federal Practice and Procedure* (2nd edn, St Paul, Minn, West Publishing Co, 1992) § 1778, 546; SE Abitanta, "Bifurcation of Liability and Damages in Rule 23(b) Class Actions: History, Policy, Problems, and a Solution" (1982) 36 *South Western LJ* 743, 750 variously cited in LJ Hines, *ibid*.

[276] See, eg: *Valentino v Carter-Wallace Inc*, 97 F 3d 1227, 1234 (9th Cir 1996) ("Even if the common questions do not predominate over the individual questions so that class certification . . . is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues"); *Simon v Philip Morris Inc*, 200 FRD 21, 29–30 (ED NY 2001), cited, but with reservations, by Hines, *ibid*.

Notably, this expansive view has a certain parallel under Australia's regime, wherein it has been held that Pt IVA provides a mechanism where the proceedings cease to be representative proceedings and become proceedings in which the circumstances of individual applicants are considered in separate proceedings, once the common issues are determined and it becomes necessary to examine the subjective element of each class member's claim.[277] Again, the requisite "substantial" commonality and manageability would be relatively easy to establish under this construction of Pt IVA.

On the other hand, Hines observes that, under its restrictive application, FRCP 23(c)(4)(A) merely authorises bifurcated class actions and reiterates a court's power (implicit in (b)(3) anyway, because "predominance" contemplates that some issues must be resolved on an individual basis) to certify a class action even when some issues cannot be resolved commonly. Supporters of this interpretation contend that the provision is merely a "housekeeping tool, not a mechanism to circumvent other Rule 23 requirements", and in particular, is not intended to serve as an "alternative" to a (b)(3) class action or alter the predominance test in any way.[278] The uncertainty and lack of uniformity with which FRCP 23(c)(4)(A) has been interpreted suggests that the wording is best avoided in other regimes.

Although the need for actual proof of individual matters is a critical problem which has been referred to academically[279] and judicially[280] as one of "manageability" of class litigation, the case law to date across the focus jurisdictions has shown that judicial burdens have been substantially reduced in having to resolve these individual issues in class actions by the use of various judicially- and

[277] This was the approach adopted in *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, and it has been endorsed/applied since: eg, *Schanka v Employment National (Admin) Pty Ltd* (1998) 86 IR 283 (FCA); *Vasram v AMP Life Ltd* [2000] FCA 1916, [21].

[278] See LJ Hines, "Challenging the Issue Class Action End-Run" (2003) 52 *Emory LJ* 709, 711, 721; RA Nagareda, "The Preexistence Principle and the Structure of the Class Action" (2003) 103 *Columbia L Rev* 149, 238–39 ("The certifying court surely cannot seek to satisfy [predominance and] a heightened showing of commonality simply by culling out the other, non-common issues and then declaring itself in compliance with Rule 23(b)(3)"), and for judicial support for this interpretation, cited Hines, *ibid*, at fn 69, p 743 and fn 220, respectively: *In re Three Mile Island Litig*, 87 FRD 433, 442 n 17 (MD Pa 1980) (stating that Rule 23(c)(4)(A) permits class actions "even when some matters will have to be treated on an individual basis", and was intended to realise class action economies "in cases with a mixture of common and uncommon issues that are separable"); *Castano v American Tobacco Co*, 84 F 3d 734, 745 n 21 (5th Cir 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)"); *Arch v American Tobacco Co*, 175 FRD 469, 496 (ED Pa 1997) ("Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues").

[279] BM Debelle, "Class Actions for Australia? Do They Already Exist?" (1980) 54 *Aust LJ* 508, 514; NJ Williams, *Damages Class Action Under the Combines Investigation Act* (Ottawa, Information Canada, 1976) 32; SS Gensler, "Class Certification and the Predominance Requirement under Oklahoma Section 2023(B)(3)" (2003) 56 *Oklahoma L Rev* 289, 310.

[280] *Mouhteros v DeVry Canada Inc* (1999), 41 OR (3d) 63 (Gen Div) [31] (Winkler J).

legislatively-directed devices that actually avoid the necessity of every class member giving his or her individual evidence. As Newberg notes,[281] just because

> proceedings of an adversary type are required to resolve disputed individual issues relating to the defendant's liability and relief exposure to particular class members, litigants and the parties should not automatically presume that adversary proceedings necessarily require the full panoply of formal procedural and evidentiary rules and jury trial rights associated with traditional nonclass litigation.

Fleming agrees, and observes[282] that some departures from traditional methods of proof, whilst sacrificing the philosophy of individualism and standards of proof, are to be justified "within the bounds of necessity: the necessity of assuring effective and timely compensation to all deserving victims, which would otherwise be jeopardized by the limited resources of the ordinary judicial system." The aim of all such procedures is to resolve individual issues creatively and efficiently, while at the same time not derogating from or unlawfully enhancing the substantive rights of the parties.

With this caveat in mind, the drafters of the respective class action regimes of the focus jurisdictions have sought to help the courts in their management of "formidable but not beyond control"[283] class litigation, by (variously) bestowing upon the courts wide powers to enable individual issues to be determined expeditiously and justly,[284] to prescribe measures by which to simplify proof or argument,[285] and to dispense with or impose any procedural steps that the courts consider appropriate and consonant with justice to the parties.[286] The drafters of the Canadian provincial regimes have gone beyond the other schemas, by expressly permitting the use of standardised proof of claim forms and the auditing of claims on a sampling basis where the assessment and distribution of monetary relief is concerned,[287] and the possibility of statistical evidence.[288] These various powers, plus the exercise of the court's inherent jurisdiction to control its procedures, have lead to an array of innovative procedures and time-saving measures being judicially developed and imple-

[281] *Newberg* (4th) § 9.63 p 452.

[282] JG Fleming, "Mass Torts" (1994) 42 *American J of Comparative Law* 507, 514, quote at 529. Similarly, GG Howells, "Mass Tort Litigation in the English Legal System" in J Bridge *et al* (eds), *United Kingdom Law in the Mid 1990s* (London, UK National Committee of Comparative Law, 1994) 599–604.

[283] This was how the court described the task ahead of it in *In re Ampicillin Antitrust Litig*, 55 FRD 269, 277 (DDC 1972).

[284] CPA (Ont), ss 12, 25(1); FCA (Aus), ss 33Q, 33R.

[285] CPA (Ont), s 23; FRCP 23(d)(1). There is no equivalent provision in FCA (Aus).

[286] CPA (Ont), s 25(3); FCA (Aus), s 33ZF(1).

[287] CPA (Ont), s 24(6)(a), (c). Discussed further in: WK Winkler (the Hon), "Class Proceedings and ADR: Synergies in a Civil Action" (2001) 20 *Advocates' Society J* 3, 5.

[288] CPA (Ont), s 23, which Fleming describes as an "exceptional statutory sanction": JG Fleming, "Mass Torts" (1994) 42 *American J of Comparative Law* 507, 514, fn 30, and which Kleefeld supports as "innovative" and which "Courts can be expected to increasingly use . . . as their comfort with them grows": JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, [27].

mented. In the words of the US Supreme Court, the responsibility of the court is to "exercise sound discretion and use the tools available",[289] a view which has been proactively adopted throughout the focus jurisdictions.

For instance, it has been judicially suggested that it may be sufficient to take a more global approach of the evidence. In particular, repetitive patterns of conduct may reasonably permit the drawing of inferences about the rest of the class, especially in respect of reliance, as one Australian court explained:

> As to reliance, it may be appropriate, if a sufficient number of Group Members give evidence of reliance and the respondents lead no evidence from members of the scheme of non-reliance, to infer, having regard also to the nature of the statements found to have been made, that they were made to, and relied upon by, all Group Members.[290]

The device of prospectively obtaining evidence from a handful has also been utilised in Ontario to justify the commencement of a class action. In *Anderson v Wilson*,[291] one of the classes proposed consisted of almost 18,000 patients who were sent a notice by public health officials, informing them that they may have been infected with Hepatitis B at one of the defendants' clinics during the course of an electroencephalogram test, and should be tested for the virus. It was acknowledged that each member of this class would have a "modest claim that would not of itself justify an independent action",[292] since the claim only consisted of a fear of a serious infection and anxiety during the waiting period for a test result. The class was permitted to proceed on the basis that, if evidence from patients to support such reactions to the letters was necessary, it was probably sufficient to hear from a few typical plaintiffs, as the individual reactions to the notices were likely to be similar in each case.[293] The prospective use of a global or class-wide approach (also invoked in appropriate cases under FRCP 23[294]) is

[289] *Reiter v Sonotone Corp*, 442 US 330, 346, 99 S Ct 2326 (1979).

[290] *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 534–35 (Lindgren J). For similar statements, see Merkel J in *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) ATPR ¶41–679 (FCA) [61]; *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [79]. See also, for suggestions for sampling: *King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd)* [2003] FCA 212, [7] (court proposed that it should "hear evidence from the applicant and a small group of individual shareholders (a sample) and determine whether all or any respondent is liable to all or any of them").

[291] (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (Ont CA), earlier certified: (1997), 32 OR (3d) 400 (Gen Div), upheld on appeal: (1998), 156 DLR (4th) 735, 37 OR (3d) 235 (Div Ct), varied by Ont CA, special leave refused: SCC, 25 May 2000. This was the first time that alleged medical malpractice had been certified as a class action in either Canada or the US: W Hinz, "Medical Related Class Actions Becoming More Common" (1997) 7(2) *Health Law* 1.

[292] *Anderson* (Ont CA), *ibid*, [18].

[293] *Anderson* (Ont CA), *ibid*. The Div Ct had removed this class on the basis that "fear of disease" was not compensable, but the CA restored it because the claim (similar to nervous shock) might ultimately be sustained. Discussed by RB Kligman, "Health Risk as a Cause of Action" (2001) 21 *Health Law in Canada* 63.

[294] Eg: *Mick v Level Propane Gases Inc*, 203 FRD 324, 331 (SD Ohio 2001) ("when a common fraud is perpetrated on a class of persons, they should be able to pursue an avenue of proof that does not focus on questions affecting only individual members. . . . [P]roof of reliance may be sufficiently established by inference or presumption"); *Pettway v American Cast Iron Pipe Co*, 576 F 2d 1157, 1222 (5th Cir 1978).

necessarily only speculative at the commencement of the class action, but is a critical factor in class action certification.[295] If the court does not consider that such evidence is likely to eventuate (with the result that it would probably be necessary for the applicant to call all class members to give evidence on an individual matter such as reliance), then the class action will be disallowed on the basis that separate proceedings would be superior to class treatment.[296]

Deeming provisions and presumptions may also be useful. Some courts have relied upon the application of deemed rather than actual reliance where necessary statutory preconditions for deeming have occurred;[297] and the raising of a rebuttable presumption of reliance on misrepresentations using "fraud on the market" theory[298] where such presumptions are accepted.[299] In this respect, the possible use of alternative methods of proof is a factor which falls within the "proportionality rather than perfection" principle, being examples of the philosophy that "the effective and economic handling of group actions necessarily requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole."[300] Of course, presumptions and deeming provisions do not remove the element of reliance. They simply assist manageability to be found because the court has relieved the class members of having to individually prove that element.

Not all proposals for handling the individual issues in a manageable fashion will be successful, however. Courts in the focus jurisdictions have shown a remarkable tendency to at least consider alternative methods of proof that may

[295] W Pengilley, "Class Actions: What Constitutes a 'Class'?" (1999) 15 *Trade Practices L Bulletin* 13, 16; use of global evidence of reliance also suggested in NJ Williams, *Damages Class Actions under the Combines Investigation Act* (Ottawa, Information Canada, 1976) 32–33, 114.

[296] *ACCC v Internic Technology Pty Ltd* (1998) ATPR ¶ 41-646 (FCA) where, given the individual circumstances of each class member, what was represented to each, and whether each was induced, Lindgren J came to the opposite conclusion that he had reached in *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, handed down on the same day.

[297] Eg: where a claim is made under a prospectus or offering circular, there is a deemed reliance under various Securities Acts in Canada: Ontario, s 130(1); BC, s 131(1).

[298] Whereby reliance is proven through fiction of "market reliance" which assumes every statement made in marketplace affects price of stock and that every purchaser of stock has thus relied on every statement through this market impact. Reliance on the theory is permitted in limited circumstances in the US: *Basic Inc v Levinson*, 485 US 224, 241–47 (1988), where the theory was first used by the US Supreme Court for Rule 10b-5 claims associated with securities traded in a developed market. For further discussion, see: See WB Rubenstein, "A Transactional Model of Adjudication" (2001) 89 *Georgia LJ* 371, 392 ("fraud-on-the-market enables certification by turning common-law individual issues into market-based common issues"); D Fischel, "Program Trading, Volatility, Portfolio Insurance, and the Role of Specialists and Market Makers: Efficient Capital Markets, the Crash and the Fraud on the Market Theory" (1989) 74 *Cornell L Rev* 907, 908.

[299] The theory was rejected in class action jurisprudence in Ontario as not comprising part of the common law of that jurisdiction: *Carom v Bre-X Minerals Ltd* (1998), 41 OR (3d) 780 (Gen Div) [39]–[40], and see the extensive discussion of the theory, and a comparison of the Ontario and US legal positions, by Winkler at [16]–[42]. Some US states also provide that reliance cannot be presumed for the purpose of allowing class treatment: eg, *South West Ref Co v Bernal*, 22 SW 3d 425, 438 (Tex 2000), and discussed further in Appellate Practice Group Locke Liddell and Sapp, "Recurring Issues in Consumer and Business Class Action Litigation in Texas" (2002) 33 *Texas Tech L Rev* 971, 1022.

[300] Lord Woolf, *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996) [2].

be used later in the proceedings, when deciding whether a class action should be certified but, at times, the light of appellate scrutiny has been fatal. Such instances have included: application of the market share theory,[301] where there is uncertainty as to which of several possible defendants has been responsible for the plaintiffs' injuries; the use of epidemiological studies[302] where there is doubt as to what caused the injuries;[303] and the use of random sampling and probability analysis for damages calculation, by determining individual trials for randomly selected plaintiffs in each category of plaintiff and then extrapolating the average damage award to all class members in that category.[304]

Notwithstanding these occasional oversteppings, all manner of dispute resolution forums, from lawyer panels to mediation to court-annexed determinations, and with greatly simplified procedures, such as evidence "on the papers" to the exclusion of oral testimony, have been suggested and utilised in class action litigation, especially when small claims by the class members are involved. The following list shows some of the diverse mechanisms that have been employed across the focus jurisdictions to deal with the evidence required from absent class members in order to resolve their individual claims:

- the use of mini-hearings, involving a mediation-arbitration framework;[305]

[301] Permitted in *Gariepy v Shell Oil Co* (2001), 51 OR (3d) 181 (SCJ) [11]. The theory applies in the case of an interchangeable substance such as a generic drug, where the specific manufacturer of the substance used by a class member is unknown, but the product by different manufacturers is the same; each manufacturer is liable only to the extent of its own market-share. According to JG Fleming, "Mass Torts" (1994) 42 *American J of Comparative Law* 507, 512, the theory was first advanced in *Sindell v Abbott Laboratories*, 26 Cal 2d 588 (1980) (generic drug DES, synthetic oestrogen used by pregnant women to avoid miscarriages, later vaginal lesions; 11 manufacturer defendants). Fleming considers that "plaintiffs are largely doomed to fail without substantial modification of the traditional standard [of proof of causation]"): at 514.

[302] This evidence seeks to establish a causal relationship by comparing a class of persons exposed to the suspected agent with the general population.

[303] Originally permitted as a basis of certifying causation as a common issue in *Anderson v Wilson* (1998), 156 DLR (4th) 735, 37 OR (3d) 235 (Div Ct) [17] (former patients sought to certify class action against physician and several clinic employees after it was discovered that there was a possible link between the EEG clinics and contracting of hepatitis B; suggestion that upon proof of certain facts, viz, a common breach of the standard of care for infection control practices at the clinics, a common highly infectious EEG technician with a particular strain of Hepatitis B, and a common body of epidemiological evidence that patients treated at the defendants' clinics by that technician were over 500 times more likely than the general population to contract Hepatitis B, would amount to proof of causation on balance of probabilities, and that question of causation could amount to a common issue on this basis) but overruled on appeal, as a denial of individual evidence required to establish causation: (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) [28]–[30], leave to appeal refused: SCC, 25 May 2000.

[304] *Cimino v Raymark Industries Inc*, 751 F Supp 649 (ED Tex 1990). The federal appellate court later found the "extrapolation" phase improper, holding that it violated the defendants' Seventh Amendment right to individualised evidence as to causation and damage issues for each of the class members: 151 F 3d 297 (5th Cir 1998), and see: EF Sherman, "Export/Import" (2002) 52 *DePaul L Rev* 401, 416.

[305] *Gagne v Silcorp Ltd* (1998), 167 DLR (4th) 325, 41 OR (3d) 417 (CA) (wrongful dismissal case settled; reference to determine quantum of damages for each class member via mini-hearing process, with mediation and arbitration stages; each class member permitted personal lawyer in mini-hearing; all claims eventually settled for about $2M). For positive comments about efficiency, see: D Lundy, "Class Action as Employee Remedy?" [1999] *Can Lawyer* 47. For earlier ground-breaking examples, see: *Godi v Toronto Transit Comm* (Gen Div, 20 Sep 1996); *Atkinson v Ault Foods*

- use of standardised sworn claim forms,[306] to be assessed by a panel of legal persons;[307]
- requiring class members to swear affidavits as to individual issues;[308]
- requiring class members to file individual claims, supporting documentation and affidavits, for defendant to respond within stipulated period, settlement conference to follow (by phone if convenient), if no success, referees to conduct investigation at hearing of individual circumstances and to report back to court;[309]
- delegating assessment of damages for individuals or sub-classes to a registrar, special master or referee, especially where individual claims for damages are small sums or where a formula for individual proof of damages has been established which is capable of being uniformly applied.[310]

The opportunity for a "plaintiff-less trial" (the term used by Winkler J in *Lau v Bayview Landmark Inc*[311]) also encourages the class action to be regarded as a superior device to a number of unitary actions. Alternatively, as Sharpe J described in *Rosedale Motors Inc v Petro-Canada Inc*,[312] if it is possible to resolve issues in isolation from the situation of any injured party, then that fairly accurately describes that scenario which is more likely to be permitted to proceed by way of class action because it is judicially economic to do so. The scenario may arise where all the facts are within the knowledge of the defendant/s,[313] where little (if any) evidence will be required from the plaintiff

Ltd (Gen Div, 23 Dec 1997). Also, see the mediation process adopted, with great success, in *McMullin v ICI Aust Operations Pty Ltd* (1997) 72 FCR 1.

[306] *In re First Databank Antitrust Litig*, 205 FRD 408 (DDC 2002) (settlement procedure).

[307] *Butler v Kraft Foods Ltd* (FCA, 19 Jun 1997) (action settled; individual claims assessed by three barristers).

[308] *Maxwell v MLG Ventures Ltd* (1995), 7 CCLS 155 (Gen Div) [7] (as to extent and date of actual knowledge); *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 (as to quantum of damages, each member of class to submit written claim verified by medical reports/certificates).

[309] *Webb v K-Mart Canada Ltd* (1999), 45 OR (3d) 425 (SCJ)[24] (notably, in drafting this proposal for adjudicating on individual damages claims, court rejected both defendant's and plaintiff's proposals, making it a unique ADR process: K McKinney, "The Use of Class Actions in Wrongful Dismissal Cases" (2000) 10 *Windsor Rev of Legal and Social Issues* 149, 162).

[310] In Aust: *McMullin v ICI Aust Operations Pty Ltd (No 6)* (1998) 84 FCR 1, the terms of which were more fully discussed in *King v AG Aust Holdings Ltd* [2002] FCA 1560, [6]. In US, mooted in *In re Industrial Diamonds Antitrust Litig*, 167 FRD 374, 386 (SD NY 1996). In Canada: *Webb v K-Mart Canada Ltd* (1999), 45 OR (3d) 425 (SCJ), where, in the absence of agreement between the parties, the court ultimately ordered that individual damages be assessed by members of the Bar, as court officers and referees.

[311] (1999), 40 CPC (4th) 301 (SCJ) [57].

[312] (1999), 42 OR (3d) 776 (Gen Div) [33]. Sharpe J denied certification because it was, he considered, impossible to determine issues independently of the evidence of class member franchisees. However, overruled on appeal: Div Ct, 22 Oct 2001, because, inter alia, the common issue whether the defendant franchisor had breached its contractual obligations was not dependent upon the conduct of individual franchisees: at [6].

[313] Eg: *Nantais v Telectronics Proprietary (Canada) Ltd* (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div) [39]; leave to appeal refused: (1996), 129 DLR (4th) 110, 25 OR (3d) 347 (Gen Div) (pacemaker leads allegedly faulty; lead recipients did not contract with defendant manufacturer; had no knowledge of cause of, and did not contribute to, lead failures).

class members,[314] where there are no individual dealings which require to be scrutinised between defendant and class members,[315] or where the parties can, or are likely to, agree on a statement of facts, so that there are few factual issues to be resolved.[316]

Quite apart from the measures sanctioned by some of the class action regimes, such as aggregate assessment of damages on a class-wide basis,[317] damages assessment and distribution to class members may also be undertaken by economical means. On the other hand, where the court discards the possible use of devices by which to assess class members' damages, should liability be proven, then that will seriously prejudice the commencement of a class action at the outset. The situation has occurred, to the class's detriment, in the Ontario decision of *Chadha v Bayer Inc*.[318] Class members had alleged a conspiracy between the defendants to fix the price of iron oxide pigment used in various construction materials by which they, as owners of buildings, had sustained increased costs of purchase. The Divisional Court discarded the possibilities[319] of the plaintiffs' being economically injured on a class-wide basis; of statistical evidence being used; and of economists' hypothetical models being applied to determine how relevant market variables would have behaved in the absence of the wrongful behaviour. None of these was useful when there were a multitude of variables affecting purchase price of a newly constructed house—negotiations about price, buildings were highly individualised end products, regional differences, and delivery costs. Therefore, in the absence of judicial devices by which to quantify the purchasers' alleged overcharge damages, the court held that the class members faced "insurmountable problems of proof" with respect to their individual damages, such that any finding of the existence of a wrongful conspiracy would not advance the class litigation.[320]

Thus, on the basis of the above, the availability and potential utility of judicial devices (such as potential damages assessment methods or repetitive patterns of reliance) should be a relevant matter that informs judicial discretion as to whether or not a court will determine a class action to be superior, and more judicially efficient, than other forms of resolution. The potential application of these innovative procedures may govern whether a court considers a class action to be viable at the very commencement of the action.

[314] Eg: *Lau v Bayview Landmark Inc* (1999), 40 CPC (4th) 301 (SCJ) [57] (facts required to determine terms of trust, and whether trust had been breached by defendants, could be acquired from defendants alone). Similarly, *Cheung v Kings Land Devp Inc* (2002), 55 OR (3d) 747 (SCJ) [37].

[315] *Delgrosso v Paul* (2000), 45 OR (3d) 605 (Gen Div) [14], [17], leave to appeal refused: (1999), 46 CPC (4th) 140 (Div Ct).

[316] Eg: *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) [16] (agreed statement of facts, and only three witnesses).

[317] See pp 407–9, 411–20.

[318] (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct), aff'd: (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA), leave to appeal refused: SCC, 17 Jul 2003, overruling earlier certification: (2000), 45 OR (3d) 29 (Sharpe J). In a similarly unsuccessful cartel class action in Australia—*Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd* (FCA, 9 Jul 1997)—the complex assessment of damages was also referred to adversely by Drummond J.

[319] *Chadha* (Div Ct), *ibid*, [23]–[27] (Somers J, Thompson J concurring).

[320] *Ibid*, [23], [31].

(c) Difficulties in joining third parties

Ontario case law has demonstrated that the prospect of the defendant to a class proceeding having to join a number of third parties, by seeking contribution and indemnity, may render class proceedings problematical. It is vital, in the interests of justice (according to such case law), to permit defendants to "get at potential indemnitors." However, if a multitude of disparate third parties are to be included in the class action, problems of manageability and complication can arise. In *Sutherland v Canadian Red Cross Society*,[321] the representative plaintiff received four units of packed red cells following neurosurgery, and contracted the HIV virus. Certification was denied. Montgomery J noted that individual claims would "require the defendants to third party doctors, hospitals, and laboratories for contribution and indemnity", and that would render the proceedings "unduly complicated and unmanageable."[322] The problem that has been academically identified is that if potential third parties are not to be included in the action, then that exposes the defendant to the possibility of subsequent litigation on the same issues with these other parties, with all of the ancillary effort and expenses, or might otherwise render the proceedings unfair for the defendant.[323] There is also "the hypothetical potential for inconsistent findings if the third party action is not heard with the main action."[324]

In contrast to the Ontario position, Australian courts have demonstrated a more robust attitude towards the management of cross-claims against third parties. The potential complication has certainly not constituted a determinative factor in the matrix of superiority criteria in that jurisdiction. To the contrary, in *Johnson Tiles Pty Ltd v Esso Australia Ltd*,[325] Merkel J endorsed the Pt IVA proceedings in respect of the principal negligence trial against the defendant, and held over the numerous cross-claims against third parties for separate trial:

> the present matter, whilst of undoubted importance, is nevertheless one of a large number of other important matters awaiting hearing before the Court. The separate trial of the negligence claims [in a class action] is capable of achieving a measure of certainty and finality without severely prejudicing rights of other litigants in the Court to have their matters proceed to trial.[326]

The British Columbia courts have viewed the issue as potentially problematical but possibly manageable on the right set of facts. Whilst observing that the

[321] (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div).

[322] *Ibid*, [36].

[323] See, especially, *AltaLRI Memorandum*, [48] and endnote 74. Also, for further discussion of the conundrum in the context of the Ontario case law, see: T Heintzmann and S Chong, "Certification in a Product Liability Class Action" (2001) 24 *Advocates' Q* 399, 420.

[324] *Wilson v Servier Canada Inc* (SCJ, 30 Nov 2001) [12].

[325] [2000] FCA 1837. Also: *Wilkins v Dovuro Pty Ltd* (1999) 169 ALR 276 (FCA).

[326] *Ibid*, [13]. See also the refusal of the court to discontinue the class action on the basis of potential third party cross-claims by the defendant in *Bright v Femcare Ltd* (2002) 195 ALR 574 (Full FCA) [148] ("I have considered the difficulty posed by hospitals or surgeons, against whom the respondents might wish to cross-claim, not being bound by a determination on these issues. . . . The risk that they may do so does not deny some utility to a determination as between the present parties").

absence of third party claims does make the class action administratively easier to manage,[327] and denying certification where third party complexities threatened to derail the class action in the future,[328] some courts in the jurisdiction have also been willing to accommodate third party claims (which are, after all, quite common in complex litigation). Proposed solutions have included staying the actions against the third parties but ordering that they will be bound by the findings in the class action trial whilst, at the same time, giving third parties leave to apply to participate in the trial of the common issues, or permitting the court to certify a class of third parties, again ensuring that the determination of the common issues will be binding upon that class.[329] However, as Somerville and Gowling point out, it is certainly true that the experience of these particular focus jurisdictions indicates that a defendant can sometimes use the need to commence a third party claim as an *indicium* of the complexity of the issues to be determined and argue that the case is too unwieldy and complicated for class action treatment.[330]

In conclusion, the superiority assessment is an extremely difficult outcome to predict, particularly when a number of the key factors which have been discussed in this chapter are in play. It is a question of balance. As an illustration, Table 7.2 summarises three interesting decisions drawn from the focus jurisdictions, where the superiority assessment was at issue. In all three, it is suggested that the opposite outcome would have been equally as cogent.

Table 7.2 ***The balancing of "superiority"***

Case: *Wilson v Servier Canada Inc* (2000) (diet pill case) (Canada)	
Why a class action would be superior	***Why a class action would* not *be superior***
✓ bifurcated procedure to decide common issues on a class-wide basis, and later individual proceedings, flexible enough to cope with the individual issues;	¶ numerous individual issues to be determined to resolve ultimate liability (21 identified, from whether class member received any information from other sources re possible side effects of the drug, to the damages suffered by each member);

[327] Eg: *Reid v Ford Motor Co* [2003] BCSC 1632, [106].

[328] *Bittner v Louisiana-Pacific Corp* (1997), 43 BCLR (3d) 324 (SC [in Chambers]) [42]–[44]; *McDougall v Collinson* [2000] BCSC 398, [127].

[329] Eg, as in the British Columbia cases of *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) and at first instance in *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (SC) [59] (eventually decertified for an entirely different reason: (1998), 157 DLR (4th) 465, 48 BCLR (3d) 90 (CA)); also, for defendant's concerns about the right of contribution from cross-defendants if it should lose in the class action: *Johnson Tiles Pty Ltd v Esso Aust Ltd* [2000] FCA 1837 [15]–[16].

[330] MJ Somerville and F Gowling, "These Plaintiffs Have No Class: A Defendant's Perspective to Defeating or Avoiding Certification" (County of Carleton Law Association conference, Quebec, 2–3 Nov 2001) [8].

Table 7.2 *(cont)*

- ✓ provides access to justice to many product users who individually could not afford the complexities of scientific/medical evidence to establish liability;
- ✓ without a class action, the defendants would be insulated by complexities of evidence and issues;
- ✓ danger of inconsistent results avoided;
- ✓ possible behaviour modification, of both actual and potential defendants, and industry-wide, vital;
- ✓ most important issue for both causes of action—whether product was defective—could be advanced for all members in the class action

- ¶ individual discovery essential of each class member (eg, did he/she follow medical advice?);
- ¶ affirmative defences of an individual nature likely (eg, was a class member contributorily negligent?);
- ¶ large numbers of class members (about 60,000), plus numerous individual issues, could render proceedings difficult to manage;
- ¶ creation of several sub-classes could be necessary, given the number of individual issues/defences

Verdict: on balance, the class action ***was*** a superior means of resolving the dispute

Case: ***Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd*** (1997) (concrete cartel case) (Australia)

Why a class action would be superior

- ✓ putative class members consisted of both govt agencies, and developers and spec builders; whilst the former could finance their own action against the defendants, a class action would appeal to developers/builders to spread costs and access court;
- ✓ class action reduces risk of inconsistent decisions;
- ✓ a finding on the common issue (whether defendants did undertake collusive pricing practices) would further other causes of action pleaded, as they turned on that same activity;
- ✓ there was no evidence that the individual issues of reliance or causation would require the litigation of an extensive range of individual circumstances

Why a class action would* not *be superior

- ¶ very complex and expensive proceeding that would only benefit the representative, especially given the dubious existence of a willing class;
- ¶ proceedings likely to be unfair to defendants for the abovementioned reason (the litigation costs to defendant > purported benefits to rep plaintiff);
- ¶ big public authorities/govt departments had commenced their own proceedings, reducing the need for this to proceed as a class action;
- ¶ substantial penalties had already been imposed upon the four defendants in earlier proceedings, thus the need for behaviour modification as a result of the class proceedings not so important

Verdict: on balance, the class action was ***not*** a superior means of resolving the dispute

Case: ***In re Telectronics Pacing Systems Inc*** (1997) (defective pacemaker leads) (US)

Why a class action would be superior

✓ risk that defendant could be ordered to conduct conflicting medical monitoring claims if putative class members pursued individual actions;

✓ for many pacemaker lead recipients, damages claims of small monetary value, uneconomical for separate actions;

✓ to the extent that, in some states, medical monitoring claims only recoverable if plaintiff could show physical injury, sub-classes used to separate those implantees who were required to show physical injury from those that were not (and in respect of other causes of action, variations in state law not significant enough to deny certification)

Why a class action would not be superior

¶ there were variations in state law with respect to medical monitoring claims, giving rise to individualised enquiries and consequent possible manageability problems;

¶ several issues—causation, whether the class member's lead has fractured, and his or her individual damages—all individualised enquiries

Verdict: on balance, the class action ***was*** a superior means of resolving the dispute

8

Assessing the Class Representative

A INTRODUCTION

THE REPRESENTATIVE PLAINTIFF, or applicant,[1] is "the face" of the action being brought on behalf of all class members. As the judgment achieved by that party will bind the members of the class on behalf of whom he or she sued, the quality of that party matters to the court, to the absent class members, and to the defendant.[2] While the assumption of responsibility associated with the position may be a burdensome task,[3] and the sums involved may be small, however, as Crerar points out, the role of the representative plaintiff is one that may appeal for personal reasons:

> [T]he evidence [is] that despite *de minimus* promise of gain to the representative plaintiff, individuals will in fact step forward to prosecute claims. . . . One could ask if the struggle of Ms Naken, all the way to the Supreme Court, was worth the price of an automobile. Few class actions make economic sense to the individual plaintiff; however, class actions are still launched. Whether motivated by politics, principle, litigiousness, crankiness, or desire for fame or empowerment, individuals will come forward.[4]

Various qualities of the representative plaintiff require detailed consideration under a class action regime. They include: the absence of any conflict of interest on the applicant's part (section B); whether the applicant can fairly and adequately represent the class (section C); and whether the applicant has a claim which is typical of the class claims, and indeed, whether typicality ought to be a separate criterion at all (section D).

Although the analysis which follows will consider the criteria pertaining to the representative plaintiff at the commencement phase of the litigation in order to determine whether the action can effectively proceed or not, it should be emphasised that adequate representation and other requirements to protect the

[1] These terms will be used interchangeably throughout this chapter. The legislation in Australia and the US refers to the "representative party", and the Canadian provincial regimes of British Columbia and Ontario refer to "representative plaintiff".

[2] *SLC Report*, [4.34], [4.36].

[3] Eg: K Roach, "Book Review" (1994) 23 *Canadian Business LJ* 156, 158–59.

[4] D Crerar, "The Restitutionary Class Action" (1998) 56 *U of Toronto Faculty of Law Rev* 47, 91–92. For similar observations about the variety of motives driving a representative, see: EF Sherman, "Export/Import: American Civil Justice in a Global Context" (2002) 52 *DePaul L Rev* 401, 409.

interests of a class are not one-off threshold tests but continue throughout, always subject to court supervision and case management.[5]

B ABSENCE OF ANY CONFLICT OF INTEREST

The statutory treatment of conflicts of interest between the representative plaintiff and the class has not been at all uniform across the legislatures of the focus jurisdictions.

In 1982, the OLRC[6] considered whether an "adequacy of representation" requirement ought to make specific reference to the lack of any conflict of interest between the class representative and the class members. It ultimately held that to prescribe a lack of conflict "might be too restrictive." That is, the existence of some conflict[7] may not preclude the representative plaintiff from vigorously prosecuting the action or adequately representing the class. Notably, this recommendation was not implemented by the Ontario legislature. A lack of conflict on the common issues is expressly required under the Ontario statute.[8] In contrast, the Australian regime[9] merely requires adequate representation. There is no express reference to the absence of a conflict of interest. Nevertheless, the relevant section has been judicially interpreted[10] to mean that the representative must have no interest antagonistic to those of the class he or she purports to represent, at least in respect of the common issues. The non-explicit nature of the Australian regime is matched by the US regime. Under FRCP 23(a)(4), it is required that the representative "will fairly and adequately protect the interest of the class". That provision has also been interpreted to mean that the representative must have no interest antagonistic to, or conflicting with, the interests of other class members.[11] In light of this legislative disparity, but given that an absence of conflict between the class representative and the class is a necessary pre-requisite across *all* the focus regimes, it appears preferable that it should be an express mandatory criterion.

[5] RH Klonoff, *Class Actions and Other Multi-Party Litigation* (St Pauls Minn, West Group, 1999) §3.20; also *Newberg* (4th) §3.42 p 540 and fn 35.

[6] *OLRC Report*, 356–57.

[7] In particular, the OLRC was referring to an ordinarily competitive relationship between the class members in industry.

[8] CPA (Ont), s 5(1)(e)(iii). Also adopted in CPA (BC), s 4(1)(e)(iii).

[9] FCA (Aus), s 33T(1).

[10] *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424, 446.

[11] *General Telephone Co of Southwest v Falcon*, 457 US 147, 158, fn 13, 102 S Ct 2364 (1982) ("the adequacy- of-representation requirement . . . raises concerns about the competency of class counsel and conflicts of interest"); *Eisen v Carlisle and Jacquelin*, 391 F 2d 555, 562 (2nd Cir 1968) (an "essential concomitant of adequate representation" is to eliminate "so far as possible the likelihood that . . . plaintiff has interests antagonistic to those of the remainder of the class"); *Sosna v Iowa*, 419 US 393, 403, 95 S Ct 553 (1975) ("where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance . . . we believe that the test of Rule 23(a) is met").

1. Key Factors Pertinent to Conflicts of Interest

Numerous challenges to the adequacy of the representative plaintiff, on the basis that he or she had a conflict of interest with the other class members, have occurred under the class action regimes of all focus jurisdictions. As a result, several factors have emerged as relevant in class litigation where conflicts of interest are alleged, and these factors are discussed below. Although an analysis of conflict depends ultimately upon a case-by-case study, it is nevertheless useful to identify the key features which are clearly pertinent to the representative's ability to represent the class without adverse interests. Furthermore, whilst several of these have been most fulsomely argued under FRCP 23 to date, they would be potentially applicable under any focus jurisdiction regime in an appropriate fact scenario.

Conflict on the common issues. In order to negate the adequacy of the representative plaintiff, any alleged conflict between the representative and the class must concern *the common issues* in the case.[12] Thus, an allegation that the representative plaintiff had a conflict as owner of land on which three oil wells were located failed in the Ontario case of *Ewing v Francisco Petroleum Enterprises Inc*.[13] That ownership was entirely separate from an agreement between himself and the defendants as to the operation and supervision of the wells which comprised the common dispute. Any conflict did not relate to the substance of the litigation. Similarly, in an action[14] under FRCP 23(b)(3) by retirees against a tyre manufacturing company to enforce a contractual obligation to provide lifetime medical benefits, the defendant argued that it had already gratuitously enhanced benefits for certain class members beyond the benefits specified in the collective bargaining agreements. If, because of the class action, it reinstated benefits to negotiated levels, that would reduce or cancel benefits for certain class members. The court rejected that argument on the basis that the common dispute in the case was to vindicate the lifetime

[12] *Ward-Price v Mariners Haven Inc* (2002), 36 CPC (5th) 189 (SCJ) [48] (no conflict identified); *Alvarado Partners LP v Mehta*, 130 FRD 673, 676 (D Colo 1990) ("conflict [must be] . . . on an issue at the very heart of the suit", citing: *Blackie v Barrack*, 524 F 2d 891, 909 (9th Cir 1975)).

[13] (1994), 29 CPC (3d) 212 (Gen Div) [10]. See also: *Chace v Crane Canada Inc* (1996), 26 BCLR (3d) 339 (SC [in Chambers]) [25] ("The representative plaintiffs proposed are backed by their insurers in this litigation. The insurer's duty in such circumstances is to act in the best interests of both insurer and insured. In the circumstances of this litigation, a conflict is unlikely to arise between them or with the other members of the proposed class insured or uninsured (apart from insured interests subject to claims handling agreements which are excluded from the proposed class)", aff'd: (1997), 44 BCLR (3d) 264 (CA); *McNaughton Automotive Ltd v Co-operators General Ins Co* (SCJ, 14 Aug 2003) [40] (some class members large, sophisticated commercial entities with risk managers who fully appreciate the impact of deductibles on rate structure, and with this knowledge, often purchased insurance packages with very high deductibles, and other class members were "the average motorist"; difference not significant since the issue was whether the actual cash value was paid as required by statutory condition 6(7). The size of the deductible and the sophistication of the insured were not relevant to that inquiry).

[14] *Halford v Goodyear Tire & Rubber Co*, 161 FRD 13 (WD NY 1995).

character of the health care benefits, and "[r]einstatement of negotiated benefits does not, on logic alone, preclude defendant from conferring additional benefits on anyone."[15] Thus, the alleged conflict must pertain to the class claim directly, and to the issues at the very heart of the suit, for it to adversely affect adequacy of representation.

Effect of competitive relationship. A general competitiveness between class members and the representative, absent the litigation, is no ground for declaring that the class action must be disallowed for reasons of conflict. The existence of an ordinarily competitive relationship between class members in the business environment will not necessarily translate to a conflict of interest within a class suit where a claim is instituted against a third party for allegedly wrongful conduct harmful to *all* class members. As the court explained in *Sunrise Toyota Ltd v Toyota Motor Co*:

> Although on one level all members of the plaintiff class are competitors in the sale of Toyota vehicles within the Region, nonetheless as to the class claims their interests are alike. There is no ground for fear that plaintiff's interests are antagonistic to those of others in the class as to the subject matter of the case.[16]

It is only when the competitive relationship between the representative plaintiff and the class members gives rise to conflicts of interest that go to the common issues and substance of the litigation (such as where the class members are alleging damage sustained in a limited business market[17] or where multiple dismissed employees seek reinstatement to a limited number of positions[18]) that representation may be inadequate on the grounds of conflict. Provided that this caveat of "conflict on the common issues" is kept firmly in mind, any reluctance to recommend[19] as a legislative criterion an absence of conflict of interest, because of the possibility of a competitive business relationship, seems misplaced.

[15] *Halford v Goodyear Tire & Rubber Co*, 161 FRD 13, 15 (WD NY 1995).

[16] 55 FRD 519, 533 (SD NY 1972) (class of car dealers alleged that defendants had conspired to ship to New York dealers a disproportionately small number of Toyota vehicles; defendants unsuccessfully argued that competitive relationship among dealer class members meant representative would not adequately represent them).

[17] Eg, in the case of antitrust litigation: "recovery of any amount of damages on behalf of the named plaintiffs will perforce diminish the amount of damages recoverable by the other class members for the amount of business 'not done' . . . Because of the nature of this class, composed of members who have identical interests in exploiting the limited market for their own benefit, we conclude that the interests of the named plaintiffs are inherently antagonistic": *Chestnut Fleet Rentals, Inc v Hertz Corp*, 72 FRD 541, 545 (ED Pa 1976); *Glictronix Corp v American Tel and Tel Co*, 603 F Supp 552, 585 (DNJ 1984); *Franklin Container Corp v Intl Paper Co*, 1983-2 Trade Cas ¶ 65,727 at 69,722 (ED Pa 1982).

[18] In the case of class member employees who are competitors for limited positions, see: *Allen v City of Chicago*, 828 F Supp 543, 553 (ND Ill 1993); *General Telephone Co of the Northwest Inc v EEOC*, 446 US 318, 331, 100 S Ct 1698 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees. . . . Under Rule 23, the same plaintiff could not represent these classes"); and also, *Newberg* (4th) § 3.34 pp 475–77.

[19] *OLRC Report*, 354, 357.

Different remedies sought by representative and class members. It will be recalled that the English representative rule required that different remedies could not be sought for different class members, the relief had to be of the same type and beneficial to all, not merely personal to the representative plaintiff.[20] This bar has been specifically excluded by the class action regimes in Australia[21] and Ontario,[22] which each expressly permits that class proceedings are possible where members of the class seek different remedies. The US regime is silent on this particular issue.

Notwithstanding the legislative reference, there have been occasions under Australia's Pt IVA regime where the class members and representative plaintiffs have sought differing remedies, and the defendants have challenged whether indeed the actions were validly commenced. This has arisen especially where the representative has sought injunctive relief to stop the defendant's activities, but the rest of the class has sought damages for their respective losses.[23] In such cases, the courts, whilst permitting different remedies within the one class action, have noted that it is probably necessary that there be a "substantial overlap" in the facts needed to establish both the claims of the applicant and of the class.[24] It has been judicially acknowledged in these cases that there may be differences between the arguments raised by the parties if different remedies are sought, but that is to be expected.

Under FRCP 23, whether a representative plaintiff who has an alleged claim for damages (say, as a terminated former employee in a discrimination suit) can also represent a class for both injunctive relief and damages (say, the present employees) has been described by Newberg as an issue upon which "courts are in conflict".[25] According to Newberg, some courts have held (and similarly to the Pt IVA position) that if the plaintiff's claim for damages "has sufficient common threads" with present employees who would be seeking injunctive relief, such that there were common questions and that proof of the plaintiff's case would also prove the case for the present employees and entitle both to a remedy, then typicality, adequacy and an absence of conflict will be satisfied.[26]

In a somewhat different context, where the relief sought by the representative plaintiff was quasi-criminal and that by the class members was entirely civil in nature, the Australian Full Federal Court similarly dismissed the defendant's

[20] *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) 1035.

[21] FCA (Aus), s 33C(2)(a)(iv).

[22] CPA (Ont), s 6(3).

[23] Eg: *ACCC v Chats House Investments Pty Ltd* (1996) 71 FCR 250 (false "foreign exchange trading"); *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424 (pyramid selling scheme); *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512 (pyramid selling scheme), in all of which the ACCC as "consumer watchdog" instituted proceedings as representative plaintiff (although, in the last-mentioned, unsuccessfully).

[24] See generally: *Chats House*, *ibid*, 254–55; *Golden Sphere*, *ibid*, 445–46.

[25] *Newberg* (4th) § 3.35 p 495, and see particularly the cases cited in fnn 26–28 thereof.

[26] *Newberg*, *ibid*, and eg: *Gerdom v Continental Airlines Inc*, 648 F 2d 1223, 1228 (9th Cir 1981) (concerning maximum height/weight ratios for flight attendants: if Continental's weight requirements illegal, both suspended and terminated flight attendants entitled to remedy).

contention that the class action was not well commenced. In *Finance Sector Union of Australia v Commonwealth Bank of Australia*,[27] the first applicant, the FSU, sought to invoke a penalty on the defendant bank for alleged breaches of an award, whereas the class member employees were seeking the recovery of moneys allegedly underpaid by the bank. The court noted the bank's argument that "a proceeding for a penalty for breach of an award, while not a criminal proceeding . . . is a proceeding for relief materially different to damages",[28] and stated:

> FSU has a more confined interest than Mr Macey and the named group members. FSU is interested (in the legal sense) only in enforcement of the award. While it may be taken that Mr Macey and the group members are also keen to see the award enforced, they have an additional interest as well: obtaining payment of any moneys underpaid by CBA. That does not create a problem . . . its purpose [s 33C(2)] is to make clear that it is not a legitimate objection to a representative proceeding that it involves particular claims for relief or disparate issues.[29]

Thus, it is evident that, in Australia, by combination of careful statutory drafting and judicial determination to overcome the effects of the representative rule, the representative plaintiff may pursue a different form of relief from that of the class members. Such divergences are held not to be a conflict of interest.

Different methods of proof of damages. Where the cause of action asserted by the representative plaintiff and on behalf of class members is exactly the same, but the representative's personal claim for damages will require proof of different matters from those that must be proven for the damages which are being sought by the class members because the nature of their injuries were not the same, is the representative adequate in those circumstances, or is there a conflict? This has been a significant question under the regimes of the focus jurisdictions.

The issue was confronted squarely under Australia's Pt IVA in *Tropical Shine Holdings Pty Ltd v Lake Gesture Pty Ltd*,[30] which arose out of assertions that the defendant had advertised the sale of furniture in such a way as to mislead potential purchasers of the furniture as to both price and quality. The representative plaintiff was itself an importer, distributor and retailer of furniture. The class members were described as those "who had bought furniture at the sales advertised, promoted and conducted" by the defendant, and who would suffer, or had sustained, damage as a result. The applicant's personal claim for damages was that it had lost sales because purchasers who would otherwise have dealt with it were persuaded by the defendant's advertisements to buy furniture from the defendant instead. The applicant had to prove that it would otherwise

[27] (1999) 94 FCR 179 (Full FCA), affirming earlier proceedings: [1999] FCA 824 (O'Connor J).
[28] *FSU v CBA* (Full FCA), *ibid*, [15].
[29] *FSU v CBA* (Full FCA), *ibid*, [18]–[19].
[30] (1993) 45 FCR 457, cited with approval in *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424, 444, and *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 522.

have made sales to the defendant's customers, and if successful, its damages were to be measured by those lost sales. However, in respect of the class members, the case was that each was induced by false statements in the advertisements to purchase furniture from the defendant for more than it was worth, and the appropriate measure of damages for each class member was therefore to be measured by overpayment.[31] In this scenario, the two claims for damages were inconsistent and very different. On that basis, the defendant argued that the applicant's personal claim was too dissimilar to those of the class members for a class action to be an efficient and effective means of dealing with the claims. This was rejected by the court, which held (after "substantial consideration") that the class action had been validly commenced:

> [I]t is an essential ingredient of the applicant's personal claim that people were misled by the advertisements into purchasing furniture from Federation Furniture Company. The cases divide only after that fact is established. . . . Having regard to the substantial overlap in the facts requiring to be established and the absence of any discernible conflict of interest, it seems to me impossible to conclude that this will not be an efficient and effective means of dealing with the various claims.[32]

This decision has been heralded as showing a "bolder approach" under Pt IVA as to whether the criteria for commencement/continuance of class proceedings are met,[33] that the court was rightly generous to allow the matter to proceed at least to the determination of the core common issues,[34] and that it has "removed a significant barrier" to the commencement of class proceedings where the class members' interest in the proceedings is materially different (the same broad relief but differing nature of injury sustained) from that of the applicant.[35]

The significance of different injuries being assessed as between the representative and class members has also arisen for consideration under the US regime. For example, in a class suit by past and present residents who lived near nuclear testing facilities against owners and operators of the facilities,[36] the representative plaintiff's alleged causes of action were the same as the class, in that all of the plaintiffs sought to establish negligence, strict liability and violations of statute (and an alleged link between harmful exposure and disease such as cancer). However, of the eight representatives, half had cancer and the others had a relative with cancer. Thus, if liability were proven (said the court), the representatives and those class members who had been diagnosed with cancer

[31] The court noted that the representative plaintiff did indeed purchase two items of furniture from the defendant—but only to have them technically analysed, not because it relied on anything said in the advertisements.

[32] *Tropical Shine* (1993) 45 FCR 457, 464.

[33] M Doyle, "The Nature of Representative or Class Actions in the Context of Compensation Claims Against Resources and Utilities Companies" [1999] *AMPLA Ybk* 277, 292.

[34] S Stuart-Clark, "Mass Tort, Drug and Medical Device Litigation in Australia" (1997) 8 *Aust Product Liability Reporter* 95, 103.

[35] V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U British Columbia L Rev* 459, [19].

[36] *O'Connor v Boeing North American Inc*, 180 FRD 359 (CD Cal 1997).

would seek to recover for treatment of their diseases and their loved ones' diseases, whereas other class members who had yet to suffer any disease or injury would seek to recover, by way of damages, the costs of early detection/monitoring of latent disease. In this scenario, the class representatives were held not to be typical[37] of the class they sought to represent because the plaintiffs would not advance the interests of those class members seeking medical monitoring, and conversely, many of the representative plaintiffs would not benefit from recovering anything in respect of a medical monitoring to detect signs of latent disease.

Some of the judicially-espoused tests of typicality under the US regime include whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct.[38] In the absence of a typicality criterion in either the Australian or Canadian regimes, it is arguable that differences in the manner of proof of damages may be more easily accommodated.

Different assessments of damages. The differing and personal damages which applied to different class members was one of the grounds upon which the proceedings under the representative rule in *Markt & Co Ltd v Knight Steamship Co Ltd* failed,[39] and express negation of that bar has been considered essential in most modern class action regimes.[40] Thus, differences in the likely quantum of damages between the representative plaintiff and class members is no evidence of conflict.[41] Similarly, although there is no express no-bar provision under FRCP 23, the reality is that if variations in the amount of individual damages would render a class action inappropriate, then a class action would be extremely difficult, because differences in the amount of damages among class members "are inevitable unless they happen to be factually identical, which is not required under [the rule]."[42] Thus, an argument that the amount of damages suffered could vary significantly between the representative plaintiff and other class members has not been found to render the representative atypical under FRCP 23(a)(3).[43] In practice, a particular feature of the focus jurisdictions'

[37] As required by FRCP 23(a)(3).

[38] See p 310.

[39] [1910] 2 KB 1021 (CA).

[40] FCA (Aus), s 33C(2)(a)(iii); CPA (Ont), s 6(1); CPA (BC), s 7(a).

[41] *Fehringer v Sun Media Corp* (2002), 27 CPC (5th) 155 (SCJ) [37] ("The fact of the matter is that in most class proceedings the damages to which individual class members are entitled are likely going to vary greatly. I am not satisfied that that is a sufficient reason to find that a representative plaintiff may be in a conflict with other class members").

[42] *Newberg* (4th) § 3.16 p 370.

[43] *Safran v United Steelworkers of America*, AFL-CIO 132 FRD 397 (WD Pa 1989) (seniority differences between representative employees and other class members, which meant that former would receive much larger damages awards if liability proven, did not affect typicality); *In re School Asbestos Litig*, 789 F 2d 996, 1010 (3d Cir 1986); *Olden v LaFarge Corp*, 203 FRD 254, 270 (ED Mich 2001) (emission of cement dust; "The putative class members claims may differ in the amount of damages due to each individual, but that feature alone is not fatal to a finding of typicality"), and discussed *Newberg*, *ibid*.

schemas has been the many and varied methods by which differential assessment of class members' damages has been achieved or contemplated.[44]

Relationship with the defendant. Two incidences where conflict could feasibly arise is where the representative plaintiff is a relative of the defendant,[45] or in collusion with the defendant.[46] Although often warned against by law reformers,[47] these conflict scenarios appear to be relatively uncommon.

Relationship with the class lawyers. Where a representative plaintiff is a member of the law firm seeking to act as class lawyers, a potential conflict arises. The argument that the representative has a stake in the legal fees and that appearances must be preserved has been upheld in Ontario,[48] with the Superior Court of Justice making the following observations: "[a]s a general principle, it is best that there is no appearance of impropriety. In this situation, there is the perception of a potential for abuse by class counsel through acting in their own self-interest rather than in the interests of the class", and "the better practice is that class counsel be unrelated to a representative plaintiff so that there is not even the possible appearance of impropriety." Similarly, in the United States, courts have sometimes refused to certify representative plaintiffs on the basis that the plaintiff had a close relationship with the proposed class counsel.[49] One has also criticised a close familial bond between a class counsel and a class representative on the basis that "there is a clear danger that the representative may have some interests in conflict with the best interests of the class as a whole when making recommendations or decisions that could have an impact upon attorney fees."[50]

Where representative represents class in more than one litigation. In the Ontario case, *Carom v Bre-X Minerals Ltd*,[51] which arose out of a sham gold mine at Busang in Indonesia,[52] the Superior Court of Justice permitted a class

[44] See pp 416–23.

[45] Eg: *Shankroff v Advest Inc*, 112 FRD 190, 194 (SD NY 1986) (class action by investors against defendant broker re oil and gas investment; representative plaintiff improper because broker from whom she purchased her interest was her husband's cousin; another representative plaintiff substituted).

[46] Eg: *Eisen v Carlisle and Jacquelin*, 391 F 2d 555, 562 (2nd Cir 1968) ("it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit").

[47] See *ALRC Report*, [179]; *SLC Report*, [4.36]; *OLRC Report*, 353.

[48] *Kerr v Danier Leather Inc* (2001), 14 CPC (5th) 293 (SCJ) [72].

[49] *Zylstra v Safeway Stores Inc*, 578 F 2d 102, 104 (5th Cir 1978); *Susman v Lincoln American Corp*, 561 F 2d 86, 90, 96 (7th Cir 1977); *Zlotnick v TIE Communications Inc*, 123 FRD 189, 194 (ED Pa 1988) (close familial relationship between class counsel and class representative inappropriate). Cf: *Werlinger v Champion Healthcare Corp*, 598 NW 2d 820, 827–28 (ND 1999); *In re Greenwich Pharmaceuticals Sec Litig*, 1993 WL 436031, at 2 (ED Pa 1993), and note Newberg's question, 'How far does this bar extend?": *Newberg* (4th) §3.40 p 521.

[50] *Petrovic v Amoco Oil Co*, 200 F 3d 1140, 1155 (8th Cir 1999).

[51] First instance: (1999), 44 OR (3d) 173 (SCJ) (Winkler J), and ultimately on appeal: (2001), 196 DLR (4th) 344, 51 OR (3d) 236 (CA).

[52] Bre-X Minerals Ltd was an Alberta company involved in exploring and developing gold mining properties in Busang. As a result of a series of announcements about the gold resources there,

action to be instituted against the gold exploration company and its officers and directors (the main *Bre-X–Carom* action), but disallowed a class action against, inter alia, the brokerage firms who promoted the company's shares.[53] One of the reasons advanced was that the representative plaintiffs against certain of the brokers were also the representative plaintiffs in the main *Bre-X–Carom* action. Winkler J disliked that scenario:

> This dual status leaves each of them in a position where they have potential conflicts in interest with the other subclass members on the common issues. . . . In the main action, the plaintiffs have claimed in conspiracy against the Bre-X defendants. There are no allegations of conspiracy against [the brokers]. However, proof of the conspiracy claim against the Bre-X defendants in the main action may well serve as a defence to the claims against [the brokers]. Where the success of a claim of one class may serve as a defence to the claims of another class or a subclass, the representative plaintiffs advancing the separate claims cannot help but have a conflict on the common issues.[54]

In such circumstances, there was an unacceptable risk of conflict on the part of the representative plaintiffs, and the class action against the brokers was disallowed. The problem of related lawsuits involving the same class members has similarly arisen under FRCP 23. In a suit by Disney shareholders against purchasers of Disney stock for alleged material misrepresentations,[55] the representative plaintiffs instituted both a class action and a shareholder derivative action. The court accepted the defendant's argument that the two sets of litigation, and dual status, caused a conflict of interest, in that "recovery in the class suit could reduce the potential recovery in the derivative action." On this basis, they were held to be inadequate representatives.

Where relief sought not beneficial to all class members. If the facts indicate that the particular remedy being sought by the representative plaintiff against the defendant may actually harm some class members, a conflict will manifest, and the proceedings will be held to be improperly commenced. This potential conflict is as old as the English representative rule itself, and could render the proposed plaintiffs unsuitable also under that rule, as *Smith v Cardiff Corporation*[56] demonstrated. In that case, the declaration sought by the applicant tenants, if granted, would have imposed increased rents upon some tenants

the company's share price rose from about 50 cents a share in May 1993 to $228 a share by May 1996. The share prices then plummeted when independent sources indicated that the gold resources claimed in the announcements were unsubstantiated. Independent testing later revealed that the gold samples from Busang had been "salted".

[53] Although various aspects of the judgment of Winkler J at (1999), 44 OR (3d) 173 (SCJ) were appealed (see (2000), 46 OR (3d) 315 (Div Ct)), and (2001), 196 DLR (4th) 344, 51 OR (3d) 236 (CA)), refusal to certify the action against these putative defendants was never appealed.

[54] *Carom* (SCJ), *ibid*, [278].

[55] *Kamerman v Steinberg*,113 FRD 511, 516 (SD NY 1986).

[56] [1954] 1 QB 210 (CA). Also see: *Duke of Bedford v Ellis* [1910] AC 1 (HL) 8 ("the relief sought [is] in its nature beneficial to all whom the plaintiff proposed to represent").

in the purported class of litigants, in order that they would subsidise the remainder of the class. A representative proceeding in that case was disallowed, and it is unlikely that it would be permitted under a class action regime either.

There are numerous other scenarios in the modern class action context (most of which have manifested to date under FRCP 23 jurisprudence) whereby the relief sought by the representative could harm the interests of some class members and which could give rise to some reluctance, even hostility, toward the suit. Tensions between, for example, landlords and lessees,[57] former franchisees versus current franschisees,[58] former shareholders versus current shareholders in a securities fraud action,[59] those seeking statutory redress,[60] and class members with present injuries versus class members with possible future injuries,[61] may all give rise to intra-class conflicts, such that the representative plaintiff cannot be said to fairly and adequately represent the entire class. The test has sometimes been referred to as the "benefits test", whereby the representative will be adequate if the class members will "be helped" by the success of the class action brought on their behalf.[62]

The difficulty where some class members are opposed to the relief sought in the class litigation has been highlighted recently in Ontario by the fact that the significance of dissenting class members has been referred for appellate consideration specifically so that the issue can be "properly reviewed". In *1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd*,[63] class member franchisees sued the defendant franchisor in contract for rebates allegedly due

[57] See, eg, the hypothetical example of representative landlord vs class member tenants of a commercial shopping centre affected by a rail derailment in: MG Cochrane, *Class Actions: A Guide to the Class Proceedings Act 1992* (Aurora, Canada Law Book Co, 1993) 28.

[58] *Broussard v Meineke Discount Muffler Shops Inc*, 155 F 3d 331, 337–38 (4th (NC) Cir 1998) (former franchisees had an interest only in maximising any damages defendant would have to pay; certain current franchisees unable to benefit from a damages award because of executed releases, but could obtain the benefit of any funds defendant restored to account; representative plaintiffs' pursuit of a damages remedy "was at best irrelevant and at worst antithetical to the long-term interests" of the current franchisees who had an interest in the continued viability of the defendant).

[59] See J Donnan, "Class Actions in Securities Fraud in Australia" (2000) 18 *Company and Securities LJ* 82, 85–86, in which US examples of such conflict are cited of the scenario where applicant shareholder could seek to oppose high compensatory payouts to class members who were former shareholders (as likely to reduce overall shareholder wealth); whereas former shareholders would not have the same qualms and would seek to maximise their recovery, thereby rendering a conflict.

[60] Eg: *Lester v Lukhard*, 622 F Supp 316, 318–19 (WD Va 1985) (if representative plaintiff successful, some class members could be held not "disabled", and thus could lose their eligibility for social security payments).

[61] *Amchem Products Inc v Windsor*, 521 US 591, 626–27, 117 S Ct 2231 (1997) (asbestos mass tort claim; class representatives inadequate, particularly as settlement fund was drafted; "for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future").

[62] *Eisen v Carlisle and Jacquelin*, 391 F 2d 555, 562 (2nd Cir 1968) ("defendants have argued that different members of the class will have varying theories as to what constitutes the 'excessive price,' and other class members may be satisfied with the present price policy. Nonetheless, all members of the class, including those who would otherwise prefer to abide by the status quo, will be helped if the rates are found to be excessive"), also described in these terms by the *OLRC Report*, 369.

[63] (2003), 64 OR (3d) 42 (Div Ct).

and owing. Three class member franchisees, who were in debt to the franchisor and who for economic reasons were vulnerable, put in affidavits as to their personal reasons for not supporting the certification, particularly a fear that their present economic relationship would be disrupted, should the representative plaintiffs succeed on the claim. The court held that the express opt-out provision in the Ontario statute indicated that "mere dissent was not enough to cause the court to prefer separate actions to certification",[64] but that, when significant numbers of the putative class have a real interest in seeing an action based on interpreting a contract fail, serious questions arise: "is it sufficient that they may opt out, or is that a fundamental flaw in using the class action procedure?"[65] In this regard, the Ontario Divisional Court referred to US authority[66] which indicated that, where different vulnerabilities and disparity existed in the economic position of some class members vis-a-vis the defendant, that could mean that the representative plaintiffs would not fairly and adequately represent the interests of the class, and had interests in conflict with the other members which could not be cured by opt out rights.

It is evident that there are two opposing but cogent arguments in this scenario. On the one hand (argued the plaintiff), "class members unhappy with the possible economic impact of a successful action may opt out, but their unhappiness is not a basis for denying others the opportunity to employ the class action procedure." On the other view (that of the defendant), "opting out is not the solution", and a class action should not be certified where there are conflicts of this kind. The impact of US authorities in this regard is evident from this statement of the Divisional Court:

> [The trial judge] found that . . . 'evidence from class members regarding their opposition to a class proceeding is of no assistance in determining whether a class proceeding should be certified'. In the American courts there have been decisions to the contrary, including at least one at the appellate level. The rules being interpreted are substantially similar. While such decisions are not 'conflicting' within the meaning of our Rule, nevertheless they give a basis for considering that the matter is open to serious debate . . . and of general importance in the development of the law relating to class actions.[67]

Of course, there are also US authorities[68] (not referred to by the Divisional Court) which indicate (in the context of 23(b)(3) actions where opting out is as of right) that, although an opt-out approach is not always a complete answer to alleged conflict between class members, it can be satisfactorily used to protect

[64] *Ibid*, [21].
[65] *Ibid*, [25].
[66] The Divisional Court referred to: *Broussard v Meineke Discount Muffler Shops Inc*, 155 F3d 331 (4th (NC) Cir 1998) and to: *Free World Foreign Cars Inc v Alfa Romeo SpA*, 55 FRD 26 (SDNY 1972). Incidentally, in respect of the decision in *Alfa Romeo*, *Newberg* (4th) § 3.30 p 448 notes that "this case appears to have been an ideal situation for use of the opt-out provision".
[67] (2003), 64 OR (3d) 42 (Div Ct) [40], earlier competing arguments at [38].
[68] See n 73 below.

the rights of dissident class members and thereby allow the representative to adequately represent the class. However, as the Ontario Divisional Court indicated, internal dissension and opposition by some class members to the class suit, where success in the suit could harm those class members' interests, raises a vexed issue.

It is emphasised that this particular potential challenge to the representative's adequacy, and the question as to whether a conflict exists, applies where some of the class members are concerned or fearful that the relief sought by the representative could be harmful to them. It is not intended to cover the quite distinct scenario where there are class members who are disinterested in the commencement of a class suit, and where the representative appears to be driving the litigation in the absence of other interested litigants. The latter scenario has also been the subject of challenge. However, it is surely correct to say that any class member who passively chooses to remain a disinterested victim of allegedly unlawful conduct rather than wish to litigate to assert his or her rights cannot be said to have "a conflict" on the common issues with the class representative.[69] Rather, the case of the "indifferent class member" will be discussed subsequently under the "typicality" criterion.

2. Dealing With a Conflict of Interest

Where a conflict between the representative plaintiff and the class is alleged, a class action will not necessarily be precluded. A variety of devices may be used to successfully eliminate the concern at the outset, so as to permit the commencement of the class action. Several have manifested across the focus jurisdictions.

One of these devices is the prospective use of sub-classes, each requiring its own representative plaintiff, the employment of which is discussed elsewhere.[70] Moreover, at the outset, whether class members do have genuine conflicts with the class representative can be difficult to gauge. This is where the availability of an opt-out procedure has been judicially endorsed in Australia,[71] Canada[72] and the US[73] to be useful, for it avoids the class action failing for conflicts that

[69] See discussion of this point in *Newberg* (4th) § 3.30 p 449.

[70] See pp 184–88.

[71] Eg: *Milfull v Terranora Lakes Country Club Ltd* (FCA, 16 Jun 1998) (investors who had a special claim not contemplated by the class action should opt out: Kiefel J); *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [86] (opt-out rights preserve class members' autonomy and freedom of choice); and see: R York, "All Together Now: Standard Term Contracts and Representative Actions" (1996) 10 *J of Contract Law* 85, 91–92.

[72] Eg: *Delgrosso v Paul* (1999), 45 OR (3d) 605 (Gen Div) [15]; *Elms v Laurentian Bank of Canada* (2000), 73 BCLR (3d) 366 (SC) [19]; *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) [76]; *Dabbs v Sun Life Ass Co of Canada* (1999), 165 DLR (4th) 482, 41 OR (3d) 97 (CA) [20]; *1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada* (2003), 64 OR (3d) 42 (Div Ct) [21], and earlier in the same action: *1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd* (2002), 62 OR (3d) 535 (SCJ) [32]–[33].

[73] Eg: *In re Potash Antitrust Litig*, 159 FRD 682, 692 (D Minn 1995); *Thonen v McNeil-Akron Inc*, 661 F Supp 1271, 1275 (ND Ohio 1986); *Holmes v Continental Can Co*, 706 F 2d 1144, 1155

are merely speculative and, if conflicts do exist, resolves them by allowing class members who wish to remain autonomous to extricate themselves from the action.[74] As one Australian court put it, the opt-out provisions of a class action statute must surely render remote "the prospect of involuntary subjection to the jurisdiction of the court."[75] Further, in a strategy that harks back to the early days of the English representative rule[76] (under which there was no right to opt out[77]), it has been held under FRCP r 23(a)(4) that when some discontented class members are aligned with the defendant rather than with the representative plaintiff, their interests will be protected by the defendant as their representative.[78] Either the addition or substitution of another class representative,[79] or splitting the trial of the damages issue,[80] can also be used to circumvent a potential conflict. Finally, as one Ontario court described in a case where conflicts of interest on the part of the representative were alleged by the defendant, if those concerns did become a reality: "[c]ertification is a fluid, flexible procedural process. It is conditional, always subject to decertification."[81]

Thus, apart from the statutory no-bar factors which have been expressly incorporated within the class action regimes of Australia and the Canadian provinces, the experiences under these jurisdictions and under the longstanding FRCP 23 indicate that there are numerous options by which to seek to ensure that a purported conflict does not absolutely preclude the valid commencement of a class action. Newberg's comment of the US regime is as equally applicable to the regimes of the other focus common law legal systems: "[n]ormally, no plaintiff should be declared an inadequate representative because of a conflict of interest, if that conflict can be reasonably avoided through one of the safeguards provided by the rule."[82]

(11th Cir 1983) ("The presence in the lawsuit of a significant number of atypical claims not common to the class activates a requirement that absent members be given an opportunity to opt out of the class at the monetary relief stage").

[74] Also endorsed by York as a means of reducing intra-class conflict: R York, "All Together Now: Standard Term Contracts and Representative Actions" (1996) 10 *J of Contract Law* 85, 91–92; and *Newberg* (4th) §3.30 p 449, §3.42 p 541.

[75] *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1 (HCA) [95].

[76] Eg: *Fraser v Cooper, Hall & Co* (1882) 21 Ch D 718, 720; and later: *John v Rees* [1970] Ch 345, 371.

[77] That left class members with two options: to challenge the form of the representative proceeding; or to be represented by the defendant or become a defendant, and oppose the claim: *ALRC Report*, [100].

[78] Eg: *Dierks v Thompson*, 414 F 2d 453, 457 (1st Cir 1969); *Wyatt By and Through Rawlins v Poundstone*, 169 FRD 155, 162 (MD Ala 1995) ("decertification is not warranted at this time because it appears that the position of those class members who might oppose named plaintiffs on community placement issues is already being adequately—indeed, aggressively—advanced in this litigation by the defendants").

[79] Eg: *Robin v Doctors Officenters Corp*, 686 F Supp 199, 204 (ND Ill 1988).

[80] *In re Unioil Securities Litig*, 107 FRD 615, 622 (CD Cal 1985). In the US context, see further: *Newberg* (4th) §3.42 p 541–43.

[81] *Bendall v McGhan Medical Corp* (1994), 106 DLR (4th) 339, 14 OR (3d) 734 (Gen Div) [69], cited with approval in a similar scenario in *Hoy v Medtronic Inc* (2001), 94 BCLR (3d) 169 (SC [in Chambers]) [85].

[82] *Newberg* (4th) § 3.44 p 552, discussing the various safeguards mentioned herein.

It is worth noting again that once the class action has commenced, the court remains under a continuing duty to monitor the adequacy of representation and to address conflicts of interests if they develop. This monitoring role remains one of the court's ongoing responsibilities in class litigation across all focus regimes.[83]

C ADEQUACY OF THE REPRESENTATIVE

Adequacy of representation is one fundamental pillar of the modern class action regime. A successful class action binds the defendant in relation to all members of the class; but if the representative plaintiff is unsuccessful on the common issues, so will all class members be.

For the reason that class actions involve decisions being made for and binding upon absent or unascertained class members, representation must be adequate.[84] As the Australian Federal Court has explained: "because such a group member is effectively deprived of a right to appear and to make effective decisions concerning the prosecution of his or her claim, an essential element of the judicial process—the right to be heard—is lacking."[85] With similar sentiments in mind, the absence of any requirement of adequate representation in the English representative rule and its equivalents elsewhere was stated by the OLRC[86] to be one of its "most glaring deficiencies". There is an even stronger rationale under the US class action regime for, with limited exception,[87] the judicial view has generally been expressed that adequate representation is required to fulfil the constitutional due process requirements of class members[88] because a final judgment in a class action is binding on all class members.[89] Moreover, in those jurisdictions where notice informing class members of the commencement of a class action suit is not mandatory but discretionary,[90] so that the notice requirements are not likely to result in all class members learning of the proceeding, adequacy of representation assumes a "special importance."[91]

[83] *Weinman v Fidelity Capital Appreciation Fund*, 262 F 3d 1089, 1112 (10th Cir 2001).

[84] JS Emerson, "Class Actions" (1989) 19 *Victoria U of Wellington L Rev* 183, 202; *SLC Report*, [4.36]; *ManLRC Report*, 4, 55; *OLRC Report*, 351; *SALC Paper*, [6.28], and *SALC Report*, [5.6.20].

[85] *Bright v Femcare Ltd* (1999) 166 ALR 743, [11].

[86] *OLRC Report*, 348.

[87] Eg: *In re Four Seasons Securities Litig*, 502 F 2d 834, 843 (10th Cir 1974) ("due process may be satisfied by notice alone and that where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity").

[88] The Fifth Amendment to the Constitution provides, inter alia, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law". The Fourteenth Amendment provides similarly, applicable to the states.

[89] Eg: *Matsushita Elec Industries Co Ltd v Epstein*, 516 US 367, 379, 116 S Ct 873 (1996); *Cooper v Federal Reserve Bank of Richmond*, 467 US 867, 874, 104 S Ct 2794, 2798 (1984).

[90] See pp 338–43.

[91] See similar observation in *OLRC Report*, 352.

The Alberta Institute offers a different perspective. That the court examines the adequacy of a representative plaintiff as one of the certification criteria is said to be particularly justifiable because, in practice, the representative plaintiff is self-selected (other class members not yet being aware of the proceeding), and it usually falls to the defendant to point out to the court the plaintiff's inadequacies to represent the class. However, the defendant may know little about the plaintiff, and moreover, is in a conflict of interest when arguing for the class members' interests.[92] For these different reasons, it has been legislatively provided for in the focus jurisdictions that the representative must be capable of fairly and/or adequately protecting the interests of class members.[93]

A second fundamental pillar, that of typicality, the focus of the next section, is not (in contrast to the requirement of adequacy) referred to in the legislative regimes of all focus jurisdictions. However, whether, and if so to what extent, the representative's claim ought to be typical of the class members' claims is by far the more interesting and problematical, legally. It is also useful to note that, although the requirements of adequacy, typicality and commonality are dealt with elsewhere in this book, they tend to merge and overlap, a fact that has been judicially acknowledged particularly under FRCP 23.[94] With that caveat in mind, examination of the jurisprudence of the focus jurisdictions in order to provide a more complete picture as to what factors contribute towards the "adequate class representative" follows.

1. Factors to Consider *re* Adequacy

The requirement that the class representative should not have interests antagonistic to, or in conflict with, the interests of the class (whether treated as a component of adequate representation[95] or as a separate requirement over and above adequacy[96]) has been discussed previously. The requirement that the representative plaintiff be a class member is also considered separately.

[92] *AltaLRI Report*, [219].

[93] FCA (Aus), s 33T(1)—refers to "adequately". CPA (Ont), s 5(1)(e)(i)—refers to "fairly and adequately"—CPA (BC), s 4(1)(e)(i) is worded similarly. FRCP 23(a)(4)—refers to "fairly and adequately".

[94] *General Telephone Co of Southwest v Falcon*, 457 US 147, 157 fn 13, 102 S Ct 2364 (1982).

[95] As under FRCP 23, as has been made plain by the Supreme Court: *Sosna v Iowa*, 419 US 393, 403, 95 S Ct 553 (1975) ("[w]here it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, we believe that the test of Rule 23(a) is met"); *General Telephone Co*, *ibid* ("[t]he adequacy of representation requirement . . . also raises concerns about the competency of class counsel and conflicts of interest"), since followed by other courts, eg: *Hoxworth v Blinder, Robinson & Co*, 980 F 2d 912, 923 (3d Cir 1992) ("[a]dequate representation depends on two factors: (a) [competent class counsel], and (b) the plaintiff must not have interests antagonistic to those of the class").

[96] As in the Canadian provincial regimes, where the express stipulation of adequate representation is separate from, and cumulative upon, that of no conflicts.

Additional to these matters, several other constituent elements of adequate representation abound. All regimes of the focus jurisdictions share the same design feature—none of them prescribes any factors by which adequacy should be determined (a deficiency which has been subject to some law reform criticism[97]), and resort must be had entirely to case law for that. By far the majority of jurisprudence to date about the adequacy or otherwise of the representative plaintiff has arisen in the US under FRCP 23,[98] and several of the factors which have emerged therefrom as pertinent to the adequacy enquiry are instructive for regimes elsewhere. It is also evident from the following discussion that the element of adequacy of representation which is the subject of the most divisive views is whether the competency of the class lawyers ought to be a relevant consideration.

Vigorous prosecution. In reality, a primary aspect of the representative's role is to provide effective linkage between the absent class members and the class lawyers. Thus, in order to fulfill this requirement, courts have indicated that the representative must be prepared to vigorously prosecute the claim,[99] thus adopting an active rather than entirely passive role in the conduct of the litigation.[100] This requirement has been uniquely underscored in the Canadian provinces by the inclusion within the certification criteria of the relevant legislatures of a "workable plan" to be produced by the representative.[101] This plan must set out, inter alia,[102] a "workable method of advancing the proceeding on behalf of the class", albeit that case law to date indicates that the threshold for such a plan in order to achieve certification is not overly onerous.[103]

[97] *VLRAC Report*, [6.29]; *SALC Paper*, [6.28].

[98] *In re LILCO Securities Litig*, 111 FRD 663, 672 (EDNY 1986) ("Of the four elements of Rule 23(a), it is widely agreed that adequacy is the most important factor to be considered").

[99] *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [43]; *Bouchanskaia v Bayer Inc* [2003] BCSC 1306, [156]; *Campbell v Flexwatt Corp* (1998), 44 BCLR (3d) 343 (CA) [75]; *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (SC) [66]–[67]; *Senter v General Motors Corp*, 532 F 2d 511, 525 (6th Cir 1976); *Mick v Level Propane Gases Inc*, 203 FRD 324, 328 (SD Ohio 2001).

[100] *In re Storage Technology Corp Securities Litig*, 113 FRD 113 (D Colo 1986) (securities fraud action; one representative plaintiff brother's shares were purchased by a trustee when he was a minor, rendering his role "too passive to ensure vigorous prosecution"). Cf: *German v Federal Home Loan Mortgage Corp*, 168 FRD 145 (SD NY 1996) (defendant argued representative an immature, troubled teenager incapable of making important decisions and unfit for responsibilities of representing class of pregnant women; court held representative adequate).

[101] CPA (Ont), s 5(1)(e)(ii); CPA (BC), s 4(1)(e)(ii).

[102] The requirements of the plan have become quite detailed over the course of the regimes. Eg, in *Gregg v Freightliner Ltd* (2003) 35 CCPB (BC SC) [103], the plan was foreshadowed to include: "the methods of gaining information, such as discovery of documents; the methods of discovery (including follow-up discovery and answering outstanding discovery questions); amendments to pleadings; adding new parties; the anticipated method of proof for the pension litigation, including what type of expert evidence is anticipated; method of notice to persons who may fall within the class or subclass both within British Columbia and outside of British Columbia; and the method for dealing with individual claims."

[103] Judicial comments of workable and passworthy plans include: "lean": *McNaughton Automotive Ltd v Co-operators General Ins Co* (SCJ, 14 Aug 2003) [39]; "always a work in progress and cannot be expected to cover every eventuality in advance": *1176560 Ontario Ltd v Great*

A further indication of "vigorous prosecution" in Canada is that the representative plaintiff should instruct legal counsel.[104] In the normal course, if the class representative has been selected by other class members and has retained experienced counsel, that will reflect positively on his or her appropriateness.[105] It is not compulsory in the provincial regimes of that jurisdiction that the class representative be legally represented, and in this respect, there is a division of views manifesting in class action regimes. The question of legal representation was specifically addressed by the ALRC, which recommended that Australia's class action legislation contain express requirement that the representative should not be able to conduct the proceedings without legal representation except with the court's leave.[106] This was not eventually enacted by Parliament, and Pt IVA remains silent on the issue. However, in the amendments to FRCP 23 which became effective 1 December 2003, the courts operating under that rule are now required to appoint class counsel to represent the class.[107] Quebec's regime also mandates legal representation.[108] The rationale behind such a mandate is difficult to refute: absent class members' interests are more likely to be protected when the applicant is represented by a lawyer; the technical, complex and procedural requirements of class actions suggest that independent legal representation should be a legislative requirement in such cases; and an unrepresented plaintiff attempting to conduct a class action could create an

Atlantic & Pacific Co of Canada Ltd (2003), 64 OR (3d) 42 (Div Ct) [43]; "not reasonable to expect the representative plaintiff to provide for every tactical step that the defendants may chose to take": *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [45]; "the litigation plan ought to contain at least some preliminary proposal as to how to deal with the individual issues that remain after the common issues are dealt with": *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 360 (SCJ) [78]; "A practice has developed in class proceedings of accepting litigation plans in support of certification motions that are sparse and lacking in detail. While this may be appropriate in more straightforward cases, in complex litigation such as the instant case, a detailed plan which meets the requirements of the Act is of critical importance": *Carom v Bre-X Minerals Ltd* (1999), 44 OR (3d) 173 (SCJ) [98].

[104] *Maxwell v MLG Ventures Ltd* (1995), 7 CCLS 155 (Gen Div) [10]; *Reid v British Columbia (Egg Marketing Board)* (2003), 11 BCLR (4th) 334 (SC) [54]. In *Cevallos v City of Los Angeles*, 914 F Supp 379 (CD Cal 1996), it was held that a *pro se* plaintiff ordinarily cannot represent the interests of a class of other plaintiffs and will be an inadequate representative. Also in the US: *Shaffery v Winters*, 72 FRD 191, 193 (SD NY1976). In Australia, lack of legal representation, and subsequent judicial criticisms of the slow or unwieldy progress of the action, and possible prejudice to both other class members and the defendant to the action, have been commented upon, eg, *Revian v Dasford Holdings Pty Ltd* [2002] FCA 1119, [23]; *McIntyre v Eastern Prosperity Investments Pte Ltd (No 4)* [2002] FCA 1133, [25].

[105] *Peppiatt v Nicol* (1994), 16 OR (3d) 133 (Gen Div) [46], cited with approval in *AltaLRI Report*, [216].

[106] *ALRC Report*, [201], and see cl 25 of the Draft Bill. Also, see: Law Reform Commission of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977), cl 4(1) of the Draft Bill ("In determining whether the representative plaintiff will fairly and adequately protect the interests of the class . . . the Court may consider whether provision has been made for legal representation that is adequate for the protection of the interests of the class").

[107] FRCP 23(g)(1)(A). According to the Advisory Committee Notes, this provision, inter alia, "recognizes the importance of class counsel" and refers to the appointment of class counsel as a "basic requirement": see *2004 Federal Civil Rules Book* (Harvard, Dahlstrom Legal Publishing, 2004) 71–72.

[108] CCP (Que), art 1049.

enormous burden for courts, defendant's lawyers, class members, indeed, for all involved.[109]

Where the class representative's participation is so minimal that he or she has "virtually abdicated to the attorneys the conduct of the case",[110] that will amount to inadequate representation. However, the extent to which the class representative should have knowledge of the facts or legal causes of action underpinning the class action has been the subject of much discussion, particularly under FRCP 23, where it has been frankly acknowledged that "[i]n truth, class actions are inevitably the child of the lawyer rather than the client when the client's recovery is going to be small in relation to the costs of prosecuting the case. So, the courts have, in recent years, applied less rigorous standards for class representatives."[111] Indeed, if, as these authorities suggest, it is the competency of class lawyers which is the overriding criterion, the selection of a named representative plaintiff may appear to have little role to play—although in some scenarios, such as the multiple defendant case, the correct representative is still vitally important. In any event, as one US commentator puts it, "the representative characteristically is a figurehead who exercises little, if any, meaningful supervision over the conduct of the litigation by class counsel."[112] In other jurisdictions too, the courts have tended not to attach too much weight to the apparent limited knowledge of the representative plaintiff, given that the action is driven to a large extent by class lawyers.[113]

The reality, as judicially and academically recognised under FRCP 23 particularly, is that the level of understanding will vary enormously from case to case, especially given the complexity of many modern class action suits. To require the representative to have a detailed knowledge of the facts or the law relevant to the class claim would hold the representative to such a high standard that the effect of class actions legislation would be essentially nullified. Further, if the representative plaintiff lacks an "expert knowledge of all aspects of the case", or lacks appreciation of the "finer points of the litigation" or "seems confused" over some aspects of the civil litigation process, or of the legal issues involved in

[109] *ALRC Report*, [199]–[200]; *FCCRC Paper*, 38, both of which recommended mandatory legal representation.

[110] As stated in *Kirkpatrick v JC Bradford &Co*, 817 F 2d 718, 728 (11th Cir 1987). Insufficient involvement, and surrender of control to the class lawyers, was held to apply in *Kelley v Mid-America Racing Stables Inc*, 139 FRD 405 (WD Okla 1990).

[111] *Williams v Balcor Pension Investors*, 150 FRD 109, 118 (ND Ill 1993). Also: note the trend towards "assessing adequacy of representative's attorney rather than the personal qualifications of the named plaintiff" in *In re Western Union Securities Litig*, 120 FRD 629, 635 (DNJ 1988); *La Mar v H & B Novelty & Loan Co*, 489 F 2d 461, 465–66 (9th Cir 1973) ("Compliance with the [adequate representation] prerequisite must necessarily be determined more by examination of the fitness of the counsel of the candidate for representative party status than by the attributes of the candidate").

[112] R Nagareda, "The Preexistence Principle and the Structure of the Class Action" (2003) 103 *Columbia L Rev* 149, 149, citing EH Cooper, "The (Cloudy) Future of Class Actions" (1998) 40 *Arizona L Rev* 923, 927; also: J Wegman Burns, "Decorative Figureheads: Eliminating Class Representatives in Class Actions" (1990) 42 *Hastings LJ* 165, 186.

[113] *Haney Iron Works Ltd v Manufacturers Life Ins Co* (1998), 169 DLR (4th) 565 (BC SC) [30]; *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) [73].

the class action, or hopes to place a "great deal of reliance on the expertise" of the lawyers, that is not to say that the representation cannot be fair and adequate. Provided that the plaintiff has an understanding of the basis of the suit, that his or her concerns reflect those of class members, and that he or she is willing and able to instruct counsel as needed, that should arguably be sufficient in any of the focus jurisdictions.[114]

A further aspect of the requirement of vigorous prosecution is to ensure that class members are kept informed about the state of affairs. Facilitating communications with absent class members throughout the litigation is a vital part of the representative's role, and this requirement is also encapsulated within the "workable plan" required to be submitted by representative plaintiffs in the Canadian provinces, which must set out, inter alia, a "workable method . . . of notifying the class members of the proceeding".[115] In the unusual circumstance in Ontario in which the representative plaintiff had a strong antipathy towards a substantial majority of class members and would not speak to them, the criterion of adequacy, unsurprisingly, failed.[116] By way of further example, a failure on the purported representative's part to discuss the tax consequences of the class action with prospective class members has also resulted in a finding of inadequate representation under FRCP 23.[117]

Past wrongful conduct of representative. One factor which has arisen in US jurisprudence as potentially relevant is where allegations are made of the representative plaintiff's past unethical or unlawful conduct. Newberg notes that, in respect of FRCP 23,

[114] Eg: *Adair v Sorenson*, 134 FRD 13, 19 (D Mass 1991) (class representative "need not have knowledge of all the relevant facts to be an adequate representative"); *In re Newbridge Networks Sec Litigat*, 926 F Supp 1163, 1177 (DDC 1996) ("In complex litigation such as securities actions, a plaintiff need not have expert knowledge of all aspects of the case to qualify as a class representative and a great deal of reliance on the expertise of counsel is to be expected"); *In re Catfish Antitrust Litig*, 826 F Supp 1019, 1037 (ND Miss 1993) ("An antitrust litigant is not expected to appreciate the finer points of the Sherman Act, Clayton Act, or the Federal Rules of Civil Procedure governing class certification"); *Dorfman v First Boston Corp*, 62 FRD 466, 473–74 (ED Pa 1973) (in relation to the representative Dorfman, of whom the court stated that "she stated at her deposition that she was 'satisfied' with her 'good investment' and seemed confused over her representative status"; nevertheless, an adequate representative). Cf: *Kassover v Computer Depot, Inc*, 691 F Supp 1205, 1213–14 (D Minn 1987) (representative plaintiff inadequate where he admitted he was unfamiliar with crucial aspects of the securities case, had no facts to support critical allegations, and was completely reliant upon his lawyers' directions). For further FRCP 23 authorities and discussion, see especially: *Newberg* (4th) § 3.34.

[115] CPA (Ont), s 5(1)(e)(ii); CPA (BC), s 4(1)(e)(ii).

[116] *R v Nixon* (SCJ, 12 Mar 2002) [11] (inmate in high security jail, claiming damages for prison authority's conduct when fires were lit by inmates, declared most co-class members "some of the worst sex offenders in Canada", and that he "wanted nothing to do with these people").

[117] *Lubin v Sybedon Corp*, 688 F Supp 1425, 1462 (SD Cal 1988) (according to Mr Lubin's deposition: he had never read or seen original or amended complaint, did not recognise the names of many of the defendants, did not understand how much he had invested in the limited partnership and had never read the prospectus, and misunderstood the nature of the complaint's fraud allegation).

> [m]ost cases have rejected such challenges as irrelevant to the issue of adequacy to represent a class for particular claims or issues, though such contentions have been upheld when a court is persuaded that such past conduct sufficiently augurs that vigorous prosecution of the litigation on behalf of the class will not be fulfilled.[118]

For example, in that jurisdiction, the special fiduciary duties associated with the role of trustee has rendered a trustee who had been alleged to have previously failed to exercise care in overseeing a trust inadequate as a class representative.[119] Similarly, a prior securities felony conviction rendered a plaintiff an inadequate representative in a securities class suit,[120] although the District Court noted that to argue that a mere criminal record will render a plaintiff an inadequate representative was "specious".[121]

There is very limited authority in either Canada or Australia about this point. However, in *R v Nixon*,[122] the Ontario court declared that the past criminal conduct of the representative plaintiff put him in a position of conflict with other class members. One of the common issues was whether the defendant prison authorities had adequate policies and practices in place to deal with the recurring problem of inmates of a high security jail setting fires. As a previous arsonist himself, the court considered that the representative plaintiff could conflict with other members of the class in respect of how arsonists should be dealt with.[123]

Motives of the representative. The fact that the representative plaintiff may be motivated by "principle" rather than by any deeply held vindication of loss is no basis for precluding adequate representation. The ALRC firmly rejected what it called a "dubious" argument that "crusaders" are inappropriate representatives.[124] The same attitude is evident under FRCP 23, where one court succinctly stated that "principle, coupled with the hope of rectifying a claimed loss and the prospect of a substantial recovery, may be as strong a spur to vigorous prosecution as many other motivations."[125] While a representative plaintiff who files repetitive and frivolous claims will properly be considered to be an inadequate representative where there is a "pattern of abuse of the judicial system",[126] a plaintiff who has been involved in prior litigation (15–20 law suits) or who is considered to be a "professional plaintiff" of meritorious claims (but who "cannot recall how many" pending actions he has) will not be so considered, according to US authority.[127]

[118] *Newberg* (4th) § 3.36 p 498–99 (citations omitted).
[119] *Tedesco v Mishkin*, 689 F Supp 1327, 1337–38 (SDNY 1988).
[120] *Weisman v Darneille*, 78 FRD 671, 673 (SD NY 1978).
[121] *Ibid*, fn 7, and see also: *Haywood v Barnes*, 109 FRD 568, 579 (ED NC 1986).
[122] SCJ, 12 Mar 2002.
[123] *Ibid*, [10].
[124] *ALRC Report*, [124].
[125] *Dorfman v First Boston Corp*, 62 FRD 466, 473 (ED Pa 1973).
[126] *Green v Carlson*, 653 F 2d 1022 (5th Cir 1981).
[127] *Steiner v Ideal Basic Industries Inc*, 127 FRD 192, 194 (D Colo 1987).

Personality or physical condition of the representative. Arguments that the representative plaintiff was too ill or too old to adequately represent the interests of the class members have failed under both Ontario's regime[128] and under FRCP 23.[129] Moreover, as mentioned previously,[130] allegations by the defendant that the representative was inadequate because he or she showed confusion about the litigation or about the role of the representative have generally not succeeded. However, if the representative has a neurosis that could adversely affect his or her temperament, or other psychological problems, such that the ability to make rational decisions on behalf of the class would be impaired,[131] then adequacy will not be found. The fact that the class representatives may live a migratory lifestyle has also been rejected under FRCP 23 as a ground of inadequacy.[132]

Representative's financial stake in the litigation. Notwithstanding some occasional judicial obiter to the contrary,[133] the more common view under the regimes of the focus jurisdictions is that it is not necessary in class litigation that the representative plaintiff have a large financial interest in the litigation. The prospect that a class action could incur massive costs in the quest for judicial relief for a claim of a few hundred dollars cannot be better illustrated than by the case of *Eisen v Carlisle and Jacquelin.*[134] Ultimately, the class action was refuted in circumstances where the representative plaintiff was neither willing nor able to pay the costs of notice to the class,[135] but it was not the small size of the representative's claim ($70) which gave rise to the difficulties with this action per se. Australian[136] and Ontario[137] jurisprudence is also replete with endorsement of small claims being mounted by the representative plaintiff. The ability for those with small claims to make use of the class action procedure is one of the features giving rise to its superiority over other alternatives.

[128] *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219 (SCJ) [137] (serious heart disease).

[129] Eg: *Moskowitz v Lopp*, 128 FRD 624, 635–36 (ED Pa 1989) (heart condition and other ill-health); *CV Reit Inc v Levy*, 144 FRD 690, 698 (SD Fla 1992) (elderly representative); *Steiner v Ideal Basic Industries Inc*, 127 FRD 192, 194 (D Colo 1987) (daily kidney dialysis).

[130] See pp 291–92.

[131] Eg: *Roundtree v Cincinnati Bell Inc*, 90 FRD 7, 10 (SD Ohio 1979); and see alleged infirmities of representative in: *In re American Medical Systems Inc*, 75 F 3d 1069, 1083 (6th Cir 1996).

[132] *Haywood v Barnes*, 109 FRD 568, 580 (ED NC 1986).

[133] *Gregg v Freightliner Ltd* (2003), 35 CCPB (BC SC) [98] ("Other factors include whether the proposed representative has . . . the financial and intellectual ability to litigate the matter to conclusion, or whether he or she has a strong financial interest in the outcome").

[134] 417 US 156, 94 S Ct 2140 (1974) (representative plaintiff's own stake was approx $70). Also: *Epstein v Weiss*, 50 FRD 387, 391 (ED La 1970) ("a single plaintiff may represent the entire class, no matter how small his claim may be, if other factors indicate that he will fairly and adequately protect the interests of his class").

[135] See pp 347–49.

[136] *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 534 ("the policy of Pt IVA is that respondents should not benefit from the fact that individual claims are relatively small").

[137] *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496 (Div Ct) [64] ("The goal is to permit advancement of small claims where legal costs make it uneconomic to advance them").

Representative plaintiff's financial means. In comparison to the relative uniformity of view in the case of a small financial stake in the litigation, the extent of financial resources of the representative plaintiff is the subject of inconsistent treatment across the focus jurisdictions. In respect of those regimes (such as Australia's Pt IVA) where security for costs applications against representative plaintiffs are permissible, the financial resources available to the representative most definitely do matter in the outcome of the adequacy prerequisite.[138] Additionally, although the OLRC strongly urged that the class representative's financial resources should not be a relevant consideration in determining whether he or she will be an adequate representative,[139] and cited US authority in support of that contention,[140] some Ontario courts have held to the contrary,[141] holding that

> the court must be satisfied as to the financial ability of the representative plaintiff to bear the expense that is necessarily involved for the proper prosecution of a class action. . . .The absence of such evidence leaves the court without an essential element necessary to conclude that the proposed representative plaintiff would fairly and adequately represent the interests of the class.[142]

Some US authorities post-dating the *OLRC Report* also advance the view that where the defendant demonstrates a legitimate concern about the ability of a plaintiff to successfully lead a particular class, limited discovery into a plaintiff's financial history is warranted.[143] The rationale is that, without that information, it would be difficult for the court to ascertain whether the plaintiff could satisfy the adequacy requirement of FRCP 23(a)(4). However, the US authorities exhibit inconsistency in this respect, for it has also been held that the plaintiff's personal finances are not relevant, much less decisive, of

[138] See pp 369–73.

[139] *OLRC Report*, 358. The Commission based that recommendation on three reasons: that there is no necessary nexus between the financial resources of the plaintiff and his or her ability to provide adequate representation; that contingency fees meant that the costs of the action were borne by the class lawyers, not by the representative; and that making financial resources relevant would dissuade representatives who did not want their financial means being exposed through discovery: at 137–38. The view was expressly adopted in the *SALC Report*, [4.6.3].

[140] *Sanderson v Winner*, 507 F 2d 477, 479–80 (10th Cir 1974) ("Defendants considered it important to ascertain whether plaintiffs were able to pay all the costs in the litigation including extensive depositions. We fail to see relevancy in these inquiries particularly with respect to in limine inquiry as to whether a class action is to be allowed. Ordinarily courts do not inquire into the financial responsibility of litigants. We generally eschew the question whether litigants are rich or poor. Instead, we address ourselves to the merits of the litigation").

[141] *Febringer v Sun Media Corp*, (2002), 27 CPC (5th) 155 (SCJ), decision not to certify aff'd: Div Ct, 30 Sep 2003; *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ); *Moyes v Fortune Financial Corp* (2002), 61 OR (3d) 770 (SCJ) [44] (representative plaintiff had sufficient resources to adequately fund the litigation; however, certification denied, and decision aff'd: Div Ct, 31 Oct 2003).

[142] *Febringer*, *ibid*, [35].

[143] *Liberty Lincoln Mercury Inc v Ford Marketing Corp*, 149 FRD 65, 79 (DNJ 1993). Also see cases collected in *Newberg* (4th) § 3.37 fn 1.

adequacy.[144] A similar division of opinion has been evident in law reform discussion, with some agencies (taking the contrary view to the OLRC) declaring that 'fair and adequate representation' implies that the representative *must* have the financial resources necessary to support the litigation.[145]

Ultimately, this issue is closely intertwined with the governing costs regime. In those jurisdictions in which the exposure of the representative plaintiff to adverse costs orders is reduced or even eliminated by the implementation of no-way costs rules, statutory class action funds and the like,[146] the question of the financial resources available to a representative plaintiff is likely to be a less important or relevant issue. Overall, the decisions across the focus jurisdictions indicate that the financial resources of the representative plaintiff *may* comprise a relevant factor in the adequacy matrix.

Representative not able to give all the evidence. It is not necessary that the representative must give sufficient evidence to prove the claims relied on by each class member—a submission by the defendant to the latter effect was firmly rejected under Australia's Pt IVA regime in *Silkfield Pty Ltd v Wong*.[147] Because it is permissible under the class action regimes[148] to bring a class action in circumstances in which there will be questions or issues affecting only individual members, it might be impossible for a class representative to adduce evidence to prove the liability of the defendant to other class members. That does not compromise adequate representation or render the action invalid at the outset. Rather, each class action regime provides the court with power to ensure that rights unique to individual class members can be finally and separately determined either within the proceeding that was properly commenced as a class action or as a series of bifurcated trials following determination of the common issues or by other appropriate means.[149]

Unique defences. Any alleged defect in the class representative's claim, because of some unique defence that may be raised against him or her particu-

[144] *Rand v Monsanto Co*, 926 F 2d 596, 599 (7th Cir 1991) ("no person need be willing to stake her or his entire fortune for the benefit of strangers. Class lawsuits can be frightfully expensive . . . No (sane) person would pay the entire costs of a securities class action in exchange for a maximum benefit of $1,135"); *In re Biogen Securities Litig*, 179 FRD 25, 40 (D Mass 1997) (representative held to be adequate, despite that she was only able and willing to incur costs of $200 to $500 in litigation expenses, in comparison to a personal claim of $1000).

[145] *SALC Paper*, [6.28]; *SALC Report*, [5.6.22]; *VLRAC Report*, [6.30]; *SLC Report*, [4.36].

[146] See ch 12.

[147] (1998) 90 FCR 152 (Full FCA) 171 (*obiter*). The same view was expressed in *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [43], and see also, under FRCP 23, *Davenport by Fowlkes v Gerber Products Co*, 125 FRD 116, 118–19 (ED Pa 1989).

[148] FCA (Aus), s 33C(2)(b) (i) "separate contracts or transactions" and (ii) "separate acts or omissions"; CPA (Ont), s 6(2) "separate contracts"; CPA (BC), s 7(b) "separate contracts"; FRCP 23 (b)(3) "predominate over any questions affecting only individual members".

[149] FCA (Aus), ss 33Q, 33R; CPA (Ont), s 25(1); FRCP 23(c)(4)(A).

larly, will not preclude a class action. Case law[150] and commentary[151] indicate (although not entirely uniformly in respect of limitations defences[152]) that the focus is not on the representative plaintiff's ultimate ability to recover, but on the general similarity between the latter's claim and that of the class. Unique defences which may affect the representative plaintiff's right ultimately to obtain personal relief should not affect the presentation of the case on the *common issues* for the class, or affect the adequacy of the representation or the representative's ability to instruct class lawyers on the common issues.

Moreover, the irrelevance of unique defences against the representative plaintiff appears to follow clearly from the statutory wording used in the various class action regimes. Newberg points out that, on a reasonable reading of the typicality criterion in FRCP 23(a)(3), "claims or defenses" would be "claims of a plaintiff in relation to the plaintiff's class or defenses of a defendant in relation to the defendant's class",[153] so that it is not the defences of the representative plaintiff about which the rule is speaking that must be typical. Moreover, under the regimes of Ontario[154] and Australia,[155] the existence of separate contracts involving different class members is expressly stated not to bar commencement of a class action. The scenario in *Markt & Co Ltd v Knight Steamship Co Ltd*[156] gave rise to this no-bar factor, for in that case, each consignor had entered into a separate shipping contract with the defendant, all contracts being in identical terms, but nevertheless separate. This destroyed the "same interest" requirement under the representative rule because, inter alia, the court was prepared to assume (in the absence of any direct evidence) that it was likely that the defendant could plead different defences against various class members if each class

[150] Eg, in Canada: *Abdool v Anaheim Management Ltd* (1994), 15 OR (3d) 39 (Gen Div) (representative plaintiff was, unlike other class member investors, an accountant with tax specialty, had little involvement with defendant developers or brokers, and made investment largely on recommendation of business partner; individual issues of reliance, causation and contributory negligence pertaining to merits of his claim did not preclude adequate representation). However, this was *obiter* only; certification was denied on other grounds, upheld on appeal: (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct). Eg, in US: *Rodger v Electronic Data Systems Corp*, 160 FRD 532 (ED NC 1995) (major focus of litigation concerned alleged representations and class members' reliance thereon; potential defence unique to representatives would not dominate the litigation); *Goldwater v Alston & Bird*, 116 FRD 342 (SD Ill 1987) (action alleged fraudulent marketing of bonds; alleged unique defences of recklessness and limitations defence did not prevent certification).

[151] See *Newberg* (4th) § 3.16 pp 372–78; WK Branch, *Class Actions in Canada* (Vancouver, Western Legal Publications, 1996) [looseleaf] § 4.540.

[152] If the representative plaintiff's claim is statute-barred, the Ontario experience to date is that the class proceedings will be dismissed: *Burke v American Heyer-Schulte Corp* (1994), 45 ACWS (3d) 332 (Gen Div) (breast implants); *Stone v Wellington (County) Board of Education* (1999), 29 CPC (4th) 320 (Ont CA) [10] (environmental claim), although another plaintiff could be recruited to represent the class whose claim is not out of time. Of course, any absent class members out of time will simply be excluded from the class, but that does not affect the proper commencement of the proceedings: *Fazal Din v Minister for Immigration* (FCA, 14 Aug 1998) 3 (4 excluded).

[153] *Newberg* (4th) § 3.16 p 378.

[154] CPA (Ont), s 6(2).

[155] FCA (Aus), s 33C(2)(b)(i).

[156] [1910] 2 KB 1021 (CA).

member had a separate contract.[157] Permission of separate contracts should mean, *ipso facto*, that a unique defence against the representative plaintiff ought not to jeopardise class action commencement, however that defence may arise.

Relationship with the defendant. Arguments that adequate representation was impossible due to a longstanding animosity between the representative plaintiff and the defendant (with the imputation that such a dislike could cloud the former's judgment) have failed in Ontario.[158] Whilst there has been some indication that the extent of the representative's vindictiveness toward the defendant may be relevant to whether the representative is adequate under FRCP 23, that degree of ill-feeling has been hard to prove.[159] At the other end of the spectrum, the court must be satisfied that the class suit is not the result of collusion between the representative plaintiff and the defendant.[160]

Competency of class counsel. The resources, organisational skills, specialised knowledge, and information technology requirements needed to handle numerous plaintiffs and complex issues of fact and law mean that class litigation is not for every legal counsel or firm.[161] However, whether the competency of class counsel ought to be open to judicial evaluation as part of the certification or commencement process is subject to widely differing views.

The amendments effected to FRCP 23 in December 2003 had a major impact in this regard. Until this time, the adequacy of class counsel was considered as part of the FRCP 23(a)(4) determination as to whether the class representative would fairly and adequately represent the interests of the class members.[162] However, that has changed—FRCP 23(g) now provides an express procedural format whereby the court that certifies a class action must also appoint class counsel. Further, the amended rule provides specific criteria for the court to consider when selecting class counsel,[163] with suggestion in the Committee

[157] D Kell, "Renewed Life for the Representative Action" (1995) 13 *Aust Bar Rev* 95, 95; K Uff, "Class, Representative and Shareholders' Derivative Actions in English Law" (1986) 5 *Civil Justice Q* 50, 55.

[158] *Ewing v Francisco Petroleum Enterprises Inc* (1994), 29 CPC (3d) 212 (Gen Div) [10].

[159] *Kayes v Pacific Lumber Co*, 51 F 3d 1449, 1464 (9th Cir 1995); *Lim v Citizens Savings and Loan Assn*, 430 F Supp 802, 811 (ND Cal 1976); *Larson v Dumke*, 900 F 2d 1363, 1367 (9th Cir 1990).

[160] *OLRC Report*, 353; *SLC Report*, [4.36]

[161] WCH Ervine, "Multi-Party Actions" (1995) 23 *Scots Law Times* 207, 208. Such IT support includes all of the following: keeping track of large numbers of class members; standardising documentation; keeping a database of clients with their individual features; scanning large numbers of client and defendant documents; co-ordinating pleadings which are often lengthy and complex; and holding video conferences to keep class members informed: T Weekes, "Class Acts" (1997) 47 *Gazette* 20, 22.

[162] *CV Reit Inc v Levy*, 144 FRD 690, 698 (SD Fla 1992); *Eisen v Carlisle and Jacquelin*, 391 F 2d 555, 562 (2nd Cir 1968), cited in *In re Agent Orange Product Liability Litig*, 996 F 2d 1425, 1435 (2nd Cir 1993); *General Telephone Co of the Southwest v Falcon*, 457 US 147, 157, fn 13, 102 S Ct 2364 (1982); *Hoxworth v Blinder, Robinson & Co Inc*, 980 F 2d 912, 923 (3d Cir 1992); *Sosna v Iowa*, 419 US 393, 403, 95 S Ct 553 (1975) (requiring, for the test of FRCP 23(a) to be met, "the interests of [the] class have been competently urged at each level of the proceeding").

[163] FRCP 23(g)(1)(C).

Advisory Rules that the first factor is the "likely starting point", viz, the work that counsel has done in identifying and investigating potential claims.[164]

This newly introduced provision in FRCP 23 is unique among the focus jurisdictions. Apart from the relevant rules of professional ethics which require that the legal representative must not be subject to a conflict of interest,[165] there is no express provision in the other class action regimes which governs the responsibilities or which requires judicial evaluation of legal counsel involved in the conduct of class proceedings. That is not to say that an express statutory requirement of competency of the class's legal representation has not been advocated. In line with some other law reform agencies,[166] the OLRC would have mandated that legislative approach.[167] In contrast, perhaps the strongest rejection of this concept arises from the Scottish Law Commission.[168] This reform agency recommended against any requirement that the court should satisfy itself as to the adequacy of the representative party's legal advisers, noting that a formal examination of the fitness of a lawyer to conduct a particular litigation would be an "unfamiliar duty" for a court in that jurisdiction[169] (not to mention constitute something of a sensitive and speculative issue).[170]

Apart from the limited circumstance in which more than one set of class proceedings has been filed in relation to the one dispute,[171] there has been no discussion to date in any of the case law under the Australian federal or Canadian provincial regimes, so far as can be ascertained, of any requirement that the courts become involved in adjudication of the competency of lawyers as part of the commencement/certification analysis. Whether these jurisdictions will follow the lead of the US Rules Advisory Committee and explicitly recognise, by a provision similar to FRCP 23(g), that the role played by class lawyers is often central to the success of the litigation, remains to be seen.

2. Where Representation is Not Adequate

Where a court finds that the representative is not an adequate representative, it has been statutorily provided under the Australian class action regime[172] that

[164] As reproduced in: *2004 Federal Civil Rules Booklet* (Harvard, Dahlstrom Legal Publishing, 2004) 42.

[165] Unsuccessfully alleged in Ontario in *Maxwell v MLG Ventures Ltd* (1995), 7 CCLS 155 (Gen Div) [11].

[166] *VLRAC Report*, [6.30]; Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977), cl 4(1) of the Draft Bill. Somewhat surprisingly, although the ALRC insisted on legal representation for the class (except with the court's leave), it did not refer to any criterion of adequacy of that representation: *ALRC Report*, [200].

[167] *OLRC Report*, 359–62, and see cll 3(3)(e) and 5 of the Draft Bill.

[168] *SLC Report*, [4.38]–[4.39].

[169] That Commission also recommended an opt-in procedure, and assumed that the class members, by taking that step, would satisfy themselves of the competence of the legal advisers.

[170] Also noted in *OLRC Report*, 359.

[171] This topic is beyond the scope of this book.

[172] FCA (Aus), s 33T(1), following from the explicit ALRC discussion and recommendation at: *ALRC Report*, [180] and see cl 23 Draft Bill.

the court may effect the substitution of another class member as the representative. It is clear from the provision that this substitution may occur at any time during the course of the litigation (formal certification not comprising a part of the Pt IVA schema), but only upon the application of a class member. The class action regimes of the other focus jurisdictions are not as explicit. In the certification schemas that operate under FRCP 23 and the regimes of Ontario and British Columbia, whilst adequate representation is a pre-requisite to certification itself, there is, somewhat surprisingly, no specific or express power to replace the putative representative party at the certification stage or thereafter in the case of a person who has been initially allocated that role.[173] However, the certification order issued under the Canadian provincial regimes (by which the representative plaintiff for the class is appointed) may be amended at any time during the proceedings,[174] and a court under FRCP 23 may alter, amend or modify its class ruling at any time before a judgment on the merits.[175] Consequently, as the Manitoba Law Reform Commission noted, "it is implicit in the schemes of legislation that a representative party may be replaced if necessary". In Ontario, a motion to substitute a representative plaintiff has been successfully brought[176] under the general rules governing civil procedure.[177] Nevertheless, for the avoidance of doubt, an express power on the part of the court to replace the representative party at any time, similar to that contained in Pt IVA, appears to be the preferable drafting course.[178]

Quite apart from the substitution of another representative plaintiff for an inadequate representative, there are various statutory and judicial safeguards across the regimes which provide ample protection for absent class members insofar as the adequacy of representation is concerned. For example, under Australia's Pt IVA regime, where the representative plaintiff has agreed with the defendant to settle his personal claim, the representative cannot be granted leave to withdraw as such until an application for the substitution of another class member as the representative party has been determined.[179] Under all regimes

[173] Noted by *ManLRC Report*, 104.

[174] CPA (Ont), s 10(1); CPA (BC), s 8(3).

[175] FRCP 23(c)(1).

[176] *Giuliano v Allstate Ins Co* (2003), 66 OR (3d) 238 (SCJ). See also, where representative plaintiff sought to withdraw and be replaced: *Logan v Ontario (Minister of Health)* (2003), 36 CPC (5th) 176 (SCJ).

[177] Ontario Rules of Civil Procedure, r 5.04(2), which provides: "At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."

[178] See: *ManLRC Report*, recommendation 44; *SLC Report*, [4.95]; *VLRAC Report*, [6.31] and recommendation 7. Also, the OLRC recommended such a clause: *OLRC Report*, 363, and cl 13 of the Draft Bill. This provision was not ultimately enacted. The OLRC had been concerned to ensure that substitution could be effected both at the certification stage and at any stage following certification, to overcome the possible suggestion under the Quebec regime (art 1024) that substitution was only contemplated after the court had certified the action as a class action.

[179] FCA (Aus), s 33W(2), (4)(b).

(at least where damages are claimed[180]), class members who object to the representative have the statutory right to opt out of the class action and pursue individual actions. In addition, the class representative cannot settle the class action without judicial approval; sub-classes can be created to avoid actual or potential conflicts of interest that would otherwise render the representative inadequate, with the consequent appointment of additional representative plaintiffs for each sub-class; absent class members may individually participate at some stage in the action; the court has the power to refuse to allow the action to continue as a class action; the class definition may be amended so that the representative better matches the class; and the court may use its broad statutorily-conferred powers to manage the litigation from its commencement in order to protect absent class members.

Each of the class action regimes of the focus jurisdictions has included numerous protective measures to ensure that potential or actual conflicts, and scenarios of problematical or inadequate representation, may be dealt with efficiently and effectively without rejecting the class action itself.

3. Whether the Representative Plaintiff Needs to be a Class Member

One of the most debated issues tied to the question of whether the representative plaintiff can properly represent the class is whether or not that party must be a class member. The debate necessarily entails consideration of whether, for example, consumer advocacy groups, charities, non-profit organisations, environmental activist groups, statutory bodies, trade associations, an individual who perceives injustice to others, or employee groups such as unions, could maintain a class action on behalf of others. The "ideological plaintiff" (if allowed) has no private cause of action or grievance against the defendant; is permitted to commence a class proceeding on the basis that the class members' interests will be represented properly and adequately; is expected to possess "special ability, experience or resources that would allow it to be an appropriate and adequate class representative";[181] and need not be a class member.

The arguments concerning the need for the class representative to be a member of the class have been noted to be "equally balanced".[182] By reference to law reform discussion[183] and academic commentary,[184] amongst which opinion is quite divided, the competing arguments are collected and reproduced in Table 8.1.

[180] Implicit from FRCP 23(c)(2)(B), for damages class actions pursuant to FRCP 23(b)(3).

[181] AL Close, "British Columbia's New Class Action Legislation" (1997) 28 *Canadian Business LJ* 271, 274. Also: *AltaLRI Report*, [221].

[182] *OLRC Report*, 350; *SALC Paper*, [5.2].

[183] See, especially, *OLRC Report*, 348–350; *SALC Paper* [5.1]–[5.9]; *AltaLRI Report*, [221], [225]; *SALC Report*, [4.6]; *ManLRC Report*, 55–57; LCD, *Representative Claims: Proposed New Procedures: Consultation Paper* (Feb 2001) [16]; *FCCRC Paper*, 32–33.

[184] V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U British Columbia L Rev* 459, which thoroughly explores the conundrum of the ideological plaintiff, and its disparate treatment in class action jurisprudence in Australia, Ontario and BC.

Table 8.1 ***Permitting an ideological plaintiff as class representative***

Arguments for the ideological plaintiff	Arguments against the ideological plaintiff
• requiring the representative to be a class member is no guarantee of his/her acting in the interests of absent class members—a class representative with a self-interest (particularly a large personal claim) may advance that interest to the exclusion or detriment of other class members; • on the other hand, if the class member representative's personal stake in the litigation is very small, the self-interest argument also dwindles; • a consumers' association or union may be an ardent, capable, bona fide, knowledgeable and well-resourced representative for the class members whose interests it was formed to represent; • where it is a sympathetic organisation which is driving the litigation on behalf of unsophisticated or poorly educated class members, it is at best a legal fiction and at worst unethical to maintain a pretence that instructions are to be derived from anyone other than the organisation; • allowing for an ideological plaintiff is one means of avoiding retaliatory steps that may otherwise be taken against class members who lead a class action; • an ideological plaintiff is consistent with increasing access to justice for represented persons.	• self-interest of a class member helps to ensure that absent class members' interests are protected, for the self-interested plaintiff is likely to be a better plaintiff than one who has no such interest; • having a non-member of the class as the representative marks a significant departure in terms of standing, in a litigation device that already deviates from traditional litigation in numerous respects; • the absence of an ideological plaintiff provision does not appear to have caused difficulty in bringing meritorious class actions in jurisdictions such as Ontario which has no such provision; • discovery by the defendant on the common issues could be hampered if the representative plaintiff does not have a personal claim; • insisting upon a direct interest by the representative plaintiff in the outcome of the action avoids potential debate or constitutional challenge as to whether there is a 'case or controversy' (in the case of Article III of the US Constitution) or 'matter' (in the case of Chapter III of the Australian Constitution) to adjudicate.

The experience garnered to date under the regimes of the focus jurisdictions indicates that there are two distinctly separate options by which to deal with the question of the ideological plaintiff. The first is to provide in the class action statute that the representative must be a member of the class (the traditional view), and then leave it to the inventiveness of litigants and courts to work within that requirement. The other option is to expressly stipulate in the statute

that a person who is not a member of the class may bring a class action as representative plaintiff. Each option will be considered below.

(a) Class representative as a member

The opening words of the US federal class action rule stipulate that "[o]ne or more members of a class may sue . . . as representative parties on behalf of all". Consequent upon this, and despite some academic criticisms in that jurisdiction to the contrary,[185] judicially it has been held that the representative must be a member of the class that he or she seeks to represent.[186] In that sense, it has been said that "a person can not predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action."[187] Thus, the face of the class action rule embodies the traditional view.

However, there is a door open for organisations who are non-members of the class to act as class representatives under FRCP 23. An organisation which seeks to bring a class action on behalf of its members may possess "representational standing" to bring the suit on behalf of its members who have allegedly sustained damage because of the defendant's conduct.[188] The US Supreme Court has ruled[189] upon the three requirements of the modern doctrine of representational (or associational) standing: where the individual members would have standing to sue in their own right, the interests the organisation is seeking to protect are germane to the organisation's purposes, and individual participation by members is not needed to pursue the suit or relief sought. The prerequisites and effect of representational standing are described by Newberg in the following terms:

> Numerous decisions have recognized the ability of associations, both incorporated and unincorporated, to act as class representatives under Rule 23. These entities are

[185] A Chayes, "Foreword: Public Law Litigation and the Burger Court" (1982) 96 *Harvard L Rev* 4; Note, "Class Standing and the Class Representative" (1981) 94 *Harvard L Rev* 1637. *Newberg* (4th) § 2.6 fn 9, who cites both the aforementioned articles, describes the issue as "hotly debated by commentators". See also: J Wegman Burns, "Decorative Figureheads: Eliminating Class Representatives in Class Actions" (1990) 42 *Hastings LJ* 165 ("the class representative serves no useful purpose and we would be better off without him").

[186] *General Telephone Co of the Southwest v Falcon*, 457 US 147, 156, 102 S Ct 2364 (1982) ("We have repeatedly held that a class representative must be part of the class"); *O'Shea v Littleton*, 414 US 488, 494 n 3, 94 S Ct 669, citing *Bailey v Patterson*, 369 US 31, 32–33, 82 S Ct 549 (1962) ("They cannot represent a class of whom they are not a part"); *Allee v Medrano*, 416 US 802, 828, 94 S Ct 2191 (1974), citing *Long v District of Columbia*, 469 F 2d 927, 930 (DC Cir 1972) ("A person simply cannot represent a class of which he is not a member"); *Aks v Bennett*, 150 FRD 187, 191 (D Kan 1993) ("To satisfy the requirements of typicality, the class representatives must be class members").

[187] *Allee v Medrano*, 416 US 802, 829, 94 S Ct 2191 (1974).

[188] *National Organization For Women Inc v Scheidler*, 267 F 3d 687 (7th Cir 2001) (NOW was a proper class representative on behalf of women seeking abortion services); *Upper Valley Association for Handicapped Citizens v Mills*, 168 FRD (D Ct 1996) (action by advocacy association); *Owner-Operator Independent Drivers Association v Mayflower Transit Inc*, 204 FRD 138 (SD Ind 2001) (non-profit association of truck-tractor owners could represent its members for alleged statutory violations).

[189] *United Food & Commercial Workers Union Local 751 v Brown Group*, 517 US 544, 557–58, 116 S Ct 1529 (1996) (unions had standing to sue employer for damages for their members).

> afforded representative status, provided that the underlying purpose of the organization is to represent the interests of the class. This representational standing exists independently from any showing of satisfaction of Rule 23 prerequisites . . . Representational standing by an organizational plaintiff is subject to two important limitations. Because it is a standing doctrine, representation by an organization through representational standing principles is limited to the organization's own members and would not encompass, for example, a class of similarly situated non-member persons. Moreover, most courts have held that representational standing will permit the organization to seek only declaratory and injunctive relief on behalf of its members (collective relief), in contrast to damages relief which is tantamount to individual relief for members, in a class of which the organization is not a part. Apart from representational standing doctrines, an organization may represent more than its own members, in a class action on behalf of all similarly situated, provided the organization satisfies the prerequisites of Rule 23.[190]

On the face of their statutes, in respect of the standing of the representative plaintiff, the position in Australia and Ontario also appears to be traditional. Under Pt IVA, the representative party is necessarily one of the class of seven or more persons with a "claim" against the defendant on whose behalf a class action is commenced. Judicial statements support the traditional view that the representative is part of the class.[191] In Ontario, the representative plaintiff is expressed by statute to be a member of the class of litigants,[192] a position which has also been judicially reiterated.[193] Thus, in neither of these focus jurisdictions can the representative be simply a nominee with "no stake in the outcome".[194] It is noteworthy that the use of an ideological plaintiff to commence class proceedings was not sanctioned by either the OLRC[195] or the ALRC.[196]

However, in Australia at least, the traditonal view of standing contained in Pt IVA has not prevented class actions being instituted by both a union[197] and the

[190] *Newberg* (4th) § 3.34, 484–86 (footnotes omitted).

[191] Eg: *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 516 ("the representative party is necessarily one of the group of seven or more persons 'on whose behalf a representative proceeding [is] commenced': see the definition of "group member" in s 33A, and ss 33C(1)(a) and 33D(1)"); *Symington v Hoechst Schering Agrevo Pty Ltd* (1997) 78 FCR 164, 167; *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [97].

[192] CPA (Ont), s 2(1): "One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class."

[193] *Stone v Wellington (County) Board of Education* (1999), 29 CPC (4th) 320 (Ont CA) [10] ("the clear legislative requirement that the representative plaintiff be anchored in the proceeding as a class member, not simply a nominee with no stake in the potential outcome").

[194] V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U of British Columbia L Rev* 459, [1], and *Stone*, *ibid*.

[195] *OLRC Report*, 350.

[196] Because of the grouped proceedings which the ALRC envisaged that "[n]o problems concerning standing would arise. In grouped proceedings, by definition, each group member would have the requisite standing. The fact that the principal applicant, rather than the group member, has the conduct of the proceedings is irrelevant to standing": *ALRC Report*, [96]. The ALRC had recommended grouped proceedings for constitutional reasons, which Parliament chose not to follow.

[197] *Finance Sector Union of Australia v Commonwealth Bank of Aust Ltd* (1999) 94 FCR 179 (Full FCA).

national consumer watchdog, the Australian Competition and Consumer Commission (ACCC).[198] The rationale employed to permit these entities to act as class representatives entailed an exercise in statutory interpretation which revolved around the threshold requirement in s 33C(1)(a) that "7 or more persons have claims against the same person" and the standing provision of s 33D(1). Both entities had statutory standing to sue the defendants which depended upon a specific statutory entitlement[199] to sue for relief for themselves and others, conferred by statutes other than Pt IVA. This statutory standing meant that both the union and the ACCC had a "claim" within the terms of s 33C(1)(a). It followed that they each were persons referred to in s 33C(1)(a) who had, by virtue of s 33D(1), "sufficient interest to commence a proceeding on his or her own behalf" against the respective defendants. In such circumstances, s 33D(1) goes on to explicitly provide that such a person then "has a sufficient interest to commence a representative proceeding against [the defendant] on behalf of other persons referred to in [s 33C(1)(a)]". It did not matter that the ACCC was "acting in the public interest for the protection of consumers" (seeking to shut the operations down) whereas the other class members were pursuing private interests (payment of damages resulting from foreign exchange trading), nor that they were seeking different forms of relief. Nor did it matter that the union had "a more confined interest" (seeking enforcement of an award) than the employees who formed the remainder of its class (seeking monies allegedly underpaid).

Under Pt IVA, provided that the entity has capacity to commence a proceeding on its own behalf, then that person may act as a class representative on behalf of others (always provided, of course, that the other threshold prerequisites for bringing a class action under the regime are satisfied, namely, a substantial common issue and the claims arise out of, at the very least, related circumstances). As discussed elsewhere,[200] the representative plaintiffs and class members do not need to have the same claim to fall within Pt IVA's regime.

The case law under Pt IVA marks a fascinating example of lawyers and litigants working within the statutory framework, as drafted, in order to enable a class representative to act who does not have quite the "personal stake in the outcome" that may have been intended to operate under the regime.[201] As Morabito notes,

[198] *ACCC v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 254 (Branson J); *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424, 445 (O'Loughlin J). Cf: *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 523–24 (Lindgren J).

[199] Respectively, Workplace Relations Act 1996 (Aus), s 178(5)(d); Trade Practices Act 1974 (Aus), s 80(1). The ACCC elected to litigate under Pt IVA rather than the class action regime specifically incorporated within the TPA under s 87(1B) because the latter is an opt-in model; the ACCC did not have to obtain each class member's consent under Pt IVA (s 33E).

[200] See pp 214–17.

[201] In Australia, *Parliamentary Debates*, House of Representatives, 14 Nov 1991, 3174, Mr Duffy stated that "the new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress", cited by Lindgren J in *ACCC v Giraffe World Aust Pty Ltd* (1998) 84 FCR 512, 521.

> whilst Part IVA adheres to the traditional concept of a representative plaintiff having individual locus standi and being a member of the group on whose behalf the proceedings have been brought, it allows, at the same time, courts to authorize the maintenance of class actions in circumstances which appear incompatible with the constraints of the orthodox model.[202]

Similarly, the US doctrine of representational standing also achieves a limited circumvention of the traditional view that the class representative must have a personal stake and be a member of the class.

(b) An ideological plaintiff as representative

The alternative option is to draft the class action regime such that it explicitly permits a non-member to act as an ideological representative plaintiff. Thus far, this has been a rather unpopular legislative choice, notwithstanding the support voiced by various law reform agencies.[203] Even in England, where the orthodox view is manifested presently under the group litigation order[204] and under the representative rule[205] that operates in that jurisdiction, use of an ideological plaintiff in multi-party litigation has been subject to reform consideration.[206] However, the possibility of allowing representatives and representative organisations (such as consumer groups, environmental organisations or trade associations) to bring proceedings on behalf of persons whose collective interests they support faltered in that jurisdiction on the basis of considerable concerns that primary legislation would be required for implementation of a regime whereby bodies that had no cause of action themselves would be placed in the position of acting as representative plaintiff.[207]

The capacity for an ideological plaintiff was most notably enacted by the legislature of British Columbia by including, within its class action regime, the following provision: "The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is neces-

[202] V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U of British Columbia L Rev* 459, [44]. Cf: P van den Dungen, "Good Faith, Unconscionable Conduct and Imaginary Community Standards—Section 51AC of the Trade Practices Act and the Insurance Industry" (1998) *Insurance LJ* 1, who considered the requirement that the ACCC have a sufficient interest to commence proceedings on its own behalf a "major limitation" on the use of Pt IVA by this agency.

[203] *SALC Paper*, [5.5]; *SALC Report*, [4.6.2]; *AltaLRI Report*, [225]; *ManLRC Report*, 57.

[204] See CPR 19.III, and particularly, PD 19B, [3.1] (an application for a GLO "may be made either by a plaintiff or by a defendant"), and also noted in Morabito, n 202 above, fn 2.

[205] CPR 19.6, and see, eg: trade associations unsuccessfully attempted to sue on behalf of members under CPR 19.6's predecessor: *Consorzio del Prosciutto de Parma v Marks & Spencer plc* [1990] FSR 530 (Ch); aff'd: [1991] RPC 351 (CA); *Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* [1998] RPC 117 (Ch); aff'd: [1999] RPC 826 (CA). Cf: *Duke of Bedford v Ellis* [1901] AC 1 (HL) 7 (Lord Macnaghten) (representative could be "nominal").

[206] LCD, *Representative Claims: Proposed New Procedures: Consultation Paper* (Feb 2001) [16].

[207] LCD, *Representative Claims: Proposed New Procedures: Consultation Response* (April 2002) "Conclusions" [2], [7]–[8], [11].

sary to do so in order to avoid a substantial injustice to the class."[208] However, the provision has not enjoyed widespread endorsement. It has been rarely argued by class litigants[209] and has not, to date, been successfully relied upon by any would-be representative. Academically, the provision has been criticised on several bases: that the condition "in order to avoid substantial injustice" is probably too restrictive[210] or, at least, "inherently subjective and ambiguous";[211] that the provision should be redrafted and relaxed so as to make it clear that a "person" includes a non-profit society or other organisation;[212] and that its lack of use and judicial recognition, even where an ideological plaintiff was pertinent on the facts of the case, is an "unsatisfactory scenario".[213] Whilst the arguments permitting the use of a representative who is not a member of the class are persuasive, the British Columbia (and English) experience suggests that any drafting of ideological standing within a class action regime should be carefully considered.

D TYPICALITY OF THE REPRESENTATIVE

As already adverted to, a typicality criterion is an express feature of the FRCP. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class". In contrast, a typicality requirement has not been expressly included in the legislative regimes of Australia or the Canadian provinces. Commonality, which concentrates upon the features of the class, and adequacy, which concentrates upon the features of the representative plaintiff vis-a-vis the class, have been considered sufficient by these legislatures without the burden of an extra criterion. However, it is contended that, despite the legislative non-inclusion of the requirement, there is indeed an implicit meaning of typicality evident from the case law in the non-US focus jurisdictions.

[208] CPA (BC), s 2(4).

[209] *Nanaimo Community Bingo Assn v BC* (BC SC, 17 Jun 1999) [8]; *Friesen v Hammell* (1997), 47 BCLR (3d) 308 (SC) [37].

[210] AL Close, "British Columbia's New Class Action Legislation" (1997) 28 *Canadian Business LJ* 271, 274.

[211] V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U of British Columbia L Rev* 459, [76].

[212] See comments in *AltaLRI Report*, [225].

[213] V Morabito, "Ideological Plaintiffs and Class Actions—An Australian Perspective" (2001) 34 *U of British Columbia L Rev* 459, [76], citing, in particular, *Koo v Canadian Airlines Intl Ltd* [2000] BCSC 281. In this case, two representative plaintiffs did not fall within the class definition, ie, those "who were involuntarily denied boarding on [a] flight, due to more passengers holding purchased tickets on that flight than there were available seats"; Koo was unable to board his flight because the scheduled aircraft was downgraded as a result of mechanical problems. Gingras was refused transportation because of the negligence of a Canadian agent and by the time the error was detected, his flight was full; neither fell within the "evil" sought to be captured by the class definition, the disregard for passengers caused by deliberate overbooking. As Morabito notes, s 2(4) was not referred to in the court's judgment as a means of preserving these parties' representative status.

1. Possible Meanings of "Typicality"

The typicality pre-requisite under FRCP 23 has been accorded several meanings and interpretations, some oft-cited and others not so widely endorsed. For example, some of the meanings that have been postulated to date include: that proof of the claims of the representative plaintiff and the class members depends substantially upon the "same legal theory";[214] that the representative plaintiffs must demonstrate that their claims are based upon the "same core of factual allegations" such that proof of one plaintiff's claims "would establish the bulk of the elements of each class member's claims";[215] that the class representative's claims have the "same essential characteristics" as the potential class;[216] that the representative does "not have interests antagonistic to those of the class";[217] that the interests of the representative "are aligned with" the interests of the class;[218] that the representative plaintiff's claims are "coextensive" with other class members' claims;[219] and that other class members have "the same or similar injury",[220] and have been injured by "the same conduct or course of conduct".[221]

The OLRC, which considered the criterion of typicality in some detail, concluded that it was controversial and unnecessary. To the extent that it meant "there is no conflict between the class representative's interests and the interests of the class members", then it would be redundant, such a requirement being covered by the "no adverse interests" (absence of conflict) criterion.[222] Alternatively, to the extent that it meant that the applicant's claims substantially duplicate those of the class members, again, this requirement is addressed under the commonality criterion, rendering typicality redundant.[223] The

[214] *De La Fuente v Stokely-Van Camp Inc*, 713 F 2d 225, 232 (7th Cir 1983); *Scholes v Moore*, 150 FRD 133, 137 (ND Ill 1993); *Retired Chicago Police Assn v City of Chicago*, 7 F 3d 584, 597 (7th Cir 1993); *Robinson v Sears, Roebuck and Co*, 111 F Supp 2d 1101, 1124 (ED Ark 2000).

[215] *Allen v City of Chicago*, 828 F Supp 543, 553 (ND Ill 1993).

[216] *Buycks-Roberson v Citibank Federal Savings Bank*, 162 FRD 322, 333 (ND Ill 1995).

[217] *Aks v Bennett*, 150 FRD 187, 191 (D Kan 1993).

[218] B Kaplan "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure" (1967) 81 *Harvard L Rev* 356, 387 fn 120; *Amchem Products Inc v Windsor*, 521 US 591, 626, 117 S Ct 2231 (1997); *Newton v Merrill Lynch, Pierce, Fenner & Smith Inc*, 259 F 3d 154, 183 (3d Cir 2001).

[219] *Spivak v Petro-Lewis Corp*, 120 FRD 693, 699 (D Colo 1987).

[220] *General Telephone Co of the Southwest v Falcon*, 457 US 147, 156, 102 S Ct 2364 (1982); *Hanon v Dataproducts Corp*, 976 F 2d 497, 508 (9th Cir 1992); *Aks v Bennett*, 150 FRD 187, 191 (D Kan 1993).

[221] *Stewart v Abraham*, 275 F 3d 220, 228 (3d Cir 2001); *In Re American Med Sys Inc*, 75 F 3d 1069, 1083 (6th Cir 1996). For further discussion of some of the factors enumerated in this list, of the other typicality tests, and for further authorities, see, eg: GS Meece, "Class Actions, Typicality and Rule 10b-5: Will the Typical Representative Please Stand Up?" (1987) 36 *Emory LJ* 649, 652ff; S Tucker, "The Application of Subclasses to Rule 10b-5 Actions in the Second Circuit" (1990) 25 *New England L Rev* 733, 746–47; *Newberg* (4th) §§ 3.13, 3.23; DL Bassett, "US Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 *Fordham L Rev* 41, 68–69.

[222] *OLRC Report*, 368–69.

[223] *Ibid*, 369–70. See, for similar comment: M McGowan, "Certification of Class Actions in Ontario" (1993), 16 CPC (3d) 172, 173.

typicality requirement has similarly not been recommended in various other jurisdictions in which class litigation has been the subject of law reform attention over the last 5–10 years.[224]

Moreover, the reality is that, after several years' combined jurisprudence under the non-US focus jurisdiction regimes, an absence of any typicality criterion has not engendered difficulties. Under the regimes of Ontario[225] and British Columbia,[226] allegations that the representative plaintiff probably did not have the "typical experience" that the other class members suffered has not precluded representation of the class by that plaintiff. Judicial statements within these cases clearly demonstrate that factual differences do not render a representative atypical and unsuitable—rather, it is a question of requisite commonality between the representative's claim and those of the other class members, and of the courts' being satisfied of those various constituent elements that make up "fair and adequate" representation. Any requirement that the representative plaintiff is typical of or shares the characteristics of class members has been specifically rejected by several decisions in the Canadian provinces.[227] Australian courts have also rejected the requirement of typicality,[228] as evidenced by the fact that, for example, a union did not have the "same injury" or "same legal theory" as the employee class members of whom it successfully contended it was a representative plaintiff in *Finance Sector Union v Commonwealth Bank of Australia*.[229] Therefore, to the extent that the representative plaintiff in *Sutherland v Canadian Red Cross Society*,[230] a non-haemophiliac infected with the HIV virus by transfusion, was held to be an

[224] The criterion was specifically rejected in *AltaLRI Report*, [216], not followed in *Final Woolf Report*, and was ignored in: *SLC Report*, *ManLRC Report*, *SALC Report*, *VLRAC Report*, *FCCRC Paper*; and *ALRC Report*.

[225] Eg: *Nantais v Telectronics Proprietary (Canada) Ltd* (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div) [9] (class action on behalf of recipients of allegedly defective pacemakers; two representatives' pacemakers had not failed at time of commencement); *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [68]–[69] (facts above); *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [31] (subway fire and smoke inhalation; representative plaintiff required hospital treatment whereas other class members did not); *Peppiatt v Royal Bank of Canada* (1996), 27 OR (3d) 462 (Gen Div [34] ("the Act focuses on common issues, and that is not the same as typicality").

[226] *Harrington v Dow Corning Corp* (1996), 22 BCLR (3d) 97 (SC) [51]; *Pearson v Boliden Ltd* (2001), 94 BCLR (3d) 133 (BC SC [in Chambers]) (25 Jul 2001) [75], appeal allowed in part on other grounds: (2002), 7 BCLR (4th) 245, 222 DLR (4th) 453 (CA); *Gerber v Johnston* [2001] BCSC 687, [50]; *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (SC) [66].

[227] Eg: *Anderson v Wilson* (1998), 156 DLR (4th) 735, 37 OR (3d) 235 (Div Ct) [65], not affected by appeal; *Carom v Bre-X Minerals Ltd* (1999), 44 OR (3d) 173 (SCJ) [183] (obiter only); *Millard v North George Capital Management Ltd* (2001), 47 CPC (4th) 365 (SCJ) [43]; *Pearson v Boliden Ltd* (2001), 94 BCLR (3d) 133 (BC SC [in Chambers]) [69], [75].

[228] Although the term "typicality" was not used in *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304, this is plainly rejected in the following statement: "I am . . . not persuaded that substantial differences in individual circumstances disqualify a case from being a class action. Part IVA anticipates that individuals in the group will have differing circumstances. . . . As far as group actions provided for by Pt IVA are concerned, what is relevant is similarity not difference": at 311 (Einfeld J).

[229] (1999) 89 FCR 417 (FCA); (1999) 94 FCR 179 (Full FCA).

[230] (1994), 112 DLR (4th) 504, 17 OR (3d) 645(Gen Div).

inadequate representative for a class encompassing haemophiliacs, and for cross-infected persons who were not infected by transfusion, that decision has rightly been criticised[231] as incorrectly decided on the basis that it appears to require a finding of typicality.

Even in the US jurisdiction where typicality is an express requirement, judicial doubts have been voiced about whether it adds anything to the other requirements of adequacy of representation or commonality.[232] Indeed, its relationship with *commonality* has been variously stated to be "murky" and "interchangeable".[233] Even the Supreme Court considered that the two requirements "tend to merge".[234] Other judicial statements tend to indicate that the typicality criterion is sometimes treated in the same breath as commonality;[235] or seemingly follows on inevitably from the conclusion which the court has formed on commonality.[236] One court explained that typicality overlaps extensively with *adequacy* because both criteria were derived from a common phrase in the original Rule 23.[237] Certainly, references to an absence of antagonism between representative and class members would appear, on the basis of Supreme Court authority,[238] to fall comfortably within the adequacy rubric in

[231] GD Watson and M McGowan, *Ontario Civil Practice 2001* (Scarborough, Carswell Thomson, 2000) vol 1, 339; SJ Page, "Class Actions in Canada" (2000) 21 *Health Law in Canada* 1, 5.

[232] See discussion in: CJ Beysselance, "Certification of Class Actions on Appeal: Considerations of Mootness and the Typicality of the Plaintiff's Claims" (1982) 56 *Tulane L Rev* 1331, 1332–39.

[233] Respectively: *Harriss v Pan American World Airways Inc*, 74 FRD 24, 41 (ND Cal 1977), and *Droughn v FMC Corp*, 74 FRD 639, 642 (ED Pa 1977). Also: *Newberg* (4th) §3.13.

[234] *General Telephone Co of the Southwest v Falcon*, 457 US 147, 157, fn 13, 102 S Ct 2364 (1982). Also: *Shamberg v Ahlstrom*, 111 FRD 689, 695 (DNJ 1986) ("In many ways, the typicality requirement 'overlaps the requirements that the named representatives adequately represent the class, that there be common questions of law and fact, that such questions predominate, and that the class action be a superior means of resolution' ").

[235] *Wyatt By and Through Rawlins v Poundstone*, 169 FRD 155, 165 (MD Ala 1995) (regarding institutionalisation of the mentally-disabled; "These claims are all common to and typical of the class"); *Reyes v Walt Disney World Co*, 176 FRD 654, 658 (MD Fla 1998) ("plaintiffs have failed to satisfy the commonality and typicality requirements" of FRCP 23); *Shipes v Trinity Industries*, 987 F 2d 311, 316 ("Allegations of similar discriminatory employment practices . . . satisfy the commonality and typicality requirements of Rule 23(a)").

[236] *Moore Video Distributors Inc v Quest Entertainment Inc*, 823 F Supp 1332, 1339 (SD Miss 1993) ("The plaintiffs have not made a prima facie showing that the terms of the contracts were the same or that they were all breached in the same manner or under the same set of circumstances. Nor have the plaintiffs demonstrated that the experiences of the representative plaintiffs, Moore Video, were typical of those of the other plaintiffs and/or potential plaintiffs. Indeed, each alleged separate breach could present unique, individual issues of law and/or fact"); *Buycks-Roberson v Citibank Federal Savings Bank*, 162 FRD 322, 333, fn 13 (ND Ill 1995) ("commonality and typicality are closely related and a finding of one generally compels a finding of the other").

[237] *Taylor v Safeway Stores Inc*, 524 F 2d 263, 269 (10th Cir 1975) ("The guiding rationale for many of the judicial interpretations of the typicality requirement has been the historical nexus between subsections (a)(3) and (a)(4); both of these subsections were derived from a a common phrase in the original Rule 23 requiring 'one or more [representatives], as will fairly insure the adequate representation of all . . .' Because of its source in the original rule, subsection (a)(3) should logically deal with the adequacy of representation").

[238] *General Telephone Co of the Southwest v Falcon*, 457 US 147, 157 n 13, 102 S Ct 2364 (1982) (adequacy of representation requirement "raises concerns about the competency of class counsel and conflicts of interest").

any event. There is also a close overlap between *superiority*[239] and typicality, such that if no judicial economy is to be achieved by certifying the suit as a class action, then the superiority criterion will fail in any event, again rendering typicality otiose. An example of this scenario occurred in *Estate of Mahoney v FJ Reynolds Tobacco Co*.[240] A class of tobacco smokers lost their certification battle because proof of their claims would require a case-by-case analysis of each class member's exposure to the defendant cigarette manufacturers' advertising and other industry propaganda, and because there were numerous factual determinations unique to each class member (eg, what warnings were given, how class members would react to warnings and other information). Therefore, in circumstances where neither commonality nor superiority was satisfied, it is difficult to attribute any great significance to a typicality criterion which was hardly going to succeed in the circumstances either.

Certainly, a lack of clarity does not assist: what is meant by "typicality" has been frankly described by the Third Circuit as "something of an enigma".[241] The OLRC attempted "to pour water into the typicality bottle" without success, abandoning any such requirement;[242] and Newberg considers that some words used judicially to describe the concept may be simply too strict for the term to bear.[243] Moreover, the discussion of the requirement in Newberg's major commentary[244] reproduces the criteria of the representative which are discussed elsewhere.[245] Dickerson also notes extra-curially that, because the typicality requirement is duplicative of commonality and adequacy of representation, the requirement has been expressly eliminated in many US state class action regimes.[246]

Thus, on the basis of the above, an express legislative requirement of typicality, that the representative plaintiff be typical of and share the characteristics of the class members, appears problematical and unnecessary in light of other safeguards governing the representative.

2. Existence of a Class

A further optional meaning of "typicality" which was considered, and dismissed, by the OLRC was that the typicality requirement was intended "to

[239] The court must be satisfied in r 23(b)(3) actions that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy".

[240] 204 FRD 150, 154 (SD Iowa 2001).

[241] *Eisenberg v Gagnon*, 766 F 2d 770, 786 (3d Cir 1985) ("The typicality requirement of Rule 23(a)(3) . . . is something of an enigma in the jurisprudence of class actions").

[242] *OLRC Report*, 368.

[243] *Newberg* (4th) § 3.23 p 416 ("terms such as identity, coextensiveness, and coincidence may imply too strict a standard").

[244] *Newberg* (4th) §§ 3.13–3.20.

[245] See, particularly, the list of "challenges to typicality" in *Newberg* (4th) § 3.14 p 334, eg: differences between the damages of representative and class members, individual fact differences, unique defences, multiple defendants, class membership.

[246] TA Dickerson (the Hon), *Class Actions: The Law of 50 States* (New York, Law Journal Press, 2001) [looseleaf] § 6.05[1].

obligate the representative to establish affirmatively the existence of a class".[247] In particular, that Commission was concerned that, if the representative did have to prove that as a commencement criterion, it would have a similar effect to stipulating that a minimum number of plaintiffs was necessary—both would be burdensome and an impediment to bringing a class action. Furthermore, if this meaning of typicality was to screen out unmeritorious claims, then a preliminary merits test was a much better way to achieve that aim. It was also argued by the Commission that this approach to typicality had almost universally been postulated in the US jurisdictions in civil rights cases,[248] and that it would be inappropriate to adopt such a criterion for a class action regime of general application. Moreover, another justification for rejection of an "existence of a class" test is that proof would normally be required before the representative plaintiff had obtained full discovery, and when the existence of a class may depend on information wholly within the defendant's possession.[249] Finally, an apparent lack of support for an action may mask that the class members are in favour of the suit, but fear retribution.[250]

The case law under FRCP 23, however, is not entirely clear on this issue. Some authorities indicate that, even under the FRCP 23 requirement of typicality, a positive showing of the existence of a class is not required.[251] Other cases seem to support the view that evidence of support for the class lawsuit is required for certification,[252] or at the very least, that the court can consider lack of response from purported class members in determining the suitability of certification[253] or where other evidence of class conflict already exists.[254]

[247] See *OLRC Report*, 370–71 for the various arguments.

[248] This is further confirmed by *Newberg* (4th) §§ 3.20, p 406.

[249] *Newberg* (4th) § 3.20 p 407.

[250] Affidavit evidence in *Larry James Oldsmobile-Pontiac-GMC Truck Co Inc v General Motors Corp*, 164 FRD 428, 436 (ND Miss 1996).

[251] Eg: *Welch v Board of Directors of Wildwood Golf Club*, 146 FRD 131, 136 (WD Pa 1993) (defendant argued that the plaintiff failed to show that any other women had objected to alleged sex discrimination in either constitution or operation of the golf club; court rejected argument and typicality satisfied).

[252] *Liberty Lincoln Mercury Inc v Ford Marketing Corp*, 149 FRD 65, 79 (DNJ 1993) (class certification denied where only two other class members objected to Ford's uniform national warranty reimbursement formula; "Liberty Lincoln appears to be challenging . . . Ford's reimbursement policies . . . that other Dealers within its proposed class do not seek to challenge. In this regard, Liberty Lincoln's interests may well be adverse to some of the members of the proposed class"); *Block v First Blood Assn*, 125 FRD 39 (SDNY1989) (court refused to certify class where only 24/57 potential class members responded to solicitation requests).

[253] *Larry James Oldsmobile-Pontiac-GMC Truck Co Inc v General Motors Corp*, 164 FRD 428, 436 (ND Miss 1996) (alleged that "James or its attorneys have tried to drum up evidence that dealers support this lawsuit, but have been wholly unsuccessful"; but lack of interest put down to fear of retribution if they publicly demonstrated their stand on the issue + no evidence that James made concerted effort to solicit majority).

[254] *In re Folding Carton Antitrust Litig*, 88 FRD 211, 213–14 (ND Ill 1980) ("Although lack of interest and intervention in the litigation by other class members is a factor negative to class certification, it is not determinative of the question whether the plaintiffs are qualified to act in behalf of the absent members of the class"); *Lupia v Stella D'Oro Biscuit Co*, 1974-1 Trade Cas ¶ 75,046 at 96,688 (ND Ill 1972) (lack of interest possibly attributable to conflict of interest; strong

Newberg has criticised the approach of equating indifference with inadequacy of representation, and has expressed the view that it is not necessary under FRCP 23 for the representative to affirmatively prove the existence of a class.[255]

The controversy surrounding the existence of a class is evident from jurisprudence in the other focus jurisdictions too. Must the class members exhibit a desire to prosecute or a sense of grievance? It is arguable that if this cannot be pointed to by the class representative at certification, then it may well be, as one court put it, "the case of the artful pleader, who has crafted a claim that meets the 'cause of action' criterion (low as the threshold for that is) but one which is utterly lacking in reality as a class proceeding."[256] There is some persuasive authority in the non-US focus jurisdictions for the proposition that, as a criterion for commencement of class proceedings, the claim of the applicant must be typical of the class members, in the sense that there is uniformity amongst them of the *desire to prosecute* such proceedings. An applicant may have a claim, which together with the claims of 100 potential class members, raises common issues of law or fact.[257] However, if, at or near the inception of the proceedings, the applicant cannot point to any, or sufficient, of those 100 wishing to move the action forward, and willing to prosecute the action, *when it would be easy enough to point to such evidence*, then the applicant is not typical of the class, and the proceedings are inappropriate in class action form. In other words, if the class doubts whether it is worth the effort of pursuing the action, then the action cannot proceed. Whether that is properly a manifestation of typicality or commonality,[258] the importance of the factor is highlighted by the fact that the progression of class actions has failed upon the sword of indifference.

Proceedings have been discontinued under the Australian Pt IVA regime precisely on this basis, ostensibly because the class action was "otherwise inappropriate".[259] In the pyramid selling case, *ACCC v Giraffe World Australia Pty Ltd*,[260] in which the ACCC sued as representative plaintiff, there was only one complaint by a member of the scheme to the ACCC. With that in mind, Lindgren J considered that there was real uncertainty as to whether there were other "loss sufferers" wishing to prosecute and shut down the operations of the

possibility that current distributors profiting from alleged unlawful antitrust conduct; former distributors who were no longer engaged with manufacturer had "nothing to lose from the lawsuit"; hence, their interests could well be antagonistic to those of the current distributors).

[255] The approach in *Liberty Lincoln* is viewed to be, in most cases, "logically unsound": *Newberg* (4th) § 3.30 p 445, § 3.20.

[256] *Samos Investments Inc v Pattison* [2001] BCSC 1790, [157].

[257] As per: FCA (Aus), s 33C(1)(c); CPA (Ont), ss 1, 5(1)(a), (c).

[258] It was treated as the former by the OLRC (*OLRC Report*, 371), but in *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [26] and elsewhere, eg, *Samos Investments Inc v Pattison* [2001] BCSC 1790, [176], it is treated as an aspect of commonality between the representative and class members; decision to deny certification in that case aff'd: (2003), 10 BCLR (4th) 234 (CA).

[259] Pursuant to FCA (Aus), s 33N(1)(d).

[260] (1998) 84 FCR 512.

defendants.[261] It was of no use for the applicant to point to the fact that, say, more than six persons entered into the pyramid selling scheme, if no evidence could be adduced which indicated that class proceedings were desirable to those who had participated in them. In this case, it remained for the ACCC to pursue its application for injunctive relief on its own account, quite apart from Pt IVA, and regardless of whether the "general membership" of the scheme opposed that course.[262] A lack of interest on the part of the putative class members was also a feature of the order for discontinuance in *Gold Coast City Council v Pioneer Concrete (Qld) Pty Ltd*.[263]

The same conundrum has arisen in Ontario, in which a lack of evidence of complaint has mitigated against certification of several class proceedings.[264] Perhaps the most interesting scenario is that which occurred in *Hollick v Metropolitan Toronto (Municipality)*,[265] particularly given that appellate treatment of this issue varied. Once again, it was not referred to as an absence of typicality of the representative's claim. The proceedings arose out of a claim, purportedly on behalf of 30,000 persons, seeking damages and an injunction relating to noxious odours, air-borne sediment, toxic gases, and noise, alleged to be emanating from a waste disposal site in Maple, Ontario. O'Leary J of the Divisional Court denied certification, and was simply dubious that there was sufficient evidence of a class of persons whose use and enjoyment of their land had been interfered with and who wished to prosecute the action—"150 people making complaints over a 7-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with."[266] The Ontario Court of Appeal also noted that "one would expect to see evidence of . . . a history of 'town meetings', demands, claims against the no fault fund, applications to amend the Certificate of Approval, and in general, evidence to give some credence to the allegation that . . . 'there *is* an identifiable class'."[267] However,

[261] (1998) 84 FCR, 535. Lindgren J later reiterated the apparent and initial non-existence of the class: "Down to recent times, at least, the proceeding has had the odd feature that the ACCC has sought to protect the interests of numerous individuals who, on the evidence, have not wanted its assistance and have been opposed to its interference": *ACCC v Giraffe World Aust Pty Ltd (No 2)* (1999) 95 FCR 302, [223].

[262] *Giraffe World*, *ibid*, 536.

[263] FCA, 9 Jul 1997 (representative plaintiff/its solicitors widely publicised action by advertisements, direct approaches and mail contacts; Drummond J noted "the lack of interest by all other public and private persons and organisations in supporting those proceedings, notwithstanding the extensive publicity given by the applicant and its solicitors to the representative action").

[264] Eg: *Rogers Broadcasting Ltd v Alexander* (1994), 25 CPC (3d) 159 (Gen Div) [26]; *Taub v Manufacturers Life Ins Co* (1999), 40 OR (3d) 379 (Gen Div) [5], aff'd: (1999), 42 OR (3d) 576n (Div Ct); *Zicherman v Equitable Life Ins Co of Canada* (2000), 47 CCLI (3d) 39 (SCJ) [8].

[265] Originally certified: (1998), 18 CPC (4th) 394, but leave to appeal allowed: (1999), 168 DLR (4th) 760, 42 OR (3d) 473 (Div Ct), and on appeal, cert denied: (2000), 181 DLR (4th) 426, 46 OR (3d) 257 (CA), and aff'd: 2001 SCC 68, 205 DLR (4th) 19 (SCC) (ie, not certified).

[266] *Ibid* (Div Ct), [16].

[267] *Hollick* (Ont CA), *ibid*, [14] (claim fund a modest fund of $100,000 established to deal with claims arising from offsite impact, to be capped at $5,000 per claim; no claim made by any person/company). The Ont CA did not resolve this issue, holding that there were too many individual issues to justify certification.

on appeal, the Supreme Court of Canada affirmed this aspect of the Court of Appeal's reasoning,[268] but was content that the number of complaints registered with government departments over the years *did* show the existence of a class. This "victory" for the class was hollow[269]—the court did not consider that class proceedings were preferable because of the number of individual issues that required resolution, and the class action was not certified. Unsurprisingly, since this decision, defendants have sought to take the point that there was no real evidence that the potential class members truly wanted to participate in the action.[270]

In British Columbia, the case law is not clear on the issue. On the one hand, proof of the existence of a class has been judicially described as the "air of reality" test: "testing the reality of the proposed linkage between the plaintiff's claim and the proposed class."[271] It has been judicially said that "there is a distinction between looking for evidence that members of the proposed class have individually a claim on the merits, and testing the reality of the proposed linkage between the plaintiff's claim and the proposed class. The former is not an appropriate enquiry on the certification application, but the latter is."[272] On the other hand, in other case law where the defendant has sought to allege that there was no evidence that any of the individuals who fell within the class definition, apart from the representative plaintiffs, had an interest in advancing claims against the defendants, so that there was arguably no demand for access to justice in this case, the court has retreated from the allegation. In *Hoy v Medtronic Inc*,[273] the court merely noted that the Act requires only that there be an identifiable class of two or more persons, and that if there was to be a lack of interest by other class members, surely the economic rationale of class counsel would bring the class litigation to an end, but that the "innovative argument" by the defendants was not sufficient to prevent certification.[274]

[268] *Hollick* (SCC), *ibid*, [20], [25]–[26].

[269] *Ibid*, [26].

[270] *Wilson v Re/Max Metro-City Realty Ltd* (2003), 63 OR (3d) 131 (SCJ) [15]; *Macleod v Viacom Entertainment Canada Inc* (2003), 28 CPC (5th) 160 (SCJ) [17].

[271] *Samos Investments Inc v Pattison* [2001] BCSC 1790, [160]. The court described the questions asked in *Hollick* about evidence of complaint by other class members or some other credence to the allegations of nuisance caused by a landfill site as "an air of reality test of a sort": at [166]. Subsequently applied to defeat certification in: *Nelson v Hoops LP* [2003] BCSC 277, [38]–[39].

[272] *Samos*, *ibid*, [160]–[161]. The test failed in this case: "In searching for an air of reality to the plaintiff's claim, the defendants ask, in effect, where are the complaints from these large, sophisticated investors that they were intimidate prejudiced and wrongly encouraged to approve transactions which were contrary to their economic interests? The defendants say that the lack of any such evidence confirms that the plaintiff's claims have been plucked out of thin air indeed. In my view, these are relevant questions to ask and to require the representative plaintiff to produce evidence in respect of, on the certification hearing"). No such evidence was produced. Refusal to certify aff'd: (2003), 10 BCLR (4th) 234 (CA).

[273] (2001), 94 BCLR (3d) 169 (SC [in Chambers]) [27], decision to certify aff'd: (2003), 14 BCLR (4th) 32 (CA).

[274] See also: *Hoy v Medtronic Inc* (2001), 91 BCLR (3d) 352 (SC [in Chambers]) [14] for repetition of the same argument and judicial treatment.

3. Conclusion

It is apparent that, according to sporadic case law in the focus jurisdictions (and not all of it consistent), there must be evidence, not only of numerosity, but that there is a willing class. If there is the capacity but failure to acquire this evidence, then it does not involve the court in speculation to deny the existence of a class. However, this interpretation of typicality raises two spectres in class litigation.

First, one might reasonably expect defendants to now take the point that there was no real evidence that the potential class members truly wanted to participate in this action, and case law in Ontario particularly has borne this out since the decision in *Hollick*.[275] Secondly, in order for this criterion of typicality to be workable, legal representatives for the class must surely be allowed sufficient opportunity by which to publicise the action, seek out potential class members, investigate complaints which have been lodged, obtain relevant information from the defendant's records or from a complaints register, and other means that would establish either a desire or a reluctance to prosecute by a class of litigants. As Lennox notes,[276] it is a frustrating and catch-22 situation if class counsel cannot contact class members to obtain evidence of a desire to prosecute until after class certification, but a court will not certify without it. On the other hand, Glenn has observed that the more information gathered to prove the existence of the class, the more likely is the descent into a morass of detail and counter-argument.[277]

As O'Leary J was cautious to point out in *Hollick*,[278] this is *not* a means of screening out actions without merit. Typicality in this sense merely establishes, at the outset, a desire to prosecute which is common to class members and representative plaintiff alike. In that regard, to impose such a criterion is consistent with two of the overarching principles of multi-party litigation canvassed under the theoretical framework: promoting judicial economy and invoking proportionality, using the courts' resources for those who are seeking them. It is also consistent with academic opinion[279] that contemporary discussion of reform of multi-party litigation must shift from discussions about how to fund it, and instead, centre upon more purely procedural issues, such as how to prove the existence of a class. It is arguable that the third meaning of typicality, dismissed by the OLRC, has been attributed a meaning under class action litigation, particularly in the post-FRCP 23 focus jurisdictions, which is supplementary to but separate from the numerosity requirement.

[275] Eg: *Wilson v Re/Max Metro-City Realty Ltd* (2003), 63 OR (3d) 131 (SCJ) [16] (court was satisfied that a class existed).

[276] D Lennox, "Building a Class" (2001) 24 *Advocates' Q* 377, 381–82.

[277] HP Glenn, "Dilemma of Class Action Reform" (1986) 6 *Oxford J of Legal Studies* 262, 271.

[278] *Hollick v Metropolitan Toronto (Municipality)* (1999), 168 DLR (4th) 760, 42 OR (3d) 473 (Div Ct) [17].

[279] HP Glenn, "The Dilemma of Class Action Reform" (1986) 6 *Oxford J of Legal Studies* 262, 268.

Part III
Conduct of the Class Action

9

Shaping the Class Membership

A INTRODUCTION

THREE SUBSTANTIVE ISSUES shape class membership, and in the following order: how the class is defined, then notified, and then closed. It will be recalled that a key feature of each focus jurisdiction regime is that class action judgment, whether adverse or favourable to the class, is binding upon all class members who have not opted out of the class. Whether the class is composed of many or millions of members, the class judgment will bind those who are defined or described to fall within the class. That class definition is crucial when framing the opt-out notice, for those who read the notice must be able to determine whether they fall within the class definition so that they can make their choice whether to remain in or opt out of the class. The class is therefore shaped by the way in which it is defined. The class must also be closed at an appropriate stage, in order to provide finality for the defendant, particularly so that the defendant knows the extent of its liability to the class. Notably, however, the manner and the timing of class closure has not received unanimous judicial or statutory treatment across the focus jurisdictions.

The purpose of this chapter is to explore the conundrums that exist in the focus jurisdictions with respect to the manner of class definition. These include: whether that definition should be objective or subjective in terminology, and what constitutes an over-inclusive class definition (section B); the various options of the requisite notice that have been statutorily invoked by which to inform class members that the class action is on foot, and the tricky dilemma of who pays for it (section C); and the options that have been implemented to close the class, especially having regard to the statutory drafting features which have differed significantly on this issue, occasionally to the defendant's cost and the court's chagrin (section D).

Shaping the class membership is one of the most difficult issues associated with class action jurisprudence. In each of the three matters itemised above, there are significant judicial and statutory differences among the focus jurisdictions such that, in response to the movie epithet which one class action commentator notes[1] by way of analogy, "Build the field and they will come",[2] it must be acknowledged that the method of class construction very much depends upon which jurisdiction applies.

[1] D Lennox, "Building a Class" (2001) 24 *Advocates' Q* 377.
[2] "If you build it, they will come", *Field of Dreams* (1989).

B DEFINING THE CLASS

The fact that individual class members cannot be listed at the outset is not fatal to the action under any of the focus jurisdictions. Indeed, the identity of the class members may not be precisely known until they each come forward with proof of claims of the individual issues (whether aspects of liability such as reliance, or quantum of their individual damages) that comprise at least part of their claims, where proof of same is necessary after the decision on the common issues in the class's favour. Both Australian and Ontario statutes specifically provide that it is not necessary to name, identify or provide numbers of the members of the class individually at commencement;[3] and neither do the respective statutes require particular class member *identification* within the judgment itself.[4] A mere description is sufficient.[5] The US rule also refers to class description rather than identification in damages class actions under FRCP 23(b)(3). The drafters of all the regimes were careful not to require that all class members be specifically identified at either commencement or at judgment.

This caveat is consistent with the opt-out models adopted by all these focus jurisdictions. The task of identifying the precise number or identity of class members is, in the usual case, simply not going to be possible at the commencement of the action, and perhaps even at judgment on the common issues. The fact that class members are not required to be listed is also reflected in the minimum numerosity requirements of the various regimes. For example, the Canadian regimes only require a class of "two or more persons", and once satisfied, the identity and number of the remainder is irrelevant for certification purposes.[6]

Therefore, although it has been judicially recognised that class members' identification will assist the convenience of administration of the action where possible,[7] another court has succinctly stated the position under opt-out regimes: "The fact that it would be difficult at the certification stage to list by name every member of the class is not fatal. The [CPA] contemplates situations where it may be difficult to identify by name precisely every member of the class".[8]

[3] FCA (Aus), s 33H(2); CPA (Ont), s 6(4). Also CPA (BC), s 7(d).

[4] See FCA (Aus), s 33ZB(a); CPA (Ont), s 27(1)(b); CPA (BC), s 25(b).

[5] CPA (Ont), s 8(1)(a); FCA (Aus), s 33H(1)(a). Interestingly, for a US example of insufficient notice to the defendant that the plaintiff was asserting a *class* action based on class discrimination, see: *Hoffman v RI Enterprises Inc*, 50 F Supp 2d 393, 400 (MD Pa 1999).

[6] *Griffith v Winter* (2002), 23 CPC (5th) 336 (BC SC) [31]–[33].

[7] *Ormrod v Hydro-Electric Comm of the City of Etobicoke* (2001), 53 OR (3d) 285 (SCJ) [32]; *Lek v Minister for Immigration, Local Govt and Ethnic Affairs* (1993) 43 FCR 100, 103.

[8] *Robertson v Thompson Corp* (1999), 171 DLR (4th) 171 (Ont Gen Div) [25]. Cited with approval in BC: *Hoy v Medtronic Inc* (2001), 94 BCLR (3d) 169 (SC [in Chambers]) [30].

The focus jurisdictions are unanimous that both natural persons and bodies corporate can be class members.[9] Elsewhere, the contrary and narrower position is that only natural persons or particular legal entities are permitted within the class.[10] As Campion and Stewart point out, the wide approach seems preferable on the basis that "it is unclear why a corporate entity should be precluded from being part of a class if its interests have been harmed in the same way as [those] of an individual (eg, . . . overcharging or price-fixing by a defendant)."[11]

1. Problem Definitions

Notwithstanding that it is unnecessary to stipulate names or numbers of potential litigants, class actions have faltered upon class definition. A body of jurisprudence (particularly in Ontario and Australia, where attention throughout this section will focus) has developed as a result of numerous cases in which the class definition has been argued or decreed to be insufficient. The resulting guidelines particularly concern: whether the class is "over-inclusive" and too wide; or whether the definition contains subjective criteria and is too narrow. An analysis of the case law demonstrates that, despite legislatively similar wording, important judicial differences have emerged between the focus jurisdictions upon these issues. Academically, class definition has been recognised as significant; Hawke has described the defining of the class as the "fundamental problem" confronting class litigation.[12]

(a) Over-inclusive class definitions

The problem of an over-inclusive class definition, and the consequent failure of a class action at commencement, has particularly plagued Ontario proceedings. The Supreme Court of Canada expressed the problem in these terms: "There must be some showing, however, that the class is not *unnecessarily* broad—that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue."[13] The issue has also arisen for argument in British Columbia.[14] By

[9] This follows because "person" is defined to include a body corporate: Interpretation Act, RSO 1990, c I.11, s 29; Acts Interpretation Act 1901 (Aus), s 22(1)(a).

[10] Eg, in CCP (Que), art 999(c), 1048.

[11] JA Campion and VA Stewart, "Class Actions: Procedure and Strategy" (1997) 19 *Advocates' Q* 20, 28. Also endorsed by *FCCRC Paper*, 31.

[12] FG Hawke, "Class Actions: The Negative View" (1998) 6 *Torts LJ* 68, 75.

[13] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [21] (class in this case defined by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time; "[w]hether a given person is a member of the class can be determined without reference to the merits of the action": at [17]).

[14] *Olsen v Behr Processing Corp* (2003), 17 BCLR (4th) 315 (SC [in chambers]) [29] (over-inclusive argument did not succeed).

contrast, the conundrum has not often arisen in Australia, for reasons which will become evident.

(i) How the problem arises

The argument (an outline of which is to be derived from *Hollick* and other cases discussed in this section) follows these lines: the mere fact that a group of people is capable of description is not sufficient to render them a class for the purposes of class proceedings. Many of the putative class members will have no possible cause of action against the defendant (because they may have suffered no damage, for example). The danger is that, by objectively stating the definition in a manner which encompasses all those likely to have a cause of action, it will also encompass those who do not. A class definition into which the latter would fall will then be termed "over-inclusive".

Two class definitions will illustrate the problem. The first is drawn from the case of *Mouhteros v DeVry Canada Inc*.[15] The defendant operated the DeVry Institute of Technology, a private post-secondary educational institution. The representative plaintiff was a former student of DeVry. Essentially, it was claimed that DeVry misrepresented the quality of its programmes and facilities, and the marketability and employability of its graduates, and that students who enrolled at the institution relied upon these representations to their detriment. For example, it was alleged that DeVry used obsolete computer equipment, that its curriculum was outdated and of little utility, and that many of its instructors were unqualified or oherwise unsuitable. The class definition—

> all persons who attended the defendant DeVry's Ontario and Alberta campuses as students at any time between [two nominated dates]

—contained a total of 17,227 potential class members (a computer programme was used to track student enrolment). The class action did not survive certification, because the definition was over-inclusive. It sought to encompass all students of DeVry, "including those who successfully completed their programs, were satisfied with the education they received, and went on to obtain employment related to their field of study."[16] The class was defined objectively, but was too wide because it included students who had successfully found employment after graduation.

The second case illustration is that of *Chadha v Bayer Inc*,[17] a difficult case which arose from allegations of illegal price-fixing of iron oxide pigment. The class of litigants was defined as:

[15] (1999), 41 OR (3d) 63 (Gen Div).

[16] *Ibid*, [18]. Approved: *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [21].

[17] (2001), 200 DLR (4th) 309 (Div Ct), aff'd: (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA), leave to appeal refused: SCC, 17 Jul 2003.

> All homeowners or other end users in Canada who have suffered loss or damage as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in general restrict and inhibit competition, in the pigment market; in particular, all homeowners or other end users of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed by Bayer Canada . . . [between two nominated dates].

By majority,[18] the Divisional Court set aside the earlier order of certification[19] on the basis that the second part of the class definition was over-inclusive. The court was satisfied that some of the homeowners referred to in the definition would have suffered no damage as a result of the defendants' alleged wrongful behaviour.[20] This decision was appealed still further,[21] and the Court of Appeal agreed that the class definition was defective. The court held unanimously that the problem of identification and possible over-inclusion of class members under this definition was masked if it were possible to make proof of loss a common issue (ie, that loss could be established on a class-wide basis); but with liability as an individual rather than a common issue, identification and proof of those actually affected was needed, with all of the over-inclusive difficulties.[22]

These decisions are indeed illustrative of the significance of the issue in Ontario. Where the class could be defined more narrowly, the court may allow certification on condition that the definition of the class be amended, but the other and more drastic option (also evident in other cases where over-inclusiveness has been identified[23]) is to disallow certification altogether.[24]

(ii) Contrasting views

Winkler J has stated extra-curially that there is a tension in that the defendant will wish to define the class broadly so as to encompass and bind as many plaintiffs as possible in a settlement or judgment; whereas an over-inclusive objective

[18] Somers and Thomson JJ, O'Driscoll J dissenting.

[19] (2000), 45 OR (3d) 29 (SCJ) (Sharpe J), leave to appeal granted: (2000), 45 OR (3d) 478n (SCJ), in which Lane J also expressed reservations about the definition: at 480.

[20] *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309 (Div Ct) [51] (and whilst possible that definition "could be reworked", Div Ct thought it unnecessary because of other barriers to certification present: at [52], Somers J, Thomson J concurring).

[21] *Chadha v Bayer Inc* (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA), leave to appeal refused: SCC, 17 Jul 2003.

[22] *Ibid*, [59].

[23] *Olar v Laurentian University* (2003), 37 CPC (5th) 129 (SCJ) [33] (the definition: "all students who are enrolled at the School of Engineering of Laurentian University during the years 1994–2000 and who transferred into civil, chemical or mechanical engineering program of other universities in Ontario and who were required to complete additional courses" not permitted); *Lacroix v Canada Mortgage & Housing Corp* (2003), 36 CPC (5th) 150 (SCJ) [43]–[44]; *Cloud v Canada (A G)* (SCJ, 9 Oct 2001) [63], refusal to certify aff'd: (2003), 65 OR (3d) 492 (Div Ct).

[24] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [21], citing: WK Branch, *Class Actions in Canada* (Vancouver, Western Legal Publications, 1998) [looseleaf] § 4.205.

definition of the class "that contains some dubious plaintiffs" could impact on judicial efficiency and manageability.[25]

However, some courts in Ontario have tended to play down the argument of objective class definitions which are over-inclusive. In particular, it has been suggested the objectivity is supportable on the basis that its antithesis, a subjective definition, begs the merits of the litigation and "puts the cart before the horse". For example, in *Webb v K-Mart Canada Ltd*,[26] which concerned an alleged wrongful termination suit against the large retailer K-Mart, the class was defined as "all persons who are former employees . . . of K-Mart . . . and whose employment was terminated by K-Mart by notice given [between specified dates]".[27] The defendant argued that the class would include those who were terminated by K-Mart but immediately re-employed by other divisions of the retailer, and those who had received fully appropriate notice and/or pay in lieu thereof—that is, those who would have no claim against their former employer whatsoever. Brockenshire J accepted this, but considered that to limit the class to those who were "wrongfully dismissed" was too narrow, for the purpose so early in the action was to identify those who had a potential claim for relief against the defendant and who should receive notice of the litigation—

> It might be that in the end, all the former K-Mart employees are found to have been adequately taken care of by their former employer and so not entitled to damages. However at this procedural stage, the problem is to define those who have a claim, and not just those who will ultimately succeed.[28]

What the defendant was seeking to establish, according to Brockenshire J, was "a nexus between the cause of action and the class". There was, as a result, a great tendency to place the cart before the horse by seeking to define the class "by those who will ultimately succeed." His Honour considered that it was not appropriate to attempt this so early in the life of the class action. He plainly did not consider a wide class definition to give rise to problems of judicial efficiency and manageability to which Winkler J has referred. Similarly, in *Robertson v Thomson Corp*,[29] the defendants' argument that the definition of the proposed class was fatally flawed because it likely includes some individuals who, in the end, will not succeed or who do not wish to prosecute their claim was rejected by the court on the basis that any further narrowing of the class by referencing the merits of the claim or subjective characteristics was impermissible, and

[25] W Winkler (the Hon), "Advocacy in Class Proceedings Litigation" (2000) 19 *Advocates' Society J* 6, 8.

[26] (2000), 45 OR (3d) 389 (SCJ), leave to appeal denied: (2000), 45 OR (3d) 638n (Div Ct). Also see: *Wilson v Servier Canada Inc* (2001), 50 OR (3d) 219 (SCJ) [56] for another over-inclusive argument.

[27] The definition excluded certain groups, and Brockenshire J narrowed it further to exclude those who had been terminated within certain parameters. A somewhat similar definition was subsequently used in a wrongful dismissal suit in British Columbia, and was considered to satisfy the "objective" criterion: *Gregg v Freightliner Ltd* (2003), 35 CCPB 31 (BC SC) [31], [42].

[28] *Webb* (2000), 45 OR (3d) 389 (SCJ) [18].

[29] (1999), 171 DLR (4th) 171, 43 OR (3d) 161 (Gen Div) [24]–[27], citing *Newberg* (3rd) §6.61.

would contravene the policy that the merits are not to be decided at certification stage. Thus, both courts were prepared to accept that, in the manner in which the classes were defined, there might well be persons who fell within it at the outset as the definition was drafted, but who, in the end, would not succeed.

More recently still, it has been suggested in *Larcade v Ontario (Minister of Community & Social Services)*[30] (by way of obiter[31]) that an over-inclusive class definition could be cured by inclusion of some subjective elements by which to restrict those class members falling within it. By narrowing the definition in this manner (said the court), the identification of the members of the class could be left to be resolved at the trial of individual issues, rather than it be strictly ascertainable at the outset whether or not the class member fell inside or outside of the class definition.

Therefore, it is immediately apparent that there are two responses to the perceived difficulty of over-inclusive class definitions which manifested in *Chadha* and *Mouhteros*, and which (amongst other reasons) resulted in the failure of those actions at their commencement.

The first is to accept (as in *Webb*) that it will not bar a class action if the class definition will include, by its terms, persons who fall within a class which is defined by some objective criteria, but who will ultimately have no successful claim against the defendant. Definitions which do not refer to a subjective requirement that class members comprise those who have suffered some loss or damage, or who were "wrongfully" dismissed, will include putative class members who will not have a successful claim. Such definitions (indeed, all relevant three reproduced in the text in this section) will be framed very widely, but will nevertheless (according to this first view) satisfy the functions of a class definition.

The second response is to permit (as in *Larcade*) subjective class definitions by limiting the defined class to those who have suffered injury, or to those who will ultimately have a successful cause of action. However, as described in the next section, and even more problematically for classes in Ontario, several courts in that jurisdiction have strongly cautioned against the use of subjective class definitions. By contrast, Australian courts have permitted subjective class definitions, which undoubtedly explains why the conundrum of over-inclusive definitions has rarely[32] arisen in that jurisdiction. The obverse side of the class definition conundrum will be next considered.

[30] (2003), 65 OR (3d) 289 (SCJ) [53]–[55].

[31] Certification of the class action failed because it was not the preferable procedure for resolving issues relating only to the interpretation of the statute.

[32] For occasional examples of judicial criticism of over-wide definitions, see the trial decision in *Wong v Silkfield Pty Ltd* (FCA, 16 Jan 1998) 10 (this aspect of Spender J's decision not criticised on appeal either by Full FCA or HCA); *Milfull v Terranora Lakes Country Club Ltd* (FCA, 16 Jun 1998) 7.

(b) Defining the class by subjective criteria

In the decade of operation of their respective statutes, courts in both Australia and Ontario have considered numerous challenges to class definitions on the basis that they contained subjective elements. As foreshadowed, the verdict upon whether a subjective definition bars the commencement of a class action has been generally reasoned and decided in a contradictory manner in the focus jurisdictions, with the North American jurisdictions aligned together, and in opposition to the position adopted under Australia's class action regime. Even more interestingly, the division in attitude arises in the complete absence of any relevant discussion by the key Australian and Ontario law reform commission reports, as if to signify that the problem which the issue has now become was not then contemplated.[33] Before turning to the diverse judicial reasoning, it is useful to provide some brief explanation and examples of subjective class definitions.

Subjective aspects of a class definition, matters which are personal and particular to each class member, commonly arise in three scenarios (although their description tends to differ a little across the focus jurisdictions). Each of these is described below, and is supplemented by a case example (the definitions have been précised).

The first scenario occurs where the class member's state of mind is relevant to determine whether a person falls inside or outside the group (for example, the question of whether or not a class member relied upon allegedly wrongful statements or conduct of the defendant):

Philip Morris (Aus) Ltd v Nixon[34]

class members are all persons:

- who suffered cancer or other smoking-related disease, and
- whose condition first manifested over a certain period, and
- who commenced, continued or failed to quit smoking because of the conduct of the defendant/s.

The second scenario exists where the class member would fall within the definition only if the merits of his or her action were made out, so that the

[33] The OLRC made only brief reference (*OLRC Report*, 373) to the objection to a subjective class definition by defendant's counsel, but which was overruled, in *Naken v General Motors of Canada Ltd* (1979), 92 DLR (3d) 100 (Ont CA) 115–16. Whilst the ALRC did not consider this issue in any detail, it apparently contemplated subjective class definitions: *ALRC Report*, [141], although an objective class definition is contained in its model pleading, App B.

[34] Held to be an inappropriate class definition in *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) for reasons unrelated to its subjectivity. Also see: *Manual for Complex Litigation, Third* (New York, West Group, 1995) 217.

definition is conclusory of the merits[35] (for example, class members "who were discriminated against", judicially corrected under FRCP 23 in *Bacal v Septa*[36]).

The third scenario occurs where the class members are defined by reference to the allegation that they suffered loss or damage by reason of the defendant's conduct. Again, this requires that the merits of the action, with something particular to each class member, determines class membership:

King v GIO Australia Holdings Ltd[37]

class members are all persons:

- who owned shares in GIO continuously (over a relevant period), and
- who did not accept the takeover offers for those shares made by AMP by reason of the conduct of all or any of the defendants (breaches of statutory and common law duties),[38] and
- who suffered loss as a consequence.

(i) Arguments against

Class definitions which incorporate subjective elements have been cautioned against for several reasons.

First, there is a perceived problem of circularity. There are numerous decisions in Ontario under the Class Proceedings Act in which it has been stated that the class should be defined in objective terms, and that "circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided."[39] A subjective definition "does not eliminate the circularity that the loss must be proved to enter the class."[40] As Montgomery J expressed his concerns,[41] the defendants' liability to each putative class member would have to depend upon the determination of various issues specific to each individual member, such that the resolution of the common issues would not determine class membership.

[35] Example taken from *Manual for Complex Litigation*, *ibid*, and cited in *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [11].

[36] US Dist Lexis 6609 (ED Pa 1995).

[37] (2000) 100 FCR 209, [8].

[38] Note that this clause also has a subjective element under the first scenario previously considered.

[39] Eg: *Robertson v Thomson Corp* (1999), 171 DLR (4th) 171, 43 OR (3d) 161 (Gen Div) [27]; *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [11]; *Hollick v Metropolitan Toronto (Municipality)* (2000), 181 DLR (4th) 426, 46 OR (3d) 257 (CA) [11]; *Delgrosso v Paul* (1999), 45 OR (3d) 605 (Gen Div) [12]; *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) [47]–[50]; *Hickey-Button v Loyalist College of Applied Arts and Technology* (2003), 31 CPC (5th) 171 (SCJ) [12].

[40] *Chadha v Bayer Inc* (2000), 45 OR (3d) 478 (SCJ) [8] (Lane J).

[41] *Sutherland v Canadian Red Cross Soc* (1994), 112 DLR (4th) 504, 17 OR (3d) 645 (Gen Div) [21], [29]–[32] (class defined as those directly or indirectly infected with HIV as a result of receiving tainted blood or blood products; action not certified).

The US position is explained by Newberg in similar vein: "a definition in terms of objective characteristics of class members avoids problems of circular definitions which depend on the outcome of litigation on the merits before class members may be ascertained".[42] According to the authors of the *Manual for Complex Litigation*, subjective class definitions should be particularly avoided in the case of (b)(3) damages class actions because they "frustrate efforts to identify class members",[43] presumably because of the circularity that they allegedly entail.

Secondly, if the subjective elements must be proven in order to define the class and decide who is and is not a member of it, then it has been said that proof of this before the common issues could raise significant "*practical* difficulties". If a series of mini-trials were conducted to determine the members of the class by weeding out those who did not fulfill the subjective criteria,

> this raises difficult issues of res judicata and the rights of the parties to pre-trial oral and documentary discovery. Would the findings on these preliminary issues be binding on the trial judge? Should these preliminary issues be decided by the trial judge rather than a different judge? To what extent would the defendant be entitled to discovery on this point and against which individuals, since it would be prior to the definition of the class?[44]

Thirdly, it has been contended that a subjective class definition manifests a preliminary consideration of the merits. In *Lau v Bayview Landmark Inc*,[45] Winkler J emphasised that, when considering the commencement of class proceedings, it is a purely procedural matter, and it is entirely inappropriate that class definitions should contain elements which will require a determination on the merits. In this regard, the statements contained in the abovementioned major American commentaries to the effect that objective definitions "[do] not require the court to engage in impermissible consideration of the merits of the claims"[46] and that subjective definitions "contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability"[47] have been cited with approval by Ontario[48] and British Columbia[49] courts.

[42] *Newberg* (4th) § 6.14 p 614–15.

[43] Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) § 30.14, also cited with approval in *Newberg*, *ibid*.

[44] *R v Nixon* (SCJ, 12 Mar 2002) [7].

[45] (1999), 40 CPC (4th) 301 (SCJ) [30].

[46] *Newberg* (4th) § 6.14 p 615.

[47] *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) 217–18. See also the precedent for an objective class definition—for price-fixing—contained in Order, [41.41].

[48] Eg: *Lau* (SCJ, 28 Oct 1999) [30]; *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [11]; *R v Nixon* (SCJ, 12 Mar 2002) [6]; *Robertson v Thomson Corp* (1999), 171 DLR (4th) 171, 43 OR (3d) 161 (Gen Div) [27].

[49] Eg: *Brogaard v Canada (A-G)* (2002), 7 BCLR (4th) 358 (SC [in Chambers]) [102]–[106] (defendant suggested that the class definition was inherently subjective as it would require the class members to satisfy the criteria for qualification for a past and/or future Survivor's Pension through an objective administrative procedure; nevertheless, class definition held to be objective, as the "relief" that potential class members sought was right to "stand in the line" for their assessment).

Fourthly, it has been argued successfully in Ontario that subjective class definitions tend to unduly narrow the class, anticipating entitlement as they do[50]—paradoxically, the same jurisdiction in which over-broad, over-inclusive class definitions have also caused commencement difficulties in some instances.

A further argument against subjective class definitions was raised by the defendants in the Australian cases of *King v GIO Australia Holdings Ltd*[51] and *Nixon v Philip Morris (Australia) Ltd*.[52] It was contended that a subjective class definition could mean no conclusion of the litigation, contrary to the goal of judicial economy which underpins the class action. The defendants argued that if, at the end of the litigation (when common and individual issues had been determined), the subjective elements of the class definitions were not satisfied by each individual class member, then the class would become devoid of members. Those persons would not be bound by the result of the proceedings (for only class members were bound by the outcome), and that would mean that the litigation would fail to conclude the proceedings for the benefit of the defendants in any final way.[53] In contrast, an objective class definition would bind all those who fell within it in respect of the matters contained in the final judgment.

As noted previously, it is a general criterion for commencement in the North American jurisdictions that the class definition should be objectively, and not subjectively, worded. Indeed, at the highest appellate level, the Supreme Court of Canada has endorsed the use of objective definitions under Ontario's regime.[54] However, Australian courts have not heeded the contentions against subjective definitions, and in that jurisdiction, they are employed often and with judicial approval.

(ii) Arguments for

Although the argument that a narrow class definition does not give rise to finality of the proceedings for the defendant has been said to have a "superficial charm",[55] it has been rejected under Pt IVA. Moore J accepted in *King v GIO Australia Holdings Ltd*[56] that if it was not a statutory or common law breach by the defendant which caused class members to refuse the takeover offer, or if any breach which was established against the defendant did not in fact cause loss to the class members, then the class (as it was defined) would become devoid of members. Similarly, in *Nixon v Philip Morris (Australia) Ltd*,[57] Wilcox J agreed with the defendant that whether class member smokers commenced, continued or failed to quit smoking because of the conduct of the tobacco defendants would not be known until those people gave evidence; and if he or she failed to

[50] *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [11].
[51] (2000) 100 FCR 209.
[52] (1999) 95 FCR 453.
[53] *King* (2000) 100 FCR 209, [42]; *Nixon* (1999) 95 FCR 453, [125].
[54] *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC) [17].
[55] *Nixon* (1999) 95 FCR 453, [126] (Wilcox J).
[56] *King* (2000) 100 FCR 209, [42].
[57] *Nixon* (1999) 95 FCR 453, [126].

establish the causal link, then it would follow that that person was not a class member. In either of those scenarios, the courts agreed that the class members who did not satisfy the subjective element would not be bound by the outcome of the class proceedings, and would be free to bring a later proceeding against the same defendants.

However (continued the court), that in no way produced judicial inefficiency, a lack of finality, or an undue narrowing of the class, as contended. Instead, the doctrine of issue estoppel would ensure that, having failed to establish a subjective matter, say reliance, causation or damage, in the class action,[58] the class member would be precluded from contending that the same reliance, causation or damage could indeed be made out in a later action against that same defendant. To that extent, a different cause of action would be possible to mount which did not require proof of reliance, causation or damage, but then (it was held), "it is always true that a [class] member is free to bring a second action against the same defendant in relation to a different cause of action."[59] Thus, the argument that a circular definition that required proof of loss or was defined by reference to "potential outcomes" or some other subjective matter could result in a very narrow class, and consequent lack of finality for the defendant, was given little credence either then[60] or since.[61]

Moreover, these judicial opinions clearly demonstrate that the narrowing of the class by requiring proof of subjective matters, or matters which go to the merits of the litigation, may occur after the determination of the common issues. In *Nixon v Philip Morris (Australia) Ltd*,[62] Wilcox J accepted counsel's argument that any ingredient of the class definition which depends upon a subjective matter will mean that the class membership will not be known until the class members give evidence, but this clearly did not trouble the court. Under Pt IVA, where there is also no preliminary merits of the class action permitted or required, the framing of a class definition which includes subjective elements is not considered to give rise to any preliminary requirements assessment by the court simply by virtue of the fact that class members may be defined by reference to loss and damage, reliance, or other subjective characteristic. Australian courts would not regard a series of mini-trials to determine class membership as

[58] Whether as a common or as an individual issue for determination in those class proceedings.

[59] *Nixon* (1999) 95 FCR 453, [126], endorsed on appeal by Sackville J: *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) [100]–[101]; also *King* (2000) 100 FCR 209, [43]–[44].

[60] Note that, although the decision of Wilcox J was overturned on appeal: (2000) 170 ALR 487 (Full FCA), that appeal was successful on other grounds, and as noted above, Sackville J endorsed this particular aspect of Wilcox J's views in that appeal. Also: *King v GIO Aust Holdings Ltd* (2000) 100 FCR 209, [43]–[44] where Moore J endorsed the view of Wilcox J, and reiterated that this view was not affected by the appeal.

[61] Eg: *Wilkins v Dovuro Pty Ltd* (1999) 169 ALR 276 (FCA) [2] (class defined by reference to whether group members—Canola growers who purchased seed—suffered loss in having to contain or eradicate weeds allegedly included in seed). Also: *Patrick v Capital Finance Corp (Australasia) Pty Ltd* [2001] FCA 1073, [3]; *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 61, [24] (although there the class definition did suffer from other deficiencies related to ambiguity).

[62] (1999) 95 FCR 453, [125]–[126].

necessary prior to the determination of the common issues in order to satisfy the subjective characteristics contained in the definition, as the Ontario decision in *Nixon* contemplated.[63] There is clearly a philosophical difference of view between the jurisdictions on this point.

A further argument in favour of subjective class definitions under Pt IVA was postulated by Wilcox J in *Tobacco Control Coalition Inc v Philip Morris (Australia) Ltd*.[64] His Honour considered that the class definition—"All persons, bodies corporate, [etc] in Australia who have incurred monies on tobacco control measures or on treating persons suffering from smoking-related diseases by reason of the contravening conduct of the defendants"[65]—would simply be too wide unless there was the causal element in the definition linking the alleged contravention of the tobacco defendants, and the compensation sought by the class members (smokers and health groups). His Honour considered that the class definition was required to reflect the cause of action for misleading and deceptive conduct that was pleaded, under which it was not sufficient to just prove illegal conduct on the defendant's part—the class members' loss or damage had to stem from that contravention.[66] Although the class definition in this case failed on other grounds,[67] it did not fail on the basis that it included a subjective element in the definition. As a result, as Beach has observed, "it seems clear that, if an element of the pleaded cause of action is subjective (or peculiar) to the individual group member, then the group description must, as part of the enumeration of the requisite elements, include or express that subjective element" under Australian class action jurisprudence.[68]

2. Conclusion

The dichotomy of judicial opinion among the focus jurisdictions about the appropriate definition of a class calls for some expression of preferability, especially where the failure to "get the definition right" has had the serious consequence of denying certification of class proceedings in Ontario. Several reasons suggest that the use of subjective class definitions is supportable.

First, the distaste for both over-inclusive and subjective definitions exhibited in Ontario can work extreme difficulties. Indeed, it is a constant struggle to "meet a reasonable balance between inclusion and unworkability",[69] between

[63] *R v Nixon* (SCJ, 12 Mar 2002)

[64] [2000] FCA 1004.

[65] A paraphrase of the definition.

[66] *Tobacco Control Coalition Inc v Philip Morris (Aust) Ltd* [2000] FCA 1004, [85].

[67] It contained reference to future class members.

[68] JBR Beach, "Representative Proceedings—Pleadings" (Commonwealth Law Conference, Melbourne, 2003) [11].

[69] *Cotter v Levy* (SCJ, 24 Mar 2000) [14] (the class definition in this case was defined by Crane J as follows: "having in mind the serious difficulties in conforming a mass action tort to class proceedings, the appropriate class definition would be those persons who owned or occupied property

something which is narrow but impermissible by reason of its subjectivity, and a definition which is objective but over-inclusive. No case demonstrates this better than *Chadha v Bayer Inc*.[70] The definition, reproduced previously, was completely struck out as flawed, on the basis that its second part was over-inclusive (because some home-owners would not have suffered damage), and its first part was subjective because it required proof of damage from the alleged cartel.[71] On further appeal, the Ontario Court of Appeal framed the issue as follows: "Is the class definition, as formulated by the motion judge, in error because it defines the class in terms of those who have suffered damages and not in objective terms, and therefore turns on the outcome of the litigation or the merits of the claim?" The court unanimously confirmed that the class definition was, in this respect too, flawed, because the definition was not objective, but turned on the outcome of the litigation or the merits of the claims of the class member homeowners.[72]

Similarly, as Mauro has pointed out,[73] the description of the class in *Naken v General Motors of Canada Ltd*, the case which was the trigger for implementation of the CPA 1992, contained subjective elements. The Court of Appeal propounded[74] that the class action could proceed if the description of the class was amended to comprise those Firenza owners who saw a written warranty in advertisements and relied upon that warranty to purchase their new vehicles. The Court of Appeal subsequently rejected[75] further submissions by the defendant that the class definition was flawed, as it depended on those who had a successful cause of action. Of course, the decision as a whole was reversed by the Supreme Court of Canada subsequently,[76] based as it was upon the inadequate representative rule. However, it seems, as Mauro notes, incomprehensible that the drafters of the new Act would have thought that the *Naken* plaintiffs would have been uncertifiable under the new regime if the Court of Appeal's definition was adopted.

The second reason supporting the preference for a subjective class definition is that it satisfies, to a greater extent than does an objective definition, the threefold purposes of a class definition which have been proposed by case law in both

within the 'extended area' . . . I exclude the then patients of the Hamilton General Hospital; I find their inclusion unmanageable. . . . The 'extended area', in my view, meets a reasonable balance between inclusion and unworkability, keeping in mind that I make no inference or presumption of liability or damage as against the defendants to this action").

[70] (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct), aff'd: (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA), leave to appeal refused: SCC, 17 Jul 2003.

[71] *Ibid* (Div Ct), [49].

[72] *Chadha v Bayer Inc* (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA) [69].

[73] C Mauro, "Class Actions: The Defendant's Perspective" (1994) 5 *Canadian Insurance L Rev* 29, 31–32.

[74] (1979), 92 DLR (3d) 100 (Ont CA) and later proceedings at 114.

[75] Judgment delivered 17 Jan 1979.

[76] [1983] SCR 72, 144 DLR (3d) 385.

Australia[77] and Canada,[78] as well as by academic commentary elsewhere:[79] "(a) to identify those persons who have a potential claim for relief against the defendant/s; (b) to define the parameters of the action so as to identify all the persons who will be bound by the result; and (c) to describe who is entitled to notification of the suit so that such persons may determine whether or not they are class members and may consider their opt-out rights."

To test this suggestion, consider the class definition in *Bywater v Toronto Transit Commission*,[80] in which a class action was sought to be commenced in respect of a 1997 Toronto subway fire. The approved and rejected class definitions are reproduced in Table 9.1:

Table 9.1 Bywater *class definition*

Approved (objective) class definition	Rejected (subjective) class definition[81]
All persons . . . who were exposed to smoke in TTC vehicles or on TTC premises arising from a fire which commenced at approximately 7.15pm on Wednesday, August 6, 1997 at or near the Donlands subway station	All persons . . . who were exposed to smoke in TTC vehicles or on TTC premises arising from a fire which commenced at approximately 7.15pm on Wednesday, August 6, 1997 at or near the Donlands subway station ***and who suffered loss or injury resulting from smoke inhalation***

Having regard to the first purpose of a class definition, a subjective description better identifies those who have a potential claim for relief against the TTC. Proof of damage was a requirement of the negligence claim instituted against that defendant, and it was clearly not sufficient to base relief upon mere exposure to smoke. As Wilcox J noted in the *TCCI* case, the class definition will be too wide if it is necessary under the cause of action that the class members

[77] Although not using this tripartite formulation expressly, the same three factors have emerged in the Australian judgments as the significant reasons for a clear class definition: *Bright v Femcare Ltd* (2000) 175 ALR 50 (FCA) [22]; *Tobacco Control Coalition Inc v Philip Morris (Aust) Ltd* [2000] FCA 1004, [83], [89]; *Petrusevski v Bulldogs Rugby League Club Ltd* [2003] FCA 61, [19]–[22]; *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [29]; and *Cook v Pasminco Ltd* [2000] VSC 534,[59], in relation to similar State legislation.

[78] *Western Canadian Shopping Centres Inc v Dutton* (2001), 201 DLR (4th) 385, [2001] 2 SCR 534, [38]; *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [10]; *Schweyer v Laidlaw Carriers Inc* (2000), 44 CPC (4th) 236 (SCJ) [17]; *Ormrod v Hydro-Electric Comm of the City of Etobicoke* (2001), 53 OR (3d) 285 (SCJ) [31]; *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219 (SCJ) [53]; *Olsen v Behr Processing Corp* (2003), 17 BCLR (4th) 315 (SC [in chambers]) [29]; *Givogue v Burke* (2003), 25 CCEL (3d) 91 (SCJ) [12]; *Lacroix v Canada Mortgage & Housing Corp* (2003), 36 CPC (5th) 150 (SCJ) [22]; *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 360 (SCJ) [47].

[79] *ManLRC Report*, 60–61; *SLC Report*, [4.64]; Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) 217.

[80] (1999), 27 CPC (4th) 172 (Gen Div). The suggestion will be variously tested by drawing upon Australian judicial pronouncements, and counsels' winning and losing arguments, in cases that have been discussed in this section.

[81] Specifically urged by the defendant but rejected by Winkler J: at [10]–[11].

suffered loss or damage which stemmed from the defendant's contravention, and that linkage is not mentioned.[82]

Moreover, in respect of the opt-out notice (the third purpose), the articulation of a subjective class definition which is then reproduced in the notice more clearly demonstrates to the putative class members the matters that will be required to obtain relief, so that they can decide whether they wish to remain part of the action or not. *King's* case, wherein this point was addressed, provides an excellent example.[83]

In addition, the subjective narrower class definition does not mean that the fewer number of persons "bound by the result" will lead to increased litigation for the defendant. To analogise the *King/Nixon* proposition, if the class members who did not opt out of the class in *Bywater* could not successfully prove in this class action that they sustained loss or damage from the smoke inhalation under the subjective definition, then they would be estopped in future proceedings in which loss was said to arise from the conduct of the TTC from contending that loss or damage did result from that conduct. The Australian decisions canvassed previously[84] have signified that an appropriate measure of finality for the defendant will be achieved via the doctrine of issue estoppel where subjective class definitions are employed.

In summary, the arguments that a subjective class definition requires the court to assess the preliminary merits of the claim, or to seek to define those who will ultimately succeed,[85] have not been propounded by Australian courts as a reason to avoid subjective class definitions. To the contrary, it has been judicially emphasised that defining the class by reference to subjective criteria does not in any way govern or qualify how the causes of action must be pleaded and proved,[86] nor does it introduce a preliminary merits criterion to the class claim.[87] If the test of an appropriate class definition is to "enable the court to determine whether any person coming forward was or was not a class member", as the OLRC[88] proposed and which has since been judicially

[82] *Tobacco Control Coalition Inc v Philip Morris (Aust) Ltd* [2000] FCA 1004, [85].

[83] The opt-out notice (reproduced in Sch 1), approved at first instance: *King v GIO Aust Holdings Ltd* [2000] FCA 1869, aff'd: [2001] FCA 270 (Full FCA), stipulated, inter alia:

> You are a group member if you: (a) owned shares in GIO continuously between 25 August 1998 and 4 January 1999; and (b) did not accept the takeover offer for those shares made to you by AMP on 25 August 1998 and varied on 9 December 1998; and (c) did not accept the takeover offer by reason of the various representations and conduct of the Respondents detailed in the Statement of Claim; and (d) suffered a loss as a consequence; and (e) have a claim against all the Respondents.

[84] *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453 (FCA), and on appeal, *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA); *King* (2000) 100 FCR 209 (FCA); *Tobacco Control Coalition Inc v Philip Morris (Aust) Ltd* [2000] FCA 1004.

[85] *Webb v K-Mart Canada Ltd* (2000), 45 OR (3d) 389 (SCJ) [18].

[86] *King v GIO Aust Holdings Ltd* (2000) 100 FCR 209 (FCA), [40].

[87] *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [123].

[88] *OLRC Report*, 373.

endorsed,[89] then a subjective definition assists the court in that task. It must simply be accepted that the determination of whether each individual plaintiff is a member of the class can only properly be made at some stage *after* the resolution of the common issues. To return to that most useful analogy drawn by Lennox, the class most certainly does not have to be built at the very commencement of the proceedings.[90]

C INFORMING THE CLASS

The shape of a class is also determined by who is notified of the fact that an action is on foot. The question of notice is particularly vital for three reasons.[91] First, the members of the proposed class will have their rights determined by a class proceeding unless they choose to opt-out prior to any common issues trial. If the defendants win the common issues trial, all class members' claims will be extinguished. Therefore, if an opting out arrangement is to be a realistic and workable option (and, also, if it is to comply with relevant requisite constitutional requirements of due process), the potential class members must be adequately informed of their opt out rights and of the need to make a decision. Secondly, by its very nature, a class action will be brought by a representative plaintiff on behalf of class members who may be unidentified or unknown. In all probability, these absent class members will lack adequate knowledge of the suit and what is being claimed by it until informed by the representative plaintiff. Thirdly, notice informs reluctant and legally unrepresented class members of precisely how to take steps to protect their interests. However, despite unanimous agreement in principle upon the importance of notice for these several reasons,[91] the treatment of opt-out notices throughout the focus jurisdictions has been startlingly variant.

This section will focus upon three issues associated with the opt-out notice which have given rise to controversy, viz: whether an opt-out notice needs to be given to class members in damages class actions; how must it be given and what must it contain; and who should pay for it. These have all been dealt with quite disparately by the drafters of the class action regimes of the focus jurisdictions, and there has now been sufficient case law under each regime for these differences to become particularly manifest.

[89] *Anderson v Wilson* (1998), 156 DLR (4th) 735, 37 OR (3d) 235 (Div Ct) [50], observation not affected by successful appeal; *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [11]; *Robertson v Thomson Corp* (1999), 171 DLR (4th) 171, 43 OR (3d) 161 (Gen Div) [25]; *Webb v K-Mart Canada Ltd* (2000), 45 OR (3d) 389 (SCJ) [21].

[90] D Lennox, "Building a Class" (2001) 24 *Advocates' Q* 377, 378–79.

[91] These reasons are variously drawn from the following: *ManLRC Report*, 68–69; *AltaLRI Report*, [257]; *Final Woolf Report*, [48]; *OLRC Report*, 493, 510; *VLRAC Report*, [6.32]; *FCCRC Paper*, 49–51; *SALC Report*, [5.10.24]; *ALRC Report*, [188]; *SLC Report*, [4.58]; Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 7; *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [132].

1. Whether the Opt-out Notice is Mandatory

The scenario is that the class action has commenced, with the class suitably defined, and now the representative plaintiff (and class lawyers) are confronted with the prospect of having to let class members know of it. Quite probably, the representative plaintiff will have a less-than-clear idea of how many class members there are, who thay are and where they are located. Giving of notice in a class action in these circumstances may be costly, time-consuming and off-putting, having regard to the method of notice used, class size and spread. The most crucial questions, therefore, are whether notice is mandatory at all, and whether it should be necessary to give *individual personal* notice to class members or whether some other less onerous method of notice distribution is sufficient. It is apparent that, in this regard, the statutory frameworks of the Australian and Canadian regimes have been drafted to respond to perceived difficulties with the opt-out notice requirements under FRCP 23(c)(2) (now FRCP 23(c)(2)(B)),[92] which prescribes the notice requirement for (b)(3) class suits.

With respect to damages class actions,[93] the various regimes contain quite notable differences as to whether opt-out notice is mandated by statute, mandated by statute but with narrow statutory caveats whereupon notice can be dispensed with, or whether the notice is discretionary in the sense that the statute leaves it to the court to dispense with opt-out notice if the court considers it appropriate to do so. These differences are noted in Table 9.2.

There are some parallels between the US and Australia in respect of the compulsory notice in damages suits (although, as will be discussed shortly, there is a considerable difference between the two jurisdictions in the *type* of notice to be given). The Australian regime is very explicit: if the relief sought in a class action includes a claim for damages, then notice is mandatory,[94] and there are no further statutory exceptions nor room for judicial discretion. This clarity is not quite so evident under the US regime. In class actions suits for damages which are usually instituted under r 23(b)(3), notice is certainly mandatory under r 23(c)(2)(B). Class actions seeking declaratory or injunctive relief under r 23(b)(2) and class actions against a limited fund under r 23(b)(1) are not subject to the mandatory notice requirements of r 23(c)(2)(B), but instead, notice *may* be ordered under r 23(c)(2)(A) at the court's discretion. To date, notice in

[92] This sub-rule was amended in the most recent round of amendments, effective 1 December 2003, which amendments particularly affect the content of class notice in respect of (b)(3) actions. The previous version of FRCP 23(c)(2) was amended, and the replacement rule for notice for (b)(3) action is now contained in FRCP 23(c)(2)(B). Its wording is very similar to the previous FRCP 23(c)(2).

[93] Given the emphasis placed upon damages class actions in this book, this section will exclude from consideration those class actions certified under FRCP 23(b)(1) or (b)(2), in respect of which the amended FRCP 23(c)(2)(A) now specifically calls attention to the court's authority to direct notice of certification to members of these classes.

[94] FCA (Aus), s 33X(2).

Table 9.2 ***Requirement of opt-out notice: a comparison***

Australia[95]	Ontario[96]	British Columbia[97]	United States
mandatory (but can be statutorily dispensed with if class action involves no claim for damages)	discretionary (mandated by statute but can be dispensed with if court considers by factors—including costs of notice, size of claims, type of relief sought, number of class members, where class members reside —that dispensation is warranted)	discretionary (mandated by statute but can be dispensed with if court considers by factors—presence of subclasses plus the factors nominated under Ontario's statute—that dispensation is warranted)	mandatory in the case of r 23(b)(3) class actions for damages;[98] at the discretion of the court in r 23(b)(1) and(b)(2) class actions[99]

these actions has been noted by the Federal Judicial Centre to be frequently advisable to "help bring to light conflicting interests or antagonistic positions . . . of which the court was not aware at the time of the certification hearing."[100] Further, according to Newberg, the trend of authority has been to require, within the court's discretion, some sort of notice to absent class members when monetary damages are sought under r 23(b)(2).[101] The amendments effected to FRCP 23 in December 2003 leave the mandatory notice requirements in respect of (b)(3) class actions unaffected. The Advisory Committee Notes reiterate that "[t]he present rule expressly requires notice only in actions certified under Rule 23(b)(3)."[102]

[95] See FCA (Aus), s 33X(1)–(2).

[96] CPA (Ont), s 17(1)–(3), s 18(1), s 19(1), s 29(4).

[97] CPA (BC), s 19(1)–(3), s 20(1), s 21(1), s 35(5).

[98] The previous version of FRCP 23(c)(2) provided, in relevant part: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The present FRCP 23(c)(2)(B) now provides, in same relevant part: "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable . . . [same wording as previously]".

[99] FRCP 23(c)(2)(A), amended 1 Dec 2003. The Advisory Committee Notes explain that, in respect of the court's continuing authority to direct notice to class members in a (b)(1) or (b)(2) class action: "For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice".

[100] Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) § 30.211; *Newberg* (4th) § 8.5 p 177.

[101] *Newberg*, *ibid*, 178, citing: *Fontana v Elrod*, 826 F 2d 729, 732 (7th Cir 1987); *Holmes v Continental Can Co*, 706 F 2d 1144, 1155 (11th Cir 1983).

[102] 205 FRD 116, 123 (2003).

As Newberg observes, the contrasting provision for absolute mandatory opt-out notice in (b)(3) actions was seen by those who drafted the 1966 revisions to rule 23 as "an essential concomitant to class judgment finality for due process purposes" under the Fourteenth Amendment;[103] and to that end, in *Eisen v Carlisle and Jacquelin*,[104] the Supreme Court confirmed that:

> The Advisory Committee described (c)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject." The Committee explicated its incorporation of due process standards by citation to *Mullane v Central Hanover Bank and Trust Co* . . . and like cases.

Mullane's case[105] has since been judicially cited[106] as laying down the due process standard for adequate notice in monetary class actions. However, the decision has been criticised on at least two bases. First, it has been academically questioned[107] whether the facts of *Mullane*[108] justified mandatory personal individual notice for very large classes. The decision itself certainly mandated individual notice in the class actions comprising a small number of members, but whether the decision justified extending that mandate in all cases has been questioned. Additionally, it has been suggested that the mandatory notice prescribed for (b)(3) suits is perhaps too excessive: "[t]he necessary converse of the Advisory Committee's avoidance of hard analysis of the due process precedent was its promulgation of notice language more stringent than due process requires".[109] Nevertheless, the mandatory notice requirement for (b)(3) suits continues to be rigorously applied, even in stunningly big mass tort suits.[110]

In the absence of any similar express due process restraints, and as Table 9.2 shows, the legislatures of Australia and Ontario have adopted entirely different approaches to the question of whether opt-out notice should be mandatory or not. The Federal Court of Australia is required to adopt an approach which is arguably stricter than under FRCP 23, for as noted above, it can only dispense

[103] *Newberg* (4th) § 8.4 pp 175–76.

[104] 417 US 156, 173, 94 S Ct 2140 (1974).

[105] 339 US 306, 314–15, 70 S Ct 652 (1950).

[106] *Phillips Petroleum Co v Shutts*, 472 US 797, 812, 105 S Ct 2965 (1985).

[107] *Newberg* (4th) §8.4, p 175, citing also: G Goldberg, "*Eisen II*: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in Class Action Rejected" (1973) 73 *Columbia L Rev* 1641, 1652.

[108] A non-class action lawsuit in which court had to determine adequacy of statutory notice to trust fund beneficiaries.

[109] *Newberg* (4th) § 8.4 p 175.

[110] *Vancouver Women's Health Collective Society v AH Robins Co Inc (Dalkon Shield litigation)*, 820 F 2d 1359, 1364 (4th Cir 1987) (notice plan to class members approved; of foreign notice plan, court commented: "the notification program used by Robins was, under the circumstances, reasonable. The evidence indicates that every news outlet in the world received the information. . . . It appears to this court that the extensive notification program was a success. . . .While it may be argued that the program could be better instituted if it were reformulated, this fact does not render it unreasonable. Virtually anything, if repeated, can be improved upon"); *In re Agent Orange Product Liab Litig*, 818 F 2d 145, 167–69 (2d Cir 1987), and see *Newberg*, *ibid*, §17.20.

with notice to absent class members where the relief sought does not include any claim for damages.[111] As a result of this limitation, and given the lesser period of the regime's operation, dispensation has been very rarely obtained.[112] Moreover, even where damages are not sought by the class such that notice could be statutorily dispensed with, the court will nevertheless exercise its discretion in determining whether such a dispensation ought to occur. In doing so, the court is bound to take account of the consequences for a class member of being bound by an adverse decision, and where those consequences are likely to be significant, it appears that the court is "very likely not to be favourably disposed towards an application to dispense with the notice requirement", the provision being "not a charter for the infliction of injustice."[113] Thus, the position under Pt IVA is that an opt-out notice is mandated, but there is a narrow range of cases for which it may be dispensed with, and which has, to date, been rarely invoked.

It follows that opt-out notice is mandated for damages actions under Pt IVA, regardless of arguments that notice may not be needed in the case of a very small class, or could severely burden the class representative, or may actually preclude class litigation if too onerous in the case of a large class of plaintiffs who each have a very small claim. As discussed shortly, arguments to the effect that the opt-out notice will be too onerous for the representative plaintiff to bear is tempered under Pt IVA by the wide discretion afforded to the Australian Federal Court to determine the type of opt-out notice by which class members may be informed of the commencement of the proceedings and of their rights thereunder.

The Canadian regimes of Ontario[114] and British Columbia[115] exhibit quite a contrary view from the position adopted in Australia. Those statutes perceive that opt-out notice inevitably will involve expense and labour on the part of the representative plaintiff, and that the court should decide whether, in the circumstances of a particular class action, it is appropriate to impose these costs.[116] The regimes expressly allow the court to be given a discretion, in *all* types of class actions, to determine whether an opt-out notice should be given to the class, so that if, for example, the claims of the class members are small and the effect of ordering notice would be to prevent the class action from proceeding,

[111] Eg: where declaratory relief is sought as to the interpretation of a contractual provision, obiter suggestion in *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [68], or a trust deed, counsel's suggestion in: *Mobil Oil Aust Pty Ltd v State of Vic* (HCA, SL application, 5 Feb 2002).

[112] Dispensation awarded in: *Holt v Honourable Daryl Manzie* [2000] FCA 1857, especially order 8, but sought and refused in: *Schanka v Employment National (Admin) Pty Ltd* [1999] FCA 1812, [1] ("there is an insufficient basis, in my opinion, for not informing members of the class of these proceedings, which have been on foot for over 18 months, that the proceedings have commenced and to give them the opportunity to opt out, if they wish, before the proceedings progress any further").

[113] *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [68]. The Australian provisions with respect to personal individual notice were held in this case not to infringe any constitutional right on the part of absent class members.

[114] CPA (Ont), s 17(2).

[115] CPA (BC), s 19(2).

[116] This view, and the later derivative statutory embodiment, is expressed in *OLRC Report*, 511.

it is open to the court to dispense with notice altogether. In contrast to the Australian and American schemas, the aforementioned Canadian regimes[117] have been drafted to permit the court to explicitly take account, in each case, of the benefits and costs associated with notice and thereby assess whether it should be ordered at all.[118] It is evident that, notwithstanding the latitude provided to the Canadian courts on a case-by-case basis, dispensation of any opt-out notice has been ordered only extremely rarely to date.[119]

The contrasts between the regimes with respect to the mandatory/discretionary requirement of class opt-out notice is reflected in the fact that law agencies have also been highly divided on the subject of post-certification notice. Whilst some have advocated that the court should have a discretion to determine whether notice should be given to the class,[120] others have preferred the view that the interests to be protected by the commencement of such proceedings are sufficiently important that all class members should be notified of the existence of the proceedings.[121]

Having regard to the difference in legislative treatment of whether opt-out notice should be mandatory or not, and the judicial implementation of those various regimes to date, it is arguable that opt-out notice to absent class members should indeed be statutorily required for damages class actions with no room for judicial discretion to dispense with that requirement. Several points appear to support that contention. First, although the Ontario legislature implemented a discretionary notice regime in which the court may dispense with opt-out notice in any class action where it considers it appropriate to do so, it is evident that the OLRC recommended a discretionary notice regime in circumstances where it also recommended[122] that the court should decide, as a matter of discretion, whether a right to opt out should be provided to class members at all. In the end, an absolute right to opt out was legislated under the Ontario regime.[123] Mandatory class actions are not permitted. In that regard, the comments by the OLRC that "[i]f the court has decided that the interests of individual class

[117] Quebec's regime is less flexible—it requires that notice always be given: CCP, arts 1005(b), 1006, and 1030.

[118] See the list of factors prescribed by the legislature which must be taken into account when determining whether opt-out notice should be given: CPA (Ont), s 17(3); CPA (BC), s 19(3).

[119] Indeed, one of the only cases to date to dispense with notice at commencement occurred prior to certification: *Chopik v Mitsubishi Paper Mills Ltd* (2003), 29 CPC (5th) 277 (SCJ) [16], [20] (pre-certification application to discontinue class proceedings without payment to proposed representative plaintiff or class members; not necessary to inform class members of proceedings before discontinuance judicially approved where no evidence to suggest any claims withheld in reliance on the proceeding; discontinuance should be possible with minimal expense to allow the resolutions of marginal cases—"[a]n order to give notice would require that the parties incur further substantial expense with no corresponding benefit").

[120] *Final Woolf Report*, [48]; *VLRAC Report*, [6.35] and recommendation 8; *SLC Report*, [4.67]; *ManLRC Report*, 70 and recommendation 23; *AltaLRI Report* and recommendation 9, [268]; *FCCRC Paper*, 51; *OLRC Report*, 511.

[121] *ALRC Report*, [189]; and seems to be the favoured approach of *SALC Report*, [5.10.24], although it is not entirely clear.

[122] *OLRC Report*, 510–11.

[123] CPA (Ont), s 9.

members are sufficiently important that they should be allowed to opt out of the class action, class members should be informed of this opportunity"[124] reinforces the argument that, where an absolute right to opt out is conferred by the *legislature*, a mandatory notice regime should operate with equal vigour.

Secondly, the Australian regime, in which an absolute right to opt out is coupled with mandatory notice for all class suits in which damages are claimed, has functioned effectively for over a decade. Thirdly, it is arguably the type of notice (individual personal notice) required under FRCP 23(b)(3) suits which has drawn the bulk of criticism to date rather than the fact of mandatory notice for damages class suits under that regime. The onerous burden cast by the requirement of individual personal notice under FRCP 23, and how other jurisdictions have responded to the US experience, will be considered shortly. Fourthly, there is a stark lack of case law authorities in which notice has been dispensed with under the discretionary notice regimes of Ontario or British Columbia, where these regimes have, in combination, been operative for over 15 years to date. This indicates that Canadian courts are most reluctant to run the risk of some class members not being aware of the existence of the class action where class members have an absolute right to opt out, and seems to confirm the view that a statutory mandate for opt-out notice in damages actions would not significantly change the status quo that presently applies under discretionary notice regimes.

Hence, in answer to the first question postulated in this section's introduction, and based upon the experience of the focus regimes to date, mandatory opt-out notice for *all* class actions claiming some monetary relief is arguably "best practice". The controversy surrounding the issue of opt-out notice, however, becomes even more marked when one turns to consider the *type* of opt-out notice required to be provided to absent class members under the focus regimes. Again, no regime duplicates another precisely, and the comparisons are instructive.

2. Type of Opt-out Notice

(a) Status of individual personal notice

As one law commission put it, "[t]he more at stake for each person, the more effective the notice should be . Individual notice is likely to be the most effective method of giving notice but it is also likely to be the most costly."[125] The jurisdictions of the United States, Australia and Ontario again display three different approaches towards individual personal opt-out notice to class members, as Table 9.3 shows.

[124] *OLRC Report*, 512. See similar comments at 510 that "should the court grant a right to opt out to some or all of the class members, notice would be necessary to inform them of their right to exclude themselves from the class action." It is plain that the OLRC was not advocating a discretionary notice arrangement where an absolute right to opt out was implemented.

[125] *ALRC Report*, [190].

Table 9.3 ***Requirement of individual opt-out notice: a comparison***

Australia[126]	**Ontario**[127]	**United States**[128]
"The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so."	"The court may order that notice be given, (a) personally or by mail; (b) by posting, advertising, publishing or leafleting; (c) by individual notice to a sample group within the class; or (d) by any means or combination of means that the court considers appropriate."	"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

It is evident from this comparison of legislative wording that, wary of implementing the perceived rigidity of the US rule into their own schemas (and with acknowledgement that the US courts are bound by due process restraints in the US constitution which have no counterpart in other common law jurisdictions[129]), law makers elsewhere have taken explicit steps to allow the court a wide discretion as to how notices may be given to the class members. These wide provisions encompass opt-out notices as well as other types of notice that may be required during the course of the class proceedings.[130] The legislatures in Australia and Canada encouraged flexibility and innovation in delivering effective notice, and experience has shown that the judiciaries have responded accordingly. In seeking to ensure that class members are informed of the proceeding and their rights to the maximum extent possible, the judicial attitude in these jurisdictions may be summarised in the phrase, "[p]erfectability is not the guiding principle."[131]

The Australian schema represents the one end of the legislative spectrum; individual personal notice to each absent class member is to be used as a last resort. The court may only order that notice be given personally to each class member if two preconditions are satisfied: first, that it is reasonably practicable, and second, that it is not unduly expensive to provide individual notice. The first

[126] See FCA (Aus), s 33Y(5).

[127] CPA (Ont), s 17(4). The provisions of the BC statute are very similar: CPA (BC), s 19(4).

[128] FRCP 23(c)(2)(B), effective 1 Dec 2003, worded very similarly to the former FRCP 23(c)(2).

[129] The ALRC considered and rejected the US approach for the Australian jurisdiction (*ALRC Report*, [190]), and for earlier distancing of US constitutional differences, see: Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 7. See also the distinction drawn by the OLRC that "it should be noted that, in considering the notice issue, the Commission is not obliged to defer to an absolute "due process" requirement": *OLRC Report*, 509.

[130] The Australian provision in FCA (Aus), s 33Y applies to all notices under Pt IVA, not only to notice of commencement. The Canadian provisions are each ostensibly under the section dealing with notices of certification, but by means of later "relating back" provisions, they apply to post-judgment and catch-all notices also.

[131] As noted in *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 304, [19].

resort for Australian judges is by "press advertisement, radio or television broadcast, or by any other means",[132] and it is entirely up to the court to decide the way in which the opt-out notice is to be given.[133] As has been judicially explained, in determining what is "reasonably" practicable and not "unduly" expensive, the court is must consider the possible adverse consequences to a class member of the class action as well as of any possible benefits; a "value judgment is required", such that a court "is more likely to be satisfied that personal notice is reasonably practicable and not unduly expensive if an adverse determination will have significant consequences for a [class] member."[134] Notwithstanding the imposition of these two caveats, personal notice has certainly been implemented under Pt IVA, to as many as 60,000 class members,[135] and variously by pre-paid registered mail[136] or ordinary post.[137]

Given the statutory provision of s 33Y(5) which only permits individual notice to absent class members if the court is satisfied that it is practicable and inexpensive, it is unsurprising that there has been a challenge to the constitutional efficacy of the framework under Pt IVA, on grounds which drew support from the US rule. In *Femcare Ltd v Bright*,[138] the defendant product manufacturer contended[139] that Pt IVA as a whole, or specific provisions thereof, were invalid because, contrary to the requirements of Chapter III of the Constitution, they purported to authorise the Federal Court of Australia to exercise power in a manner not in accordance with "judicial process". In particular, it was argued that Pt IVA "departed from the fundamental requirement that the judicial process must accord procedural fairness", in that it failed to ensure that class members receive adequate notice of the class action, and that it was "inevitable that a significant proportion of the represented class in any proceeding would not receive notice of the commencement of the proceeding, at least if notice was provided only by media advertisements." The defendant accepted (said the court) that the requirements of Chapter III would be satisfied by a provision in the form of FRCP 23(c)(2) (now closely reproduced as FRCP 23(c)(2)(B) as set out in Table 9.3), but that, as it was drafted, Pt IVA provided

[132] FCA (Aus), s 33Y(4).

[133] FCA (Aus), s 33Y(3)(b).

[134] *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [73].

[135] Eg: *King v GIO Aust Holdings Ltd* [2000] FCA 1869, order 3 (notices sent to all recorded shareholders on defendant's share register and who did not accept takeover offer to address appearing on the register; court satisfied that this was an appropriate means and was practicable and not unduly expensive; approx 20,000 opt-out notices were subsequently received by the court registry).

[136] Eg: *Courtney v Medtel Pty Ltd* [2001] FCA 1037, [22] (class members the recipients of allegedly defective heart pacemakers; "the cost of service by registered mail is relatively modest and the parties and the Court would have the advantage of knowing which notices have not been delivered. As agreed between the parties, the applicant's solicitors should send the notices by pre-paid registered post to each Group Member at his or her address as ascertained from the database maintained by the respondents").

[137] Eg: *King v GIO Aust Holdings Ltd* [2000] FCA 1869, order 4.

[138] *Femcare Ltd v Bright* (2000) 100 FCR 331 (Full FCA) [75], [77]; approving earlier decision of Lehane J: *Bright v Femcare Ltd* (1999) 166 ALR 743 (FCA).

[139] *Ibid* (Full FCA) [30]–[35] sets out the intriguing argument.

fewer safeguards for class members than did the former FRCP 23(c)(2). The consequence (argued the defendant) was the "ignorant, passive group member"—who does not receive notice of the commencement of the class action and who does not otherwise come to know of it, but who is bound by an adverse determination in the action.[140]

The Full Federal Court rejected this argument, and in the process, explicitly condoned a less stringent means of opt-out notice than is required under the FRCP regime. It was judicially accepted that a class member may not be given or receive "notice . . . personally" of the commencement of the class action and yet will be bound by an adverse (or favourable) outcome. Notwithstanding that some class members may learn of the class action by reading about it in the media or by word-of-mouth, there is at least a possibility under Pt IVA that some members will be bound by the outcome without ever knowing that it was commenced or conducted on their behalf. Nonetheless, the Full Federal Court confirmed[141] that, given that the rationale underlying the judicial process doctrine is the need to avoid bringing the administration of justice into disrepute or the infliction of injustice on individuals, "s 33Y(5) neither brings the judicial system into disrepute nor, having regard to the advantages of representative proceedings for class members, inflicts injustice of a kind that causes the legislation to infringe minimum constitutional standards." It was an instance of where "[t]he price of providing a mechanism for the vindication of rights held in common with others may be departure to some extent from the procedures ordinarily applicable in litigation inter partes."[142]

The middle spectrum of legislative framework is occupied by the Ontario regime, where the court must have regard to an inclusive list of matters (including the costs of giving notice and the class size[143]) in order to determine by what means notice should be given. Unlike the Australian position under Pt IVA, there is no statutory preference indicated for any particular type of notice to absent class members.[144] This enactment actually went against the recommendation of the OLRC,[145] which preferred the view (ultimately enacted in Australia) that the court should be encouraged to employ inexpensive methods of notice, so that, prima facie, opt-out notice should be given by advertisement, publication, posting or distribution. The list of factors, as enacted in Ontario, directs the court's attention to whether, in any given case, it is justifiable to impose the cost and administrative inconvenience of individual personal opt-out notice. In practice, such notice is frequently ordered in conjunction with other notice methods.

[140] Consequent upon FCA (Aus), s 33ZB.
[141] *Femcare Ltd v Bright* (Full FCA) [77].
[142] *Ibid* (Full FCA) [65].
[143] CPA (Ont), s 17(3). See also, CPA (BC), s 19(3).
[144] See CPA (Ont), s 17(4). Also, for similar provisions: CPA (BC), s 19(4).
[145] *OLRC Report*, 511, and see Draft Bill, cl 16(3).

At the other end of the spectrum, invoking individual personal notice as first resort, lies the US federal regime: "While the language of the rule itself makes notice mandatory in a Rule 23(b)(3) damages suit, nature and extent of how that mandate is to be carried out are not predetermined in the rule."[146] The *Manual for Complex Litigation*, however, describes the effect of the US rule in these terms:

> [It] requires that individual notice in (b)(3) actions be given to class members "who can be identified through reasonable effort," with others given "the best notice practicable under the circumstances." When the names and addresses of most class members are known, notice by mail . . . is usually required. Publication in newspapers or journals . . . is necessary if class members are not identifiable after reasonable effort. . . . The determination of what efforts to identify and notify are reasonable under the circumstances of the case rests in the discretion of the judge before whom the class action is pending.[147]

The difficulties associated with the strict requirements of the US notice rule were illustrated in the leading case of *Eisen v Carlisle and Jacquelin*,[148] in which a representative plaintiff with a $70 damages claim[149] purported to institute a class suit on behalf of a large class[150] of odd-lot share purchasers against two dealers. Of the 6 million estimated class members, approximately 2.25 million members could be identified from the defendant's computer records. The estimated cost of sending individual notice by mail to these absent class members was about $315,000, quite regardless of the additional expense that would be required for notice by other means to the other four million class members. Adopting a pragmatic view so as not to "violate the class action device in situations where application thereof as a matter of public policy can be important, such as private antitrust, consumer and environmental litigation", the District

[146] *Newberg* (4th) § 8.2 p 164, speaking of the former FRCP 23(c)(2) which is, in all materials respects, very similar.

[147] Federal Judicial Center, *Manual for Complex Litigation, Third* (3rd edn, St Paul, Minn, West Publishing, 1995) § 30.211.

[148] This was a case of many stages, a "circuitous odyssey" according to the OLRC: *OLRC Report*, 497. It comprised *Eisen I*, 41 FRD 147 (SD NY 1966), which order the Court of Appeals for the Second Circuit held appealable: 370 F 2d 119 (2nd Cir 1966); thereafter reversed and remanded: *Eisen II*, 391 F 2d 555 (2nd Cir 1968). On remand, the district court determined that further information should be elicited, 50 FRD 471 (SD NY 1970), determined that action was maintainable as class action, 52 FRD 253 (SD NY 1971), and required defendants to bear 90% of cost of notice, 54 FRD 565 (SD NY 1972). The Court of Appeals reversed the rulings sustaining prosecution of the case as a class action, 479 F 2d 1005 (2nd Cir 1973) (*Eisen III*), with which the US Supreme Court agreed: *Eisen IV*, 417 US 156 (1974).

[149] Apart from the OLRC, *ibid*, the case has invited much law reform attention in the post-FRCP regimes, eg: *ManLRC Report*, 68; *VLRAC Report*, [6.33]; *SLC Paper*, [6.12]; Law Reform Committee of South Australia, *Report Relating to Class Actions* (Report No 36, 1977) 7; *ALRC Report*, [190].

[150] Initial estimate: "hundreds of thousands", raised to 3.75M class members: *Eisen v Carlisle and Jacquelin*, 41 FRD 147, 151 and fn 2 (SD NY 1966), but eventually reached 6M: *Eisen v Carlisle and Jacquelin*, 52 FRD 253, 257 (SD NY 1971).

Court proactively devised a notice scheme[151] (at a cost of about $21,700) by which to "fairly and adequately protect all interests in the action without imposing what in effect amounts to an insuperable tariff on prosecution of the case."[152]

The Second Circuit, however, rejected that notification scheme, stating that, in order to abide by FRCP 23(c)(2),[153] "[i]f identification of any number of members of the class can readily be made, individual notice to these members must be given, and [the representative plaintiff] must pay the costs. If this cannot be done, the case must be dismissed as a class action",[154] as it duly was. The court admonished the District Court's view of what a "liberal interpretation" permitted in respect of notices for (b)(3) class suits.[155] The Supreme Court subsequently agreed[156] that the District Court had been in error. It confirmed that when class members can be identified, individual notice is mandatory as the "best notice practicable", and that notice requirements could not be "tailored to fit the pocketbooks of particular plaintiffs", despite the consequential inevitable dismissal of the class suit.

In addition to the reluctance of law reformers in other jurisdictions to impose any statutory framework whereby an *Eisen*-type scenario could be re-enacted, the decision has attracted considerable academic criticism within the US jurisdiction. The point has been made that, if defendants are in a position to ascertain class members' names and addresses, that would presumably mandate individual notice to all those so identified, and that (unless costs were shifted to the defendant, a topic discussed in more detail later) defendants thus "had the power to prevent any effective relief for their victims."[157] Newberg's further comment upon the decision is an illustrative nutshell:

[151] Individual notice to all member firms of the New York Stock Exchange and to commercial banks with large trust departments; individual notice to approximately 2000 class members identifiable with 10 or more odd-lot transactions during certain relevant period; individual notice to an additional 5000 randomly selected class members; prominent publication notice in the Wall Street Journal and other newspapers in NY and California. See: *Eisen v Carlisle and Jacquelin*, 52 FRD 253, 267–68 (SD NY 1971). The stringent lengths to which parties must go to comply with the requirements of FRCP 23(c)(2) (and since 1 Dec 2003, see 23(c)(2)(B)) are evident from *Lachance v Harrington*, 965 F Supp 630, 636–37 (Ed Pa 1997): similar combination of individual notices sent to each record holder identified as having purchased stock (in an alleged securities fraud suit) + notice to the nation's 225 largest banks and brokerage companies, and to 704 institutional investors + an additional 1,661 notices to institutional groups and individual investors who later requested notice, presumably in response to the notice they had received from their bank or brokerage company + publication of notice in Wall St Journal.

[152] *Eisen*, *ibid*, 266–67.

[153] Since 1 Dec 2003, see FRCP 23(c)(2)(B).

[154] *Eisen v Carlisle and Jacquelin*, 479 F 2d 1005, 1013–14 (2nd Cir 1973).

[155] *Ibid*, 1015 ("While Judge Tyler seems to have realized that this phase of amended Rule 23 has decided constitutional overtones, he apparently thought the flexibility of the Rule and our statement that the Rule was to be given a liberal interpretation authorized him to exercise his discretion even if this involved the complete disregard of our specific and unambiguous ruling on the subject of individual notice to identifiable members of the class"). The earlier opinion referred to was *Eisen v Carlisle and Jacquelin*, 391 F 2d 555, 563 (2nd Cir 1968).

[156] *Eisen v Carlisle and Jacquelin*, 417 US 156, 176, 94 S Ct 2140 (1974).

[157] *Newberg* (4th) § 8.3 p 170, citing *Eisen v Carlisle and Jacquelin*, No 73-203, at 34 (S Ct Oct Term 1973) (brief for petitioner).

> [It] expresses the contradictions inherent in advocacy of liberal rule construction on the one hand and literal Rule 23(c)(2) application and restrictive implementation on the other. The result was eight years of litigation, extending all the way to the Supreme Court and leading the parties in circular fashion to substantially where they stood at the start. In the process, considerable precedent has been generated . . . Unfortunately, no single set of rules or factors has yet emerged [on class action notice], and courts continue to revisit and refine the illusive issue of reasonable notice.[158]

Thus, under the US notice rule that applies to (b)(3) class suits, when class members can be identified through reasonable efforts, those identifiable class members must receive individual personal notice of the class action and of their right to opt out; for all remaining class members, the "best notice practicable", whether that be by television or radio or journal publication or via toll-free information lines or by letters to state governors, will be ordered in conjunction with individual notice.[159] It is worth noting that the *Eisen* interpretation of the US notice requirement is not an all-encompassing prohibitive one. As Newberg observes, the decision is "of significant concern primarily in those suits that involve massive numbers of small plaintiffs which are identifiable by the defendants or through public records" (but where class members cannot be identified through reasonable efforts by either party, then individual notice is not necessary, and substitute methods can be ordered[160]); so that the impact of *Eisen* is unlikely to be adverse where the class of plaintiffs is sufficiently small so that individual notice will not be prohibitively costly; or where one or more of the class are well-funded plaintiffs able to fund the administrative notice costs at the outset; or where a significant portion of a large class membership cannot be identified through the reasonable efforts of either defendant or representative plaintiff.[161]

To conclude this section, the three class action regimes of the United States, Australia and Ontario have devised quite separate modes of opt-out notice. The US embodies mandatory opt-out notice for damages suits (in most cases), with individual personal notice as the preferred type. Australia has enacted mandatory

[158] *Newberg* (4th) § 8.2 p 165.

[159] *In Re Laser Arms Corp Securities Litig*, 794 F Supp 475, 496 (SD NY 1989) (individual notice to shareholders who could be identified though the use of trading records); *In re Agent Orange Product Liability Litig*, 818 F 2d 145, 167–69 (2nd Cir 1987) (Vietnam veterans exposed to Agent Orange; individual notice to those class members who could be identified through reasonable efforts, via the Agent Orange Registry and those involved in law suits or the Plaintiffs' Management Committee; for the remaining class members, notice ordered via TV and radio announcements, letter to state governors for distribution to state agencies; notice in servicepersons' national publications; fact that large number of mailed notices of Agent Orange class action were returned undelivered and that class counsel failed to ensure that all publication and broadcast notices were provided in timely fashion did not render notice of litigation inadequate); *In re Playmobil Antitrust Litigat*, 35 F Supp 2d 231, 249 (ED NY1998) ("In antitrust actions, individualized notice is common because the identity of purchasers should be available from Defendant's records"), and for numerous other authorities, see: *Newberg*, *ibid*.

[160] *In re Domestic Air Transportation Antitrust Litig*, 141 FRD 534, 546 (ND Ga 1992), and citing; *In re Victor Technologies Securities Litig*, 792 F 2d 862 (9th Cir 1986).

[161] See discussion in *Newberg* (4th) § 8.11 pp 198–99, and points 2(a), (b), (c) at p 199.

notice for damages suits in all cases, but with mass-circulation types of notice explicitly encouraged, and with two preconditions to be satisfied before individual notice will be permitted. Ontario's regime prefers discretionary opt-out notice, and with no preferred type of notice, that being also solely at the court's discretion. It will be recalled that it has been argued previously that mandatory opt-out notice is preferable. In any jurisdiction in which constitutional due process constraints are not determinative, the further question arises as to whether individual personal notice should be required, and on what basis any other method is preferable.

For three reasons, it is arguable that the use of non-individual and non-personal opt-out notice as a first resort, in combination with mandatory opt-out notice for damages suits (that is, the Pt IVA approach), is the superior option. First, in circumstances where many of the individual class member's claims are small, it is extremely unlikely that class members will opt out (the low opt-out rates across the various jurisdictions has been previously mentioned), and accordingly, individual notice appears unnecessary at that early stage.[162]

Secondly, as the Canadian law reform commissions have particularly emphasised, it is apparent that an inexpensive mode of notice is to be strongly preferred at the commencement of the suit, so as to enable the issues in dispute to be determined, and that the post-judgment notice requiring individual participation (if need be) is arguably the more important notice that must be brought to the class members' attention by individual personal notice. The commissions persuasively argue the point along these lines: where active participation by individual class members is required, whether to establish liability or make a damages claim following common issue judgment, or whether to participate in a settlement fund, notice assumes far greater importance then than at the opt-out commencement stage, for in the absence of the former notice, class members may not be aware of the need to come forward.[163]

Thirdly, the extreme diversity of non-individual non-personal notice that has been employed across the focus jurisdictions, and which is considered shortly, exemplifies the variety of means by which putative class members can be informed of the commencement of a class action, but without the stringency and expense of posting individual notice to those who can be identified. Courts in Ontario and Australia have strived to avoid *Eisen* and facilitate methods of notice which will adequately inform putative class members but which requirements will not stultify an action that is otherwise suitable for class action treatment. For the purposes of satisfying the goals of access to justice and judicial economy which the class action device aims to serve, to statutorily cast non-personal notice as a first resort, as the Australian legislature has done, appears extremely laudable.

Finally, individual personal notice distribution may be more easily achievable by distribution by the defendant. It is entirely within the court's discretion in the

[162] For a similar view, see *Final Woolf Report*, [48], [49].
[163] *OLRC Report*, 513–14; *AltaLRI Report*, [257]; *FCCRC Paper*, 50.

Australia schema as to who is to give the notice.[164] In contrast, the Canadian schemas provide that the representative plaintiff must give the opt-out notice to class members, with the caveat that the court may order a party to give the notice that is required to be given by another party under the statutes.[165] Although the US regime is silent on this issue, notice by the defendant has been judicially ordered where considered appropriate. Occasionally, it could be more practicable for the defendant to give the notice, for example, via the defendant's usual shareholders' newsletter[166] or internal mail system[167] or periodic billing statement,[168] and this is allowed for under the regimes.

(b) Non-individual notice

In contrast to the silence under the US notice rule as to the means by which "best notice practicable under the circumstances" can be given, legislatures in other jurisdictions have tended to take the initiative in specifying a wide variety of notice types where individual personal notice is not to be used. As mentioned previously, Australia's regime expressly permits that notice to class members be given by means of "press advertisement, radio or television broadcast, or by any other means."[169] The Ontario regime[170] explicitly allows "posting, advertising, publishing or leafleting". Following recommendation from its law reform commission,[171] the Manitoba legislature additionally provided in Canada's newest class action statute that notice could be given by creating and maintaining an internet site,[172] although other regimes have implemented this option in any event.[173]

The Ontario legislature's direction[174] to the court to consider a number of statutorily designated matters when deciding what means of notice is to be given can impact upon the eventual order of the court. This is especially so when the defendant is advocating a more extensive (and costly) form of non-personal

[164] FCA (Aus), s 33Y(3)(a).
[165] CPA (Ont), ss 17(1), 21; CPA (BC), ss 19(1), 23.
[166] *Dolgow v Anderson*, 43 FRD 472 (EDNY 1968). Also endorsed in *FCCRC Paper*, 57.
[167] *Boyd v Bechtel Corp*, 485 F Supp 610 (ND Cal 1979).
[168] *Zachary v Chase Manhattan Bank*, 52 FRD 532 (SDNY 1971). Also endorsed in *OLRC Report*, 502.
[169] FCA (Aus), s 33Y(4).
[170] CPA (Ont), s 17(4)(b). Also: CPA (BC), s 19(4)(c).
[171] *ManLRC Report*, 70.
[172] CPA (Man), s 19(4)(e).
[173] Eg: *King v GIO Aust Holdings Ltd* [2000] FCA 1869, [20]–[22] (in addition to posted notice, Federal court established a website to inform putative class members of details of the claim by providing access to current pleadings in the action; court established website, because suggestion that class lawyers maintain site problematical, given promotional material contained thereon). Internet notice has also been used extensively in antitrust litigation under FRCP 23 to inform class members of the procedures for claiming damages: *In re First Databank Antitrust Litig*, 205 FRD 408 (DDC 2002) (notice via class counsel's web site); *In re Lorazepam & Clorazepate Antitrust Litig*, 205 FRD 369 (DDC 2002) (notice on internet site), cited in *Newberg* (4th) § 10.12 p 508.
[174] CPA (Ont), s 17(3), and see *OLRC Report*, 512 for reasoning behind list of factors overpage.

notice than the representative plaintiff could undertake.[175] Apart from the obvious cost implications of various types of non-individual notice, the court is required to consider the type of relief sought (claims for injunctive relief only may justify a less onerous method of distributing opt-out notice than monetary relief); the size of the individual class members' claims (if there are several large individual claims involved, this may indicate a more likely desire to opt-out and litigate separately, hence more onerous and widespread notice may be vindicated); the number of class members; and where they live. The drafting and inclusion of criteria by which to direct the exercise of discretion as to the appropriate type of non-individual notice appears helpful and instructive, especially where two different notice plans are being proposed to the court from each side of the litigation. In that regard, the Canadian provinces' regimes are arguably to be preferred to the American and Australian regimes which leave the type of non-personal notice to the court's undefined discretion.

Frequently, combinations of mass circulation methods are used in the focus jurisdictions. Indeed, the extent of innovation in distributing notice by mass means has been impressive. Types of non-individual notice have included:

- a mix of advertisements in national daily newspapers, and posting a notice on a staff notice board or on the door of the staff toilets;[176]
- a combination of daily national newspaper and/or radio advertisement and/or individual notice in a variety of languages;[177]
- by distribution of written notices to villages by boats, and advertising and holding meetings for clan leaders of the class to explain the notice requirements;[178]
- by daily newspaper advertisements repeated across intervals;[179]

[175] Federal Judicial Centre, *Manual for Complex Litigation, Third* (New York, West Group Publishing, 1995) §30.211; and see, eg: *Chadha v Bayer Inc* (1999), 43 CPC (4th) 91 (SCJ) [3] (defendants argued notice by three separate ads in English and French language newspapers; representative plaintiff argued one sufficient, given costs of three; given the court's requirement to have regard to the cost of giving notice, the court held that a one-time notice would certainly be sufficient, and three excessive; however, ultimately, the class action was not certified on appeal).

[176] *Schanka v Employment National (Admin) Pty Ltd* [1999] FCA 1812, [2].

[177] Eg: *Cheung v Kings Land Devp Inc* (2001), 55 OR (3d) 747 (SCJ) [50] (notice of certification by prepaid mail to each putative class member and by advertisements in Chinese language newspapers in Toronto and Hong Kong); *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 304, [9]; *Montelongo v Meese*, 803 F 2d 1341, 1352 (5th Cir 1986) (notice to migrant worker class members in English and Spanish via individual notice, bilingual radio and newspaper ads).

[178] *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 304, [12] (practicalities of notice hugely complicated by circumstances of the case, involving vast area, impenetrable in parts, with a very great number of tribes, clans and languages).

[179] *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 (FCA) (publication in number of daily newspapers throughout Australia on two dates); *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman* (SCJ, 2 May 2002) [order 26] (notice of judgment published in four national and international newspapers + individual notice to persons on share register + notice sent electronically to list of brokers with request that they bring notice to attention of their clients + notice placed on nominated websites); *Hartman v Wick*, 678 F Supp 312, 329 (DDC 1988) (notice to be published in newspapers once a week for four weeks, including publication on at least one Sunday in each paper with a Sunday edition, so that anyone who was out of town during the period of publication would not be prejudiced).

- by individual notice to all known class members' lawyers, plus advertising in newspapers, magazines and medical journal, plus by press release to press outlets;[180]
- by radio and TV advertisements, specialist journal publications, and establishment of a toll-free telephone line for information;[181]
- notice posted on company bulletin boards;[182]
- notice reproduced on milk cartons;[183]
- notice attached to pay cheque envelope.[184]

One non-personal type of notice worthy of comment is that of notice by individually notifying a sample group within the class. The Canadian regimes[185] are the only statutes to explicitly endorse this methodology in legislation. Although it is true that delivery of notice to selected individuals (in conjunction with other modes) has been judicially approved in Australia[186] as part of a wider notice plan, the Canadian regimes appear to envisage sample notice as a stand-alone option. It was recommended by the OLRC that it be expressly incorporated "[b]ecause of the novelty of sampling notice".[187]

Notably, this notice alternative has not been embraced by the Canadian judiciary, and the reasons given for its rejection indicate that the probability of its use as a stand-alone method is almost nil. In one case,[188] it was argued by the defendants that sample notice should be distributed because of the potential for general newspaper advertising to create unnecessary fear and confusion among heart pacemaker patients which, in turn, could create a strain on the healthcare system by panicked patients contacting their health care providers. Two sample groups of patients at certain pacemaker clinics were suggested by the defendant, with the aim of providing the representative plaintiff with sufficient information from about 370 class members to permit extrapolation from those class members of any other information the representative plaintiff's lawyers might require. However, quite apart from the fact that, to the date of that case, notice

[180] *Wilson v Servier Canada Inc* (2000), 50 OR (3d) 219 (SCJ) [148] (plaintiffs retained class-notification expert who advocated that, with expenditure of $410,800 and properly targeted notice, effective notice would be given to approx 77% of putative class members, via some 70 Canadian newspapers and nine Canadian magazines; court preferred notice "on a more modest scale").

[181] *In re Cardizem CD Antitrust Litigat*, 218 FRD 508 (ED Mich 2003) (settlement notice disseminated by: website on internet, toll-free phone line; magazine and other written advertisements; television advertising campaign; individual notice to known class members).

[182] *Luevano v Campbell*, 93 FRD 68, 77 (DDC 1981) (notice to be posted on boards in defendant's offices).

[183] *In re Arizona Dairy Products Litig*, 1975–2 Trade Cas ¶60,555 (D Ariz 1975), cited in *OLRC Report*, 502 fn 43 (antitrust class action seeking damages caused by alleged price fixing of dairy products).

[184] *Jacobs v Sea-Land Service Inc*, 23 Fair Empl Prac Cas (BNA) 1179 (ND Cal 1980).

[185] CPA (Ont), s 17(4)(c); CPA (BC), s 19(4)(d).

[186] *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 304 (notice distribution via delivery to each household and a selection of major villages for attendance where oral explanations would be given).

[187] *OLRC Report*, 511, and fn 92, cl 16(3) of the Draft Bill.

[188] *Hoy v Medtronic Inc* (2002), 97 BCLR (3d) 109 (SC [in Chambers]).

by sampling had never been ordered in British Columbia, the court rejected sampling notice on the basis that not all class members would know that there was litigation that may affect their legal rights, which would diminish respect for the final outcome; if the class representative was unable to communicate with the entire class, his ability to make sound decisions would be hampered; class members uninformed of the litigation might commence their own action at a cost which they would not otherwise bear if the existence of the class action were known to them; that, if class lawyers could not communicate with the entire class, their ability to act effectively and to gather evidence from the class could be harmed; and that class members' ability to participate in the litigation after determination of the common issues could be thwarted if they were not all given notice in a timely way.[189]

The reasons advanced for refusal to countenance the distribution of notice by sampling engender doubts about precisely what circumstances *would* lend themselves to that mode of exclusive notice distribution. This negative judicial reaction to sampling notice, coupled with the infrequency of its use, suggests that the legislative provision is likely to remain little-used.

(c) What must the notice state?

Under each of the jurisdictions of the US,[190] Australia[191] and Ontario,[192] the opt-out notice must be judicially approved before it is sent to absent class members. Although usually drafted by the parties' lawyers, the court must always "determine for itself whether a notice drafted by one or both parties is satisfactory, having regard to the objects of the legislation and the circumstances of the case."[193] Even courts' approval of a class notice may be overturned by appellate reconsideration, should the notice be considered to contain or omit to contain information and thereby be possible to mislead class members,[194] or otherwise perceived to be defective.[195]

The statutory designation of what an opt-out notice should contain is treated entirely differently under each of the focus jurisdiction regimes. The Ontario

[189] *Hoy v Medtronic Inc* (2002), 97 BCLR (3d) 109 (SC [in Chambers]) [16], [17].

[190] Opt-out notice is to be issued in the court's name; court must ensure that all notices "are accurate, objective and understandable": Federal Judicial Centre, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) § 30.211; *Newberg* (4th) § 8.31 p 252.

[191] FCA (Aus), s 33Y(2).

[192] CPA (Ont), s 20; CPA (BC), s 22.

[193] *Courtney v Medtel Pty Ltd* [2001] FCA 1037, [8].

[194] Eg: *King v GIO Aust Holdings Ltd* [2001] FCA 270 (Full FCA) (notice amended on appeal to inform members that, unless proceedings settled, representative plaintiff's lawyers would not represent them to judgment unless they assumed responsibility for their own legal fees; extra two paragraphs inserted in notice). Challenges to notice form and to notice cost allocation are properly the subject of appeal authorisation under 28 USC § 1291: *Eisen v Carlisle and Jacquelin*, 417 US 156, 170, 94 S Ct 2140 (1974).

[195] *Greenfield v Villager Industries Inc*, 483 F 2d 824, 836 (3d Cir 1973) (opt out period provided in notice of 30 days too short).

regime contains a lengthy list of matters which the opt-out notice must state (unless the court orders otherwise); FRCP 23(c)(2)(B) notice contains some mandatory guidelines that are somewhat more detailed than those contained in the previous FRCP 23(c)(2);[196] and Australia's Pt IVA provides no minimum content at all. One common feature of all regimes, however, is that any notice that is to be issued to members of the public in connection with a class action must be readily comprehensible by non-lawyers. It should, according to judicial pronouncements in each of the focus jurisdictions,[197] be written in simple language. The fact that class action notice of certification or settlement under FRCP 23 is barely comprehensible has been often discussed academically,[198] and to this end, one of the amendments to FRCP 23, effective 1 December 2003, was to require such notice to be clearly drafted and understandable.[199]

[196] FRCP 23(c)(2) was amended 1 Dec 2003. The relevant part formerly read:

> The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any members who do not request exclusion may, if the member desires, enter an appearance through counsel.

The relevant part of FRCP 23(c)(2)(B) now reads:

> The notice must concisely and clearly state in plain, easily understood language: • the nature of the action, • the definition of the class certified, • the class claims, issues, or defenses, • that a class member may enter an appearance through counsel if the member so desires, • that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and • the binding effect of a class judgment on class members under Rule 23(c)(3).

[197] US: *In re Nissan Motor Corp Antitrust Litig*, 552 F 2d 1088, 1104 (5th Cir 1977). Aust: *McMullin v ICI Aust Operations Pty Ltd* (1998) 84 FCR 1, 4 (Wilcox J). Canada: *Hoy v Medtronic Inc* (2002), 97 BCLR (3d) 109 (SC [in Chambers]) [21].

[198] A sample of academic articles illustrate, eg: D Rhode, "Class Conflicts in Class Actions" (1982) 34 *Stanford L Rev* 1183, 1234–35 (quoting from letters received by the A-G of North Carolina in response to notice of class action against several major pharmaceutical companies, wherein one respondent observed, "Dear Sir: Our son is in the Navy, stationed in the Carribean some place. Please let us know exactly what kind of drugs he is accused of taking. From a mother who will help if properly informed. A worried mother, Jane Doe"), also citing further examples in: AR Miller, "Problems of Giving Notice in Class Actions" (1973) 58 FRD 313, 321–22; and as cited in: S Hultman Dunn, "The *Marisol A v Giuliani* Settlement: 'Innovative Resolution' or 'All-Out Disaster?'" (2002) 35 *Columbia J of Legal and Social Problems* 275, 293 and fn 131 (discussing the problems of notice to class members who are minors). Also: J Resnik, "Litigating and Settling Class Actions: The Prerequisites of Entry and Exit" (1997) 30 *U C Davis L Rev* 835, 855 (noting that, in the set of class actions the Federal Judicial Center Class Action Study considered, the notices "often lacked important information and were jargon-filled"); PD Carrington and DP Apanovitch, "The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23" (1997) 39 *Arizona L Rev* 461, 466 n 35 ("The likelihood that a class member will actually receive and comprehend the notice of the action is in every case very small"), as cited in: DL Bassett, "US Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction" (2003) 72 *Fordham L Rev* 41, 64 ("Much of what lawyers write, however, including many class action notices, is incomprehensible to average citizens. The lawyerly concern for completeness and accuracy may conflict with the objective of intelligibility").

[199] In further explanation of this amendment, the Advisory Committee Notes state: "It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complications of class-action procedure raise the barriers high": as reproduced in *2004 Federal Civil Rules Booklet* (Harvard, Dahlstrom Legal Publishing Inc, 2004) 15.

Nevertheless, as one Australian court admits, it is perhaps unrealistic to expect that, even in sophisticated societies, the opt-out notice would be received and understood by every member of the relevant class: "[t]hese consequences can be due to a whole range of matters . . . geographical isolation, illiteracy, lack of comprehension of the notice, intellectual disabilities, lack of attention or lack of interest", and the fact that it is an opt-out rather than an opt-in system.[200] Also, according to some North American scholars, one of the reasons for plain language, quite apart from seeking to protect the class members' interests, is to prevent unjust enrichment of the defendant. It has been suggested[201] that defendants can have an incentive to make opt-out notices complex, confusing and unnecessarily long in order to deter class member participation. If few people participate, then (it is argued) the defendant will be enriched either by putative class members not coming forward to press for individual quantum assessment or by the provision that any undistributed funds from an aggregate assessment of monetary relief are to revert to the defendant.

As noted above, the Canadian provincial regimes contain the most comprehensive statement of the requisite notice content,[202] including a description of the proceeding and relief sought, the opt-out date and method, the financial consequences of the class action to class members, any agreements between representative plaintiff and class lawyers about fees and disbursements, any counter-claim being asserted by the defendant, a description of the binding effect of class action judgment, and reference to the right of class members to participate. The OLRC considered it advisable that the statute specify the minimum content of opt-out notice,[203] and the lack of controversy about notice content in this jurisdiction bears testimony to both the acceptance and workability of the statutory guidelines. On the relatively few occasions on which the Canadian courts have been required to comment about a proposed opt-out notice, it has been said, for example, that the purpose of the notice is to inform but not to recruit;[204] that the notice is not to contain medical advice and that any opt-out notice should be framed as not to cause unnecessary alarm or distress to intended recipients;[205] and that while the notice is required[206] to state the

[200] *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 304, [22]; *Montelongo v Meese*, 803 F 2d 1341, 1352 (5th Cir 1986).

[201] *Rand Executive Summary*, 10; *Rand Institute Report*, 86. See, for similar observation: D Lennox, "Building A Class" (2001) 24 *Advocates' Q* 377, 394.

[202] CPA (Ont), s 17(6); CPA (BC), s 19(6).

[203] Recommended in *OLRC Report*, 513, and also implemented in CCP (Que), art 1006.

[204] *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 (Gen Div) [38] ("There is no provision in the Act for the recruitment of class members, and the notice of certification is not intended for this purpose").

[205] *Courtney v Medtel Pty Ltd* [2001] FCA 1037, [11]; *Hoy v Medtronic Inc* (2002), 97 BCLR (3d) 109 (SC [in Chambers]) [20] ("the content of the notice should be modulated to limit, to the greatest extent possible, undue panic, alarm, or concern by pacemaker patients generally and those patients in whom there are implanted the subject leads. . . . The difficulty posed is to strike the appropriate balance").

[206] CPA (Ont), s 17(6)(c).

possible financial consequences of the proceeding to class members,[207] the opt-out notice is not required to deal with payment of the defendants' costs where these are not the responsibility of the class members in any event.[208]

It follows that, in the counterpart jurisdictions in which the legislature has not prescribed such detailed content, there is considerably more room for debate as to whether a particular piece of information ought to be included in the opt-out notice, and the jurisprudence of both the US and Australia illustrate that observation. Under the former FRCP 23(c)(2), it was judicially held that the notice should adequately describe the substantive claims, but need not make the class members cognisant of "every material fact";[209] that it be neutrally drafted and avoid "even the appearance of judicial endorsement of the merits of the claim";[210] that it should describe the class definition and a statement of the relief sought (usually specifying that there was no admission of liability on the issues).[211] Whether notice of the potential costs liability of absent class members should be incorporated has, however, been the subject of contrary discussion (and it is not referred to under the new provision of FRCP 23(c)(2)(B)). Whilst a clause notifying class members of their potential financial liability, should they remain in the class, has been ordered,[212] Newberg questions whether such an item ought to be included, especially where it may constitute "an effective disincentive for remaining in the class."

Whilst the Australian legislature chose to leave the form of notice entirely for court approval,[213] there has been contention in this jurisdiction that it would assist if the court published guidelines concerning the form and content of notices.[214] At the same time, there is some judicial reluctance to set out in generic terms what a notice to class members should state,[215] and it has

[207] Eg: *Hoy v Medtronic Inc* (2002), 97 BCLR (3d) 109 (SC [in Chambers]) [21] ("if it is that individual plaintiffs will be responsible for the entire cost of the determination of individual issues, then this should be disclosed"); *Maxwell v MLG Ventures Ltd* (1995), 7 CCLS 155 (Gen Div) [12] ("the notice ought to indicate that, if a separate discovery of any class member is ordered, such member would have to pay his or her own legal costs of that discovery"); *Griffith v Winter* (2002), 23 CPC (5th) 336 (BC SC) [45] (notice should contain "a statement that the plaintiffs may be liable for costs should the action not succeed").

[208] *Maxwell v MLG Ventures Ltd* (1995), 7 CCLS (Gen Div) [12].

[209] *In re Nissan Motor Corp Antitrust Litig*, 552 F 2d 1088, 1104–5 (5th Cir 1977).

[210] *Hoffmann-La Roche Inc v Sperling*, 493 US 165, 174, 110 S Ct 482 (1989).

[211] *Newberg* (4th) § 8.31 p 254.

[212] Eg: *In re Antibiotics Antitrust Actions*, 71 Div 570 (SD NY 1971), notice clause cited in *Newberg* (4th) § 8.31 fn 19: "If damages are recovered on behalf of the class, some portion of the amount recovered may be used to compensate attorneys for the class; and it is expected that this expense would be shared by members of the class in proportion to their individual recoveries, if any. If no recovery is made on behalf of the class, class members will not be required to compensate counsel for the class." and see pp 255–56.

[213] FCA (Aus), s 33Y(2).

[214] See submission of Federal Court practitioners noted in ALRC, *Managing Justice* (Rep No 89, 1999) [7.104], fn 287.

[215] *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 304, [9] ("I do not favour the process whereby a court attempts to definitively describe the contents of opt-out notices": Hedigan J).

been judicially opined that it is a matter that may best be left for decision on a case-by-case basis.[216] As under the US rule, the question of whether, and if so what, the opt-out notice should specify in respect of the financial consequences of the proceeding to absent class members has been the subject of debate. Whilst a description of the cost consequences of the action within the notice has been judicially countenanced under Pt IVA,[217] it has also been held that the notice approved by the court should not refer to the liability of a class member to pay legal costs. The rationale for this is that any summary of the various permutations and combinations that could arise if the point of class member liability for costs was ever reached (where individual reliance and loss must be proved) made it impossible to deal with the issue in a simple and straightforward way.[218] It is apparent under Pt IVA that any class notice that was judicially approved on the basis of an assurance by the parties' legal representatives but which later turns out to be false means that legal costs may be awarded against the legal representatives.[219] This sanction serves to reiterate the close judicial supervision and priority that is given to ensuring that the class members are adequately informed of the proceeding.

Again, given the disparity of approach among the focus jurisdictions as to whether the legislation stipulates the content of opt-out notices, some expression of preference may be warranted. Given that, 35 years after the introduction of the present FRCP 23, Newberg could state that certain items "in the class notice are unsettled at best",[220] given the attempts to shore up the content of the (b)(3) notice by amending FRCP 23(c)(2)(B) on 1 December 2003, given the suggested endorsement by the Australian Law Reform Commission[221] that the no-direction policy under Pt IVA may need rethinking, and given the relatively small amount of jurisprudence in the Canadian jurisdictions to date concerning debates about the content of the opt-out notice required under those regimes, these factors in combination tend to indicate that legislative direction as to the content of the opt-out notice, and enforced compliance therewith, may present

[216] See submission of Federal Court justices noted in ALRC, *Managing Justice* (Rep No 89, 1999) [7.104], fn 288.

[217] *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) 94 FCR 167, [42] (notice in that form approved by court on basis of an assurance given on behalf of applicants' solicitors that proposed fee agreements with class members did not expose them to any liability for costs or an uplift fee without prior judicial approval).

[218] *King v GIO Aust Holdings Ltd* [2000] FCA 1869, [14]–[18], aff'd on appeal: *King v GIO Aust Holdings Ltd* [2001] FCA 270 (Full FCA) [11] on the basis that the primary judge's decision involved the exercise of a discretion on a matter of practice and procedure with which the appellate court would not interfere.

[219] *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) 94 FCR 167 (defendant claimed representative plaintiff's solicitors entering into uplift fee agreements with class members, and that class members should be so informed in class notice; court sought and obtained assurance (described n 217above); court approved opt-out notice, which did not contain statement concerning any potential costs liability class members may incur; notwithstanding assurance, retainer provided class members liable for uplift fee of 25%, without prior court approval).

[220] *Newberg* (4th) § 8.31 p 256.

[221] ALRC, *Managing Justice* (Rep No 89, 1999) [7.104].

the more attractive option. Any contrary argument that the lack of legislatively mandated content serves to simplify the notice procedure have not been particularly borne out in the context of the opt-out notices.

3. Who Pays for the Notice?

It is extremely rare that a class action statute will stipulate who is to bear the costs of the opt-out notice.[222] Instead, the regimes either expressly leave that to the order of the court, as in the case of Australia[223] and Ontario,[224] or are silent about the matter, as in the case of FRCP 23. Whatever the form of notice required, the cost of sending it is an expense that may be considerable. It is certainly a factor that may cause the representative plaintiff to rethink the financial wisdom of commencing a class suit at all, for it is apparent that, in each of the jurisdictions of the US,[225] Ontario[226] and Australia,[227] the prima facie position is that it is the representative plaintiff (or the class lawyers, if there is agreement between the representative plaintiff and the lawyers to that effect) who must bear the costs of sending the opt-out notice. Apart from the possibility of public funding of the costs,[228] the burning question is whether the defendant can ever be held responsible for bearing the costs of the opt-out notice. This has been answered affirmatively in all three jurisdictions, and the breadth of the allowance and the reasons for it give pause for caution to defendants.

To date, the Australian courts have been less likely than their Canadian or US counterparts to order that the defendant bear the costs of notice at the outset (of course, if the class wins, the defendant may be eventually required to bear them under the costs-shifting rules that apply under Pt IVA[229]). Whilst it has been

[222] See *OLRC Report*, 740–41 for further discussion.

[223] FCA (Aus), s 33Y(3)(d).

[224] CPA (Ont), s 22(1). Also: CPA (BC), s 24(1).

[225] Definitively established by the Supreme Court in *Eisen v Carlisle and Jacquelin*, 417 US 156, 177–79, 94 S Ct 2140 (1974), where the court noted with disapproval: "The District Court reached the contrary conclusion and imposed 90% of the notice costs on the respondents." Also: *Thomas v NCO Financial Systems, Inc*, 2002 WL 1773035, 7 (ED Pa 2002); *Barahona-Gomez v Reno*, 167 F 3d 1228, 1236 (9th Cir 1999); *In re Mexico Money Transfer Litigat*, 267 F 3d 743, 746 (7th Cir 2001).

[226] Eg: *Nantais v Telectronics Proprietary (Canada) Ltd* (1995), 127 DLR (4th) 552, 25 OR (3d) 331 (Gen Div) [86]; *Chippewas of Sarnia Band v Canada (A G)* (1996), 137 DLR (4th) 239, 29 OR (3d) 549 (Gen Div) [48]; *Chadha v Bayer Inc* (1999), 43 CPC (4th) 91 (SCJ) [2]–[3], all cited in *Wilson v Servier Canada Inc* (2000), 52 OR (3d) 20 (Div Ct) [16].

[227] *Johnson Tiles Pty Ltd v Esso Aust Pty Ltd* [2001] VSC 284, [15], [19]. Also, similar extra-curial comments in: M Wilcox (the Hon), "Representative Proceedings in the Federal Court of Australia: A Progress Report" (1997) 15 *Aust Bar Rev* 91, 95, and also see similar comment in: "Class Actions in Australia" (13th Commonwealth Law Conference, Melbourne, 2003) 5.

[228] In the case of a Class Proceedings Fund which exists in Ontario, a representative plaintiff may apply to have notification costs funded by that source.

[229] See pp 443–44.

judicially noted[230] that the discretion given to the court to decide who is to pay for the notice is an unfettered one, and there is no criterion to guide the court with respect to the relevant matters to consider in the exercise, it is only 'special circumstances' (such as evidence of financial hardship that may affect the ability of the plaintiffs to conduct the litigation) that would justify a departure from the general rule that the costs incurred in giving notice initially be borne by those instituting and prosecuting the litigation. However, as far as can be ascertained, no case has yet manifested under Pt IVA by which the defendants have incurred upfront all or part of the costs of class notice for that reason.

On the other hand, whilst representative plaintiffs have had to bear the costs of notice under the Canadian regimes, defendants have also been ordered to pay upfront with some frequency, and occasionally jointly with the plaintiff[231] (again, the defendant is likely to bear these costs under the costs-shifting rules operative in Ontario if it loses). The power of the court to make an order with respect to costs whereby costs are apportioned among the parties applies equally in British Columbia, which has adopted a 'no way' costs approach to costs in class proceedings generally.[232] Reasons advanced for the defendant's incursion of some or all of those costs have included: financial hardship on the part of the representative plaintiff,[233] the public interest in the pursuit of the class members' litigation,[234] difficulties caused to the class members as a result of the defendant's conduct,[235] and the fact that the defendant is purportedly better placed to pay for such notice.[236]

[230] *Johnson Tiles Pty Ltd v Esso Aust Pty Ltd* [2001] VSC 284, [15], [19], [32] (court not persuaded that payment by plaintiffs of substantial cost of advertising would constitute a financial hardship).

[231] *Dalhuisen (Guardian ad litem of) v Maxim's Bakery Ltd* [2002] BCSC 528 (SC [in Chambers]) [24] (according to the litigation plan, representative plaintiff bore cost of mailing notice to class members; defendant paid for publication of notice in various newspapers). See also: *Mura v Archer Daniels Midland Co* [2003] BCSC 727, [12] (certain defendants paid all-inclusive sum of $5,250,000 in compensation to class members; costs of notice borne by settlement fund).

[232] Noted by *AltaLRI Report*, [268]. The relevant provision permitting an apportionment of notice costs in BC is CPA (BC), s 24(1).

[233] *Wilson v Servier Canada Inc* (2001), 52 OR (3d) 20 (Div Ct) [18], approving earlier decision of Cumming J: (2000), 50 OR (3d) 219 (SCJ); *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (SC) [71], although eventually decertified because it was held on appeal that an action for spoliation should not be allowed to stand as a separate tort: (1998), 157 DLR (4th) 465, 48 BCLR (3d) 90 (CA).

[234] Eg: *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (SC) [71] ("the precipitating events raise transcendent public health issues engaging the attention of the elected and executive branches of government. . . . the provincial government will have identified the best ways and means of communicating with persons affected by transfused HCV-infected blood and will be able to give notice more cheaply than could the plaintiff. In the circumstances, it is just and appropriate that the provincial government communicate the required notice to class members").

[235] Eg: *Campbell v Flexwatt Corp* (1997), 44 BCLR (3d) 343 (CA) [84] (defendant ordered to pay cost of notification "due to the difficulties caused to the class by the disconnect orders"; upheld on appeal.)

[236] Eg: *Denis v Bertrand & Frere Construction Co* (SCJ, 20 Apr 2001) [9]; *Bywater v Toronto Transit Comm* (1999), 30 CPC (4th) 131 (Gen Div); *Joncas v Spruce Falls Power & Paper Co* (1999), 45 CPC (4th) 241 (Gen Div) [15]; *Cheung v Kings Land Devp Inc* (2001), 55 OR (3d) 747 (SCJ) [50].

The position under FRCP 23(c)(2) shows a similar breadth of allowance for cost allocation upfront (bearing in mind that, if the representative plaintiff is required to pay the costs upfront, the court may ultimately tax this expense against the defendant if it loses).[237] It has been stated that "a court may direct the defendant to effectuate notice where it can do so with less difficulty or expense than the representative plaintiffs",[238] or where "the cost to the defendant would be insubstantial, such as where it routinely directs mail to putative class members in the ordinary course of business."[239] In this respect, "the district court has discretion to allocate costs to the defendant for tasks that the court has appropriately ordered the defendant to perform."[240] A discretion to order the defendant to pay the initial costs of sending the notice have included, inter alia, where it was financially difficult for small class plaintiffs to pay the costs in meritorious claims that would be otherwise unlitigable; and where the defendant was the party to request certification of the plaintiff class.[241]

Another method by which cost allocation has occurred under the US rule is via the costs of identifying class members. In light of conflicting authority as to whether the identification process was incorporated within (thus, the plaintiff's responsibility)[242] or separate from (thus, possibly allocatable to the defendant)[243] the costs of sending the notice, and in circumstances where *Eisen* did not address the issue, the Supreme Court held in *Oppenheimer Fund Inc v Sanders*[244] that the identification of potential class members was distinct from the costs of sending notice, and that the authority to allocate identification costs was derived from the court's power to deal with procedural matters in class actions.[245] The defendants in *Oppenheimer*, however, were relieved from the lower court order to absorb the expense of compiling the relevant list of potential class members on the basis that because the costs of identification were equal for either party and substantial, it ought to be borne by the representative plaintiff. The circumstances in which the costs of class member identification *may* be shifted to the defendant include where the defendants will not be required to perform any task other than to turn over lists of names/addresses they already have and which have been previously assembled by the defendant in the ordinary course of business.[246]

[237] *Thomas v NCO Inc*, 2002 WL 1773035, 7, 19 (ED Pa 2002); *Newberg* (4th) § 8–6 pp 180–81.

[238] *Oppenheimer Fund Inc v Sanders,* 437 US 340, 356, 359, 98 S Ct 2380 (1978); and for a later discussion and purported application: *Southern Ute Indian Tribe v Amoco Production Co*, 2 F 3d 1023, 1029–31 (10th Cir 1993); *Miles v America Online,* 202 FRD 297, 305 (MD Fla 2001).

[239] Eg: *Barahona-Gomez v Reno,* 167 F 3d 1228, 1236 (9th Cir 1999).

[240] *Southern Ute Indian Tribe v Amoco Production Co*, 2 F 3d 1023, 1029 (10th Cir 1993).

[241] Respectively: *Mountain States Tel & Tel Co v District Court*, 778 P 2d 667, 673 (Colo 1989); and *Argo v Hills*, 425 F Supp 151, 159 (ED NY 1977).

[242] *In re Nissan Motor Corp Antitrust Litig*, 552 F 2d 1088 (5th Cir 1977).

[243] *Sanders v Levy*, 558 F 2d 636 (2nd Cir 1976), the lower court ruling of *Oppenheimer Fund, Inc v Sanders*, 437 US 340, 98 S Ct 2380 (1978).

[244] 437 US 340, 354, 356, 98 S Ct 2380 (1978).

[245] FRCP 23(d)(5). For further discussion, see: *OLRC Report*, 500; *Newberg* (4th) §8.8.

[246] *Southern Ute Indian Tribe v Amoco Production Co*, 2 F 3d 1023, 1030 (10th Cir 1993) (data in question was previously assembled by defendant oil companies in the ordinary course of business; they had to ascertain who had claims to land, minerals etc before they could drill).

Nevertheless, the US Supreme Court reiterated in *Oppenheimer* that courts should be very careful not to "stray too far from the principle underlying *Eisen* that the representative plaintiff should bear all costs relating to the sending of notice".[247] The stricter Australian position of insisting that representative plaintiffs fund the costs of notice except in exceptional circumstances is also supportable on the basis that the upfront costs associated with the class action should fall on the party seeking to benefit from it, and that "the defendant should not be burdened with any costs of the other party until [he or she has the] opportunity to test the claims of the class."[248] The willingness of the court to exercise its discretion to shift opt-out notice costs to the defendant is clearly a matter upon which the jurisdictions have differed somewhat to date.

D CLOSING THE CLASS

The final key aspect of shaping the class membership the subject of this chapter is the dilemma of closing the class. Consider the following scenario: the court has determined the common issues in favour of the class; however, there remain individual issues to be determined by the court in respect of each class member in order for the defendant's liability to be finally put to rest. Not every common issues resolution will require class members to take further steps at this stage. As the Alberta Institute explains,[249] it may be possible for the court to calculate individual members' entitlements to monetary relief from the defendant's records or by some other means, in which case class members under an opt-out model need do nothing at all in order to obtain redress. However, in the absence of these measures, class member participation may be necessary to prove a variety of individual issues that may remain after a determination of the common issues.

The representative plaintiff cannot, at this stage, advance the class members' claims. However, given the opt-out nature of the class action models used in the focus jurisdictions, the representative plaintiff may, even after the determination of the common issues, have little or no information as to the identity or number of class members who must now either prove their individual claims or have their individual claims refuted. The dilemma is how these absent class members must be "gathered in" to prove their individual actions, and to hence bring finality to the proceedings. It is immediately apparent that, in order to "close the class" and create a cut-off date by which eligible plaintiffs under the common issues judgment must register their desire to participate for an assessment of their individual issues, the proceeding must be converted from an

[247] 437 US 340, 360, 98 S Ct 2380 (1978).

[248] Respectively: *OLRC Report*, 742, and JS Emerson, "Class Actions" (1989) 19 *Victoria U of Wellington L Rev* 183, 210.

[249] Example of overbilling provided by *AltaLRI Report*, [263].

opt-out to an opt-in model—the class is ultimately shaped by those who choose to be proactive.

It is also readily apparent that the focus regimes have dealt with this question quite differently: the Canadian provincial regimes have handled the issue by legislative provision,[250] whilst the US and Australia have relied upon judicial creativity. The latter option has given rise to difficulties, while it appears that the legislative provisions of the former have operated smoothly and clearly.

1. The Disparate Approaches to the Issue

The US federal class action rule does not refer to the ways in which individual issues are to be dealt with. That omission in the rule was noted by the OLRC,[251] and by law commissions since,[252] as being rather unsatisfactory. Moreover, FRCP 23 makes no provision for post-judgment notice to inform class members of the steps that they have to take for individual participation so as to claim successfully against the defendant. Thus, the regime provides no explicit mechanism for closing the class. This gave rise to early difficulties under the regime, for some courts sought to convert the manifestly opt-out regime under FRCP 23 into an opt-in regime prior to determination of the common issues by requiring class members to file a "proof of claim" or "statement of intention" as a condition of ultimate recovery.[253] Such a practice was requested of class members either in the mandatory post-certification notice under FRCP 23(c)(2) or in a general notice under FRCP 23(d)(2).[254] However, as the OLRC noted, later judicial decisions criticised the judicial incorporation through the mandatory proof of claim procedure of what is in effect an opt-in requirement as being "fundamentally inconsistent" with the language and policy of the opt-out regime under FRCP 23,[255] and that courts instituted this proof of claim procedure with often very little justification or reasoning.[256] In the absence of any guidance in the rule, Newberg notes that it has been "generally conceded that a requirement for a proof of claims is governed by [general notice under] Rule 23(d), which permits the court in its discretion to make appropriate orders to facilitate the orderly progression of the action,"[257] which the Supreme Court has also affirmed.[258] It is therefore evident that class closure under FRCP 23 has been at

[250] CPA (BC), s 20; CPA (Ont), s 18.

[251] *OLRC Report*, 608. The Commission noted that the rule clearly authorised proceedings for the resolution of individual issues under FRCP 23(c)(4), but without indicating how they were to be conducted.

[252] Eg: *ManLRC Report*, 89–90.

[253] See thorough discussion and criticism in: *OLRC Report*, 474–75.

[254] See, respectively: *Philadelphia Electric Co v Anaconda American Brass Co*, 43 FRD 452, 459, 462 (ED Pa 1968); and *Harris v Jones*, 41 FRD 70, 74–75 (D Utah 1966).

[255] *OLRC Report*, 476–77, and see the cases disapproving of the practice cited in fnn 41 and 45.

[256] *Ibid*, 474–78, and especially fn 34.

[257] *Newberg* (4th) § 8.32 p 266.

[258] *Hoffmann-La Roche Inc v Sperling*, 493 US 165, 177, 110 S Ct 482 (1989).

the behest of judicial creativity, the early practices of which were directly contrary to the language and policy of the rule.

The OLRC was convinced that class closure, and post-judgment notice by which to effect that, occupied a more significant role in class action administration than cast for it under FRCP 23. To that end, the Commission recommended that, "after the common issues are decided in favour of the class, notice should have to be given to those members of the class whose participation was required."[259] This sentiment was incorporated within the eventual Ontario statute as s 18.[260] The procedure for individual participation is thereby very clear. The legislation sets out what the notice to class members should state,[261] including a description of the steps to be taken by the class member to establish an individual claim. The fact that the notice must also state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with the court's leave[262] emphasises the cut-off arrangement under the statute. Section 18 effectively "closes the class" when affirmative action on the part of the absent class members is necessary. In addition to providing clarity for class members, such a provision obviously enhances expediency and fairness for defendants.

It is curious, therefore, that a similar provision is not contained in the Australian regime, for it is evident that the ALRC was just as alive to the need for finality and class closure upon individual participation: "Where there are individual issues, each group member concerned may have to assume the conduct of his or her own proceeding so that the question can be properly determined. An appropriate notice will have to be given to group members to advise them of the situation."[263] However, such a notice did not find its way into the ALRC's Draft Bill, much less into the Pt IVA regime. This has given rise to a significant problem for class actions under the regime which have reached the stage of common issues judgment, for there is the distinct prospect that the class will not be closed unless the court intervenes, requiring another (possibly contested) application and further expense on the part of the litigants. That scenario occurred in *McMullin v ICI Australia Operations Pty Ltd*,[264] where the

[259] *OLRC Report*, 514, and Draft Bill cl 17(1).

[260] The BC provision differs from the Ontario provision in two important respects: post-judgment notice is required, whether or not the common issues are determined in favour of the class, and whether or not individual participation is required on the part of class members: CPA (BC), s 20(1). The Ontario provision has been preferred subsequently in *FCCRC Paper*, 53, and by the *AltaLRI Report*, [268], partly in the interests of minimising costs to the representative plaintiff.

[261] CPA (Ont), s 18(3). See also: CPA (BC), s 20(3).

[262] CPA (Ont), s 18(3)(d). Also: CPA (BC), s 20(3)(c).

[263] *ALRC Report*, [169].

[264] (1998) 84 FCR 1, 3–4 (defendant held to owe duty of care to various categories of plaintiffs: graziers and feedlots who owned cattle when they developed CFZ residues, graziers and abattoirs who unwittingly purchased cattle which already had CFZ residues, meat processors and exporters who owned meat found to be contaminated and condemned, and feedlot owners who found that cattle in their possession were contaminated and thereafter incurred expense in holding them in detention).

defendant applied to close the class and require class members to come forward and identify themselves (and which application was opposed by the representative plaintiff). The court obliged; the class was closed pursuant to the general power under s 33ZF(1) to make orders "to ensure justice is done in the proceeding". The court ordered that notice be given to class members of a date (2 months was specified) by which they had to identify themselves in order to become part of the class. Such judicial creativity, in the absence of a Canadian-type provision, has been employed elsewhere.[265]

Furthermore, the failure to provide procedures for individual participation and closure of the class under the Australian regime has the awkward ramification of leaving the suspension of the limitation period "in limbo", as remarked upon in the *McMullin* litigation. The limitation period stops running against all class members upon commencement of the Pt IVA class action,[266] and time does not run again unless a member opts out or until the proceeding is determined without disposing of the class member's claim. Where damages are being individually assessed, it has been judicially clarified that the proceeding would not be determined until all individual claims were assessed.[267] Practically speaking, Doyle points out that this means that one or more class members may come forward at any time after the common issues are determined in the class's favour, indeed, many years subsequently.[268] The lack of certainty for unsuccessful defendants liable for damages—that "they would never know whether they have resolved all claims", as the defendants argued in *McMullin*—is most unsatisfactory. The gap in the legislation in failing to provide a procedure for class closure has been identified by the ALRC[269] and commentators[270] alike, and the issue has been termed a "critical one to resolve"[271] under the Australian schema.

[265] A similar direction was made in the Esso case, where potential class members had until 31 August 1999 to signal their participation in the action: noted by M Doyle, "The Nature of Representative or Class Actions in the Context of Compensation Claims Against Resources and Utilities Companies" [1999] *Aust Mining and Petroleum Law Assn Ybk* 277.

[266] FCA (Aus), s 33ZE.

[267] *McMullin v ICI Aust Operations Pty Ltd* (1998) 84 FCR 1, 4.

[268] M Doyle, "The Nature of Representative or Class Actions in the Context of Compensation Claims Against Resources and Utilities Companies" [1999] *AMPLA Ybk* 277, 289.

[269] ALRC, *Managing Justice* (Rep No 89, 1999) [7.116] (footnote omitted) ("Legislation may be needed to require the Court to close the class at a specified time before judgment. Such a provision would retain the benefits of the opt-out procedure while providing, before judgment, an opt-in arrangement, naming those who receive the benefit in the event of an adverse judgment for the respondents. This will also assist the Court to make an award of damages for the entire class, where that is appropriate").

[270] See the interesting discussion of the case by the defendant's lawyer in *McMullin*: M Salter, "Class Actions: Product Liability: Recent Developments in Australia" (Class Actions Papers, Sydney, 1998) 6–11.

[271] The ALRC cites *Bright v Femcare Ltd* (1999) 166 ALR 743 in this regard: *Managing Justice* (Rep No 89, 1999) [7.116].

2. The Optimal Solution

Experience garnered under the focus regimes to date indicates that there are three reasons why post-judgment notice is extremely important and should preferably be legislated for. First, without effective notice at this stage of the proceedings, the absent class members may not realise that they must take steps to establish their individual entitlement, and if they do not act within time, they may be unable to obtain any relief at all. It is for this reason that it has been opined that post-judgment notice is arguably more important than opt-out notice, "where it is necessary for individual members to participate in the proceedings in order to obtain a remedy for their specific claims."[272]

This view is reflected in the fact that, whilst both the Ontario and British Columbia statutes provide for mandatory sending of post-judgment notice, the opt-out notice under each regime is actually at the discretion of the court and may be dispensed with, as has been discussed previously. The legislatures of both jurisdictions clearly agreed that to mandate post-judgment notice was crucial. Secondly, the failure to provide a procedure for class closure where individual participation is required means that, as an unforeseen consequence, (and as pointed out in *McMullin*), the limitation period will remain suspended for the entirety of the unidentified class members, leaving the defendant in limbo, unless the court intervenes upon the application of the defendant to "prevent injustice". Thirdly, the explicit provision in the legislation governing individual participation removes the procedural decision from the courts and negates *McMullin*-like contested applications as to the appropriate mechanism for closing the class.

[272] *FCCRC Paper*, 50; *OLRC Report*, 505.

10

Potential Impediments to Ongoing Conduct

A INTRODUCTION

THE TWO TOPICS considered in detail in this chapter are interesting for the fact that they have the potential to impede a class member's pursuit of relief via the class action device, yet have nothing to do with an inability to satisfy the commencement criteria.

The first of the topics (section B) deals with applications by the defendant that the representative plaintiff provide adequate security for the defendant's party and party costs,[1] as to ensure that the defendant will be indemnified in the event that the defendant succeeds in the action. The issue has been particularly vexing in those jurisdictions (such as Australia and Ontario) in which the usual practice is to award party and party costs against the losing party. Both law reform commissions whose studies preceded the introduction of these two regimes were cognisant of the potentially stifling effect of security for costs,[2] but the manner in which the topic has been judicially treated since implementation of the regimes has been varied. Certain judicial pronouncements have given cause for much anxiety on the part of the representative plaintiff (and hence, the class members whom he or she purports to represent), particularly under Australia's Pt IVA regime.

The second topic, that of the interrelationship between the operation of limitation periods and class action litigation, has also proven to be vexing and problematic. Essentially, "the ordinary limitations provisions must be made subject to the right of individual members of a class to establish their claims after the common questions have been determined, notwithstanding that the time for instituting proceedings has expired."[2a] However, in either judicially or statutorily providing for this, a number of difficult ancillary issues have arisen for both representative plaintiff and class members in the focus jurisdictions, all of which will be the subject of discussion in section C.

[1] See pp 437–38.

[2] *ALRC Report,* [270]; *OLRC Report*, 745–46.

[2a] Law Reform Committee of South Australia, *Report Relating to Class Actions* (Report No 36, 1977) 10.

B SECURITY FOR COSTS APPLICATIONS

1. General Issues

In some circumstances in costs-shifting regimes, the question arises as to whether a security for costs application against the representative plaintiff by the class defendant is feasible. Those circumstances include: where the representative plaintiff is a non-resident corporation with no apparent assets in the jurisdiction and no apparent business operations or income; or where the individual representative plaintiff resides out of the jurisdiction; or where the representative plaintiff, whether individual or corporate, is impecunious (a "person of straw") and unlikely to be able to meet any costs order that might eventually be made against it.

Several law reform agencies have been alive to this problem, but their responses have been mixed, with some strongly opposing[3] and others in support of[4] the defendant's general right to make such an application. It is a tricky question. The purpose of a security for costs rule is to enable a successful defendant to be partially protected where party and party costs are awarded against the losing representative plaintiff; and if security is not awarded, this may well cause the defendant considerable hardship if it is eventually successful and cannot recover those costs. On the other hand, the practical effect of allowing security for costs could be to deter meritorious claims where the representative plaintiff seeks to represent others similarly positioned, is not well-off, and has only a modest personal claim.[5] An order for security for costs is entirely at the court's discretion, where it has the jurisdiction to so order.

The position around the common law jurisdictions in respect of the fate of security for costs applications inevitably depends upon the type of costs regime that the legislature has implemented for cost awards generally. Where a no-way costs rule means that party and party costs are unlikely to be awarded against the defendant, the concept of security for costs is rendered otiose. Therefore, because the court does not have jurisdiction to order costs under the British Columbia class actions statute (given the no-costs rule) except in statutorily-defined exceptional circumstances,[6] it has been held that (in the absence of any contention of aforementioned special circumstances in the particular case), the court also did not have jurisdiction to order security for costs.[7] Likewise, it has

[3] *ALRC Report*, [270]; *OLRC Report*, 745–46.

[4] *SALC Paper*, [5.43], provided that the court should consider when exercising its discretion in relation to security for costs whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest; see also *SALC Report*, [5.17.5].

[5] For these and other competing arguments, see: *OLRC Report*, 745–46.

[6] CPA (BC), s 37(1), (2).

[7] *Samos Investments Inc v Pattison* (2002), 216 DLR (4th) 646, 5 BCLR (4th) 21 (CA) [35].

been held that the no-costs rule only takes effect in British Columbia once the court embarks upon an application for certification under the Act, and until then, the action is governed by the ordinary litigation tests for security.[8] However, on those rare instances where the defendant has made application pre-certification, it has failed to obtain the order for security,[9] indicating a judicial reluctance to derail class actions on this basis so early in their life.

The Ontario legislature, which enacted a costs-shifting regime, chose to remain silent on the issue. This was despite a recommendation by its law commission[10] that the legislation provide that, except in respect of the class members' individual proceedings, security not be required in any class action. It appears, therefore, that security for costs applications are clearly permissible in class actions commenced in that jurisdiction, albeit with the caveat, per the relevant court rules,[11] that if no defence has yet been delivered, it is premature to bring a motion for security for costs.[12] Modest sums have been ordered to be held available as a form of security for the defendant's costs for a pending motion for certification,[13] but it does not appear as yet that any successful security for costs application has been sufficient to stop the class action in its tracks, as early academic commentary[14] warned against. However, quite the opposite scenario has emerged in Australia's class action regime.

2. The Australian Position

The Australian legislature ensured that security for costs would be a paramount concern in that jurisdiction by expressly providing[15] that nothing in Pt IVA affects the court's ordinary powers to order security for costs in representative proceedings.[16] As extra-curial comment notes, "relatively well-resourced

[8] *Edmonds v Actton Super-Save Gas Stations Ltd* [1996] BCJ No 2051 (BC SC [in Chambers]) [4], [8] ("With respect to the contention that the court ought to be mindful of s 37 of the *Class Proceeding Act*, it is clear in my view that that provision only applies and becomes operative once the court embarks upon an application for certification under the statute"). Also see: *Secure Networx Corp v KPMG, LLP* [2002] BCSC 1001, [14], aff'd: (2003), 12 BCLR (4th) 317 (CA) (7 Apr 2003).

[9] *Secure Networx Corp* (CA), *ibid*, [9] ("I think that the prospect that the respondent could face an exceptional award of costs under s 37(2) at the certification stage or beyond based on its conduct thus far was a factor that the chambers judge was entitled to consider on the security question at this stage").

[10] See cl 41(2) of the Draft Bill, and *OLRC Report*, 745.

[11] Ontario Rules of Civil Procedure, r 56.03(1) provides: "In an action, a motion for security for costs may be made only after the defendant has delivered a defence".

[12] *Millgate Financial Corp v BF Realty Holdings Ltd* (1994), 15 BLR (2d) 212 (Gen Div) [37].

[13] *Sutherland v Canadian Red Cross Soc* (1994), 25 CPC (3d) 118 (Gen Div) [4] ($5,000 held in representative plaintiff's solicitors' trust account sufficient, especially where plaintiffs undertook to apply to Class Proceedings Fund which, if successful, would mean that Fund would become liable for defendant's costs if plaintiffs lost); the same sum was ordered to be held in trust as a form of security in *Bendall v McGhan Medical Corp* (Gen Div, 22 Oct 1993).

[14] J Chapman, "Class Proceedings for Prospectus Misrepresentations" (1994) 73 *Canadian Bar Rev* 492, 510.

[15] FCA (Aus), s 33ZG(c)(v).

[16] Those powers are contained in FCA (Aus), s 56.

[defendant] corporations can therefore be expected to take the point" under that class action regime.[17] According to one early decision, it would appear that it was very much Parliament's intention that nothing in Pt IVA was to affect or impede the operation of the court's discretion to award security for costs in Pt IVA cases on the same basis as may be ordered in other cases.[18] Via a series of decisions in which the defendant has made an application for security to be provided by the representative plaintiff,[19] the Australian federal court has carefully outlined the problems involved with, and principles that govern, such an award in the context of class actions. Although earlier academic commentary[20] tended to view security for costs applications as being available in theory but unlikely and/or inappropriate in practice, a series of recent decisions under Pt IVA provide defendants with greater scope with which to seek a sizable security deposit from the representative plaintiff, failing which the action will not proceed.

(a) Divergency of judicial views

Indeed, the Australian case law concerning security for costs in the context of class actions is displaying something of an uneasy tension with respect to the class members' positions. Class members have an expressly conferred immunity from costs in respect of the class action.[21] Therefore, it would seem to be "incongruous and anomalous for Parliament specially to confer that immunity . . . and then for the courts to indirectly remove the effect of that immunity by making orders for security for costs on the basis that the representative plaintiff is bringing the proceedings for the benefit of others who ought to bear their share of the potential costs liability [to the defendants]."[22] Others have observed that while a representative party may be ordered to provide security for costs (the legislation says so), it would be contrary to the "spirit if not the letter" of

[17] M Wilcox (the Hon), "Representative Proceedings in the Federal Court of Australia: A Progress Report" (1997) 15 *Aust Bar Rev* 91, 94; and by the same author, "Class Actions in Australia" (13th Commonwealth Law Conference, Melbourne, 2003) 7.

[18] *Woodhouse v McPhee* (1997) 80 FCR 529, 533.

[19] *Woodhouse*, *ibid* (no security ordered); *Ryan v Great Lakes Council* (1998) 154 ALR 584 (no security ordered), aff'd: *Ryan v Great Lakes Council* (1998) 155 ALR 447 (Full FCA, single judge Lindgren J); *Tobacco Control Coalition Inc v Philip Morris (Aust)* Ltd [2000] FCA 1004 (security ordered); *Nendy Enterprises Pty Ltd v New Holland Aust Pty Ltd* [2001] FCA 582; leave to appeal disallowed in: *Nendy Enterprises Pty Ltd v New Holland Aust Pty Ltd* [2002] FCA 550 (security ordered); *Bray v F Hoffmann-La Roche Ltd* (2003) 200 ALR 607 (Full FCA) (security to be reconsidered), overruling earlier decision not to order security: *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405.

[20] Eg, M Doyle, "The Nature of Representative or Class Actions in the Context of Compensation Claims Against Resources and Utilities Companies" [1999] *AMPLA Ybk* 277, 290–91; V Morabito, "Security for Costs and Class Actions in the Federal Court of Australia" (2001) 20 *Civil Justice Q* 225, 245; S Stuart Clark and C Harris, "Multi-Plaintiff Litigation in Australia: A Comparative Perspective" (2001) 11 *Duke J of Comp and Intl Law* 289, 302; JE Rowe and P Long, "Security for Costs in Representative Actions in the Federal Court" [Dec 2001] *Plaintiff* 20.

[21] Pursuant to FCA (Aus), s 43(1A).

[22] *Woodhouse v McPhee* (1997) 80 FCR 529, 533.

class members' immunity from costs, and the intention of Pt IVA to allow represented persons greater access to justice, if an order for security for costs forced class members to contribute to a pool of funds in order to provide the security required, abandon their claims or continue them as separate proceedings.[23] That was certainly, until very recently, the predominant judicial view.

However, the dilemma is this: on the one hand, if one does not enquire into the financial position of the class members, it may be said that an impecunious representative plaintiff may be selected to shield more financially viable class members from any adverse costs order. In one instance, the court was not prepared to make that finding. When faced with a number of potential representative parties, the Federal Court stated in *Cook v Pasminco Ltd (No 2)* that class lawyers are not obliged to make a choice in the interests of the prospective defendant:

> No doubt a variety of factors may lead to one person rather than another becoming representative party, such as the proximity of the person to the solicitors' office; ease of communication between the solicitors and the person; degree of interest and involvement; likely performance as a witness; the facts of the individual cases. Assume now that one prospective representative party is a person whose means appear to be sufficient to meet, wholly or partially, an adverse costs order, while another is almost insolvent. Solicitors are not subject to any legal or ethical obligation to choose the former. Certainly they could not be criticised for choosing the latter. It might even be suggested (I express no view) that they owe a duty to the former to choose the latter, unless other factors suggest a different choice![24]

In this case, there was no evidence to the court to prove why an undischarged bankrupt had been chosen as representative plaintiff, and the court was not prepared to draw any inferences.

On the other hand, Full Federal Court clarification of the operation of security for costs in the context of class actions has recently occurred in *Bray v F Hoffmann-La Roche Ltd*.[25] In circumstances in which the representative plaintiff was clearly in no position to fund the action,[26] the decision indicates that a more robust view ought to be taken, certainly a view that accords more with the protection of the defendant, should the defendant ultimately be successful in the action:

[23] *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [73]; *Ryan v Great Lakes Council* (1998) 154 ALR 584 (FCA) 589 ("s 43(1A) ought generally to be regarded as a substantial impediment to the 'financial pool' approach . . . [which] would have the effect of exerting substantial pressure on group members to make a contribution to securing the respondents' costs, even though s 43(1A) expressly exempts them from liability to meet those costs. . . . The group members may have decided to remain in the representative proceeding, and not opt out or embark on a separate action, in reliance on the protection afforded by s 43(1A)"); *Ryan* (1998) 155 ALR 447 (FCA) 457.

[24] *Cook v Pasminco Ltd (No 2)* (2000) 107 FCR 44, [29]–[30].

[25] (2003) 200 ALR 607 (Full FCA).

[26] The representative plaintiff had net assets of $73 000; and income of $931.40 pm, sourced from a Canadian invalid pension. The defendant sought security in the sum of $300 000–400 000. The applicant's solicitors stated that "they do not hold instructions from any group member(s) that they or any of them would be able to provide security".

> Depending upon the particular circumstances, I do not think that an order providing reasonable security for costs necessarily operates indirectly to remove the effect of the immunity provided by s 43(1A). It is one thing for a group member to be saddled with an order for what might be joint and several liability for a very substantial costs order at the end of the hearing of a representative proceeding, but it is another thing to have the choice of contributing what might be a modest amount to a pool by which the applicant might provide security for costs. It is a question of balancing the policy reflected in s 43(1A) against the risk of injustice to a respondent . . . which, on the admitted facts, has no chance of recovering very substantial costs from the applicant if it is successful in defending the proceedings. Much would depend upon the number of group members involved, their financial circumstances and in particular whether an order for security for costs might stifle the proceedings. In that regard, in my opinion, it was for the applicant to adduce evidence about the likely effect of any order for security for costs. She chose not to do so and in my view, in those circumstances, the discretion having miscarried, it should be exercised again.[27]

In the same case, Finkelstein J, writing separately, suggested some further important reasons why the courts should look behind the representative plaintiff to the class members or to others funding the class action.[28] In his Honour's view, "the characteristics of the class should be taken into account on an application for security. Accordingly, if there is still a rule that an order for security should not be made against an impecunious natural person . . . the rule may have little application to many class actions", where the classes may be comprised of corporate or natural persons, rich and poor. Additionally, where the representative plaintiff's solicitor is "standing behind" the representative plaintiff and funding him or her by means of the contingency fee, then that representative plaintiff may adopt some characteristics of the "nominal plaintiff" (and "[w]hen a proceeding is brought by a 'nominal plaintiff', that is, a plaintiff who will not himself benefit from the action but is making the claim for the benefit of someone else, an order for security is usually made"). Finkelstein J noted that, whilst a party who is being funded by his solicitor is not really a "nominal plaintiff", nevertheless, the solicitor does stand to benefit from the action (especially as regards the additional fee) if the action is ultimately successful, and that this ought to be a relevant, though not a decisive, consideration when deciding whether security should be ordered. The more robust attitude to security is evident from his Honour's statement:

> While class actions provide many benefits to the community, they have their attendant dangers. They can be used as an instrument of oppression. It is not unknown for a class action to be brought in relation to an unmeritorious claim in the hope of compelling the defendant to agree to a settlement to avoid the enormous expense of fighting the case. Those types of actions can be discouraged by an appropriate order for security.[29]

[27] *Bray v F Hoffmann-La Roche Ltd* (2003) 200 ALR 607 (Full FCA) [141]–[142] (Carr J).

[28] *Ibid*, [252]. Branson J, the third member of the Full Federal Court, agreed with both Carr and Finkelstein JJ on the issue of security for costs: [214].

[29] *Ibid*.

(b) Summation of relevant factors

It is undeniable that, on the case law to date, public policy considerations weigh strongly against any order for security that might impede a class claim,[30] but circumstances do exist whereby representative plaintiffs under Pt IVA will find it difficult to resist an order for security. Apart from the circumstances mentioned by Finkelstein J above, those that might, in a given fact scenario, either justify or negate such an order, as clarified by case law, are shown in Table 10.1 (where RP designates the representative plaintiff).

In summary, the purported objectives of class actions (especially greater access to justice) provide opportunity for representative plaintiffs to resist security for costs applications. Nevertheless, there is now, with a decade of jurisprudence to draw upon, cause for concern for Australian representative plaintiffs where security applications are made against them.

C OPERATION OF LIMITATION PERIODS

The interrelationship between statutory limitation periods and class actions is interesting for the manner in which judicial pronouncements and legislative activity have governed the representative's conduct and, in addition, sought to protect the absent class members' interests.

It is a particular instance of the cross-fertilisation of elementary ideas among the jurisdictions, and of the benefits from a comparison of legislative disparity of expression and effect, both strands being aimed at eliciting the "better view". The conundrum of limitation periods also conveniently highlights the interplay between the class and the representative plaintiff, and patently exposes or draws out the difficulties confronting the designers and users of a class action system where the representative's desired course of action may (absent court intervention) impact adversely upon the interests of the class. Furthermore, the interrelationship between class actions and limitations issues illustrates the continuing and onerous task upon the judiciary to both monitor the representative's conduct and to act in a manner that is cognisant of the interests of those who are not before the court.

1. The Dilemma of Limitation Periods

There is inevitably a tension when one considers class actions and the running of the limitation periods relevant to the causes of action which the representative plaintiff alleges: "the policies underlying class actions and statutory limitation periods, in effect, serve different masters. A class action procedure is

[30] Eg: *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [75].

Table 10.1 ***Security for costs under Pt IVA***

Factors justifying security for costs	Factors negating security for costs
• court satisfied that 'person of straw' deliberately selected as RP in order to immunise from costs orders (if proceeding fails) particular class members of substantial means and for whose particular benefit action is being brought—in that event, fact that class members are entitled to costs immunity would not operate against an order for security;[31] • the class claim is spurious, oppressive or clearly disproportionate to costs involved in pursuing it;[32] • if significant problems exist with way that the class claim is pleaded and class defined, so that action cannot proceed until problems are rectified, and if it cannot properly be said that the proceeding enjoys a high possibility of success;[33] • while claim might be one of 'public importance', by RPs who appeared motivated by public interest rather than any pecuniary or other private interest, it was not 'public interest' litigation;[34] • if there is no evidence that, if security for costs order made, it would bring proceedings to a halt.[35]	• RP has bona fide claim, reasonably arguable case for relief which has been conducted efficiently, and which raises important issues of principle;[36] • the claims of class members arise out of an unlawful and widespread activity which has been admitted to by the defendants, and where public policy considerations weigh strongly against any order for security that might impede or hinder the class members' claim for consequent relief;[37] • an order for security is likely to stultify meritorious proceedings;[38] • the class claim has a high prospect of success, so that it is hence unlikely defendants would ever become entitled to recover costs, or is an example of 'public interest' litigation;[39] • defendant's position regarding costs adequately protected so no order for security is warranted.[40]

[31] Eg, obiter in: *Bray v F Hoffmann-La Roche Ltd* [2002] FCA 1405, [68], [72]; *Ryan v Great Lakes Council* (1998) 154 ALR 584 (FCA) 586; *Woodhouse v McPhee* (1997) 80 FCR 529, 534. Note approval of this position by ALRC, *Managing Justice* (Rep No 89, 1999) [7.111]. Factor applied in: *Tobacco Control Coalition Inc v Philip Morris (Aust) Ltd* [2000] FCA 1004, [74] (costs immunity of class members "does not preclude the making of a security order, especially bearing in mind that the proceeding has been structured so as to immunise from costs orders the organisations whose officers control TCCI"); also *Nendy Enterprises Pty Ltd v New Holland Aust Pty Ltd* [2001] FCA 582, [4], [8], and later: [2002] FCA 550, [11] (some concerns that representative plaintiff may have been selected as an impecunious representative party; security of $50,000 ordered).

[32] Obiter in: *Woodhouse v McPhee* (1997) 80 FCR 529, 534.

[33] Crucial in *Tobacco Control Coalition Inc* (security ordered in the sum of $300,000 ($100,000 for each defendant)).

[34] *Tobacco Control Coalition Inc*, *ibid* (corporate representative plaintiff conceded impecuniosity, but argued that the purpose of a class action/public interest of the litigation warranted special consideration).

[35] *Nendy Enterprises Pty Ltd v New Holland Aust Pty Ltd* [2002] FCA 550, [8].

[36] *Woodhouse v McPhee* (1997) 80 FCR 529 (principle at stake related to rights of former employees of company in liquidation; class claim for accrued employee entitlements by employees against

predominantly a plaintiff's vehicle for redress, while a statutory limitation period is a defendant's shield [against indefinite and interminable litigation]."[41] The situation is further complicated by the existence of absent class members whose existence, claims and accrual dates may be a mystery to the defendant. The defendant will wish to be informed of these claims within a reasonable timeframe (particularly where retaining documentary evidence and proofing witnesses is necessary to defend the class members' claims).

As a general rule, the bringing of a class action by the representative plaintiff will stop the limitation period from running against that particular plaintiff in respect of the claims alleged in the class action, just as in any unitary litigation. In respect of class actions, however, other extenuating circumstances can intervene, for example: what of the claims of the rest of the class who technically have not brought the class action under the opt-out model but whose claims are being asserted in the action; additionally, even where the representative plaintiff commences the class suit within time, a plentiful number of situations may occur following the expiry of the limitation period by which the absent class member can lose his or her status as such, or the class action itself may end, or indeed, may never be certified. How are the limitation periods in relation to each class member's claim to be treated in these scenarios? For these (and other) reasons, opt-out class actions[42] require some modification of the rules regarding limitation of actions that would normally apply in unitary litigation,[43] but the "appropriate" modifications have been the subject of some debate and legislative differences of opinion.

A few preliminary points are necessary before embarking upon the treatment of limitation periods among the focus jurisdictions. First, by way of terminology,

directors on the basis of their liability for insolvent trading by their company, no order for security); *Ryan v Great Lakes Council* (1998) 154 ALR 584 (FCA) 589 (claims bona fide and arguable). Also: *Bray v F Hoffmann-La Roche Ltd* (2003) 200 ALR 607 (Full FCA) [252] (Finkelstein J: "the court should not shy away from undertaking a preliminary evaluation of the merits" when considering security for costs applications under Pt IVA).

[37] *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [75] (no order for security; remitted for further consideration).

[38] *Woodhouse v McPhee* (1997) 80 FCR 529, 534.

[39] Considered relevant, but unable to be made out, in *Tobacco Control Coalition Inc v Philip Morris (Aust) Ltd* [2000] FCA 1004, [75].

[40] *Wong v Silkfield Pty Ltd* (FCA, 16 Jan 1998) 17 (representative plaintiffs resident in NZ; had sufficient assets available with which to satisfy the defendant's costs; not challenged on appeal).

[41] *OLRC Report*, 780.

[42] An opt-in class action regime does not give rise to the same difficulties. As the SLC noted, their recommendation of an opt-in arrangement meant simply that, in the case of both representative party and other class members, the claims would have to be made within the relevant limitation period, but that, insofar as the representative party was concerned, the limitation period would be suspended upon commencement of the action, and insofar as any other class member was concerned, it would be suspended from the date when he or she opted in: *SLC Report*, [4.137]. On that basis, no amendment to the limitation statutes was required to cope with the opt-in schema recommended: at [4.140].

[43] See Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 10; *ManLRC Report*, 71; *AltaLRI Report*, [414].

the cessation of the running of a limitation period in the context of class actions is commonly referred to as the "tolling" of the limitation period, and the "tolling effect" refers to "the method of calculating the time that the absent class member has to file an action after tolling has ended."[44] Secondly, any statutory modification of the limitation periods in the context of class actions will never operate to revive a barred claim where no claim was issued by the representative plaintiff within the limitation period.[45] Thirdly, it is important to recall that, while law reform commissions have considered that it is essential and helpful to deal as clearly as possible with the issue of limitation periods for class members,[46] the caveat is that provisions dealing with limitation periods may encompass matters of substantive law. As the High Court of Australia has noted, "[s]ome statutes of limitation have traditionally been held to be procedural on the basis that they bar the remedy not the right; other limitation provisions have been held to be substantive."[47] Given the constraints that commonly apply to the powers of a rule-making committee, the requirement for separate legislation to modify the law relating to limitation periods has been variously recommended in Australia,[48] in Canada[49] and in England.[50]

Figure 10.1 illustrates, by time line, some occurrences that are significant in the analysis of any limitations problem in the class action context.

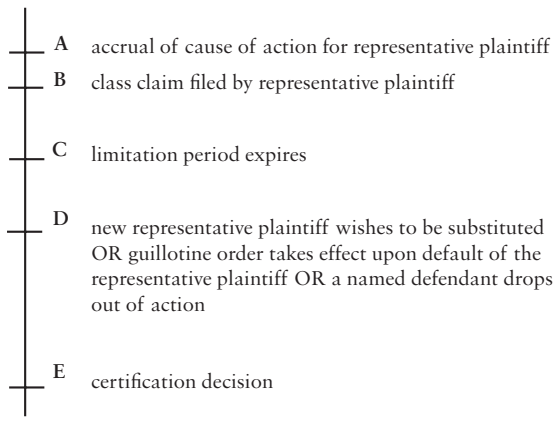

Figure 10.1 ***Time line of events relevant to limitation periods***

[44] *Newberg* (4th) § 17.19 p 366, citing *Chardon v Fumero Soto*, 462 US 650, 652, fn 1, 103 S Ct 2611 (1983).

[45] Noted by *Pearson v Boliden Ltd* (2002), 7 BCLR (4th) 245, 222 DLR (4th) 453 (CA) [74]; *Ballen v Prudential Bache Securities Inc*, 23 F 3d 335, 337 (10th Cir 1994); *Newberg*, *ibid*, 369.

[46] *ManLRC Report*, 72; *FCCRC Paper*, 95; *OLRC Report*, 771.

[47] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (HCA) [98] (footnotes omitted).

[48] Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 10.

[49] *FCCRC Paper*, 95, and see Decision #35 that the class proceedings rule would not address limitation periods.

[50] *Final Woolf Report*, ch 17, [45].

The key occurrences in Figure 10.1 will be referred to subsequently by the relevant event letter where appropriate. In this section, each of the three themes—cross-fertilisation of ideas among the jurisdictions, legislative disparity, and the interplay between class members and the class representative—will be considered, in the context of the particular difficulties associated with operation of limitation periods in class actions.

2. Cross-fertilisation of Ideas

The jurisprudence under FRCP 23 in respect of limitation periods has had a marked impact upon the treatment of the issue elsewhere among the focus jurisdictions. The US federal rule is entirely silent about the issue, and hence, has given rise to weighty judicial reasoning by which to craft solutions to a variety of limitation questions. It was held in early decisions[51] under the revised 1966 rule (and later confirmed by the Supreme Court[52]) that, at its simplest, the commencement of a certified class action suspends the running of the applicable statute of limitations against *all* potential class members (the position where the class action is not ultimately certified, or is decertified, is discussed later). In effect, this shields all absent class members from having to either file a claim to preserve his or her rights or seek agreement from the defendant that the limitation period will not be raised as a defence[53] prior to the expiry of the limitation period at point C.

By particular statutory provisions, the regimes in Australia's federal jurisdiction[54] and in Canada's provinces[55] have embodied that FRCP 23 jurisprudence, by similarly providing for suspension of the limitation period for all absent class members in respect of the claims to which the class action relates. This suspension has been widely praised judicially in those jurisdictions as "far reaching",[56] as providing considerable "practical advantages",[57] and as acting in the interests of fairness toward absent class members.[58]

[51] *State of Minnesota v US Steel Corp*, 44 FRD 559 (D Minn 1968); *Philadelphia Elec Co v Anaconda American Brass Co*, 43 FRD 452 (ED Pa 1968); *Esplin v Hirschi*, 402 F 2d 94 (10th Cir 1968).

[52] *American Pipe and Const Co v Utah*, 414 US 538, 551–56, 94 S Ct 756 (1974); cited in *Eisen v Carlisle and Jacquelin*, 417 US 156, 176 n 13 (1974). Also: *Chardon v Fumero Soto*, 462 US 650, 659–61, 103 S Ct 2611 (1983).

[53] Both suggestions mooted, but discarded, as possibilities in *FCCRC Paper*, 95.

[54] FCA (Aus), s 33ZE(1).

[55] CPA (BC), s 39(1); CPA (Ont), s 28(1).

[56] As used to describe Supreme Court Act 1986 (Vic), s 33ZE in *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1 (HCA) [167].

[57] *Brogaard v Canada (A G)* (2002), 7 BCLR (4th) 358 (SC [in Chambers]) [140]; *Scott v TD Waterhouse Investor Services (Canada) Inc* (2001), 94 BCLR (3d) 320 (SC) [115]–[116]; *Ho-A-Shoo v Canada (A G)* (2000), 47 OR (3d) 115 (SCJ) [57].

[58] *FCCRC Paper*, 93–94.

A variety of cogent justifications have been asserted by the judiciary under FRCP 23 (and in early academic commentary[59]) for the suspension of limitation periods as against absent class members which are concomitant with the language and policy of the opt-out class action model. For example, the Fifth Circuit observed in *Vaught v Showa Denko KK*[60] that class action notice is intended to enable class members to opt out if they wish to pursue their claims independently. "If there were no tolling [of the limitation period], notice would be irrelevant, because the limitation period for absent class members would most likely have expired, making the right to pursue a claim separately meaningless."

Secondly, as the OLRC noted, and the Eighth Circuit reiterated in *Adams Public School District v Asbestos Corp, Ltd*,[61] the tolling of a statute of limitations prevents "needless duplication" by the filing of numerous claims. Accordingly (both reasoned), if class members are not required to indicate formally their participation in an opt-out class action prior to a determination of the common issues in order to protect the right to participate in a favourable judgment, then equally, class members should not be required to act in order that they avoid the adverse effects of the running of a limitation period. Any other view would be incompatible with the aim of judicial economy which underpins the opt-out class action regime.

Thirdly, limitation periods are intended to prevent plaintiffs from sleeping on their rights and to give defendants timely notice of claims and of plaintiffs. The US Supreme Court remarked in *Crown, Cork & Seal Co Inc v Parker*[62] that the tolling of limitation periods where a class suit is commenced is not inconsistent with those two purposes. "Class members who do not file suit while a class suit is pending cannot be accused of sleeping on their rights"—class action regimes "permit and indeed encourage absent class members to rely on the [representative] plaintiff/s to press their claims." Equally, a class action "notifies the defendants not only of substantive claims . . . against them, but of the number and generic identities of the potential plaintiffs", without requirement for each individual class member to file proceedings in order to protect rights to litigate. Therefore, it followed that the class action tolling rule was not inconsistent with the purposes served by statutes of limitations.

These reasons, while not articulated in the jurisprudence under the Australian and Canadian focus regimes, are just as cogent and plausible in order to justify

[59] Note, "Statutes of Limitations and Defendant Class Actions" (1983) 82 *Michigan L Rev* 347, 347–48; WA Jonason, "The American Pipe Dream: Class Actions and Statutes of Limitations" (1982) 67 *Iowa L Rev* 743 both proposing refinements to the narrow *American Pipe* ratio.

[60] 107 F 3d 1137, 1147 (5th Cir 1997), revised opinion at 1997 US Lexis 12786. Same observation previously made in: *Crown, Cork & Seal Co Inc v Parker*, 462 US 345, 351–54, 103 S Ct 2392 (1983).

[61] 7 F 3d 717, 718–19 (8th Cir 1993). See also: *Devlin v Scardelletti*, 536 US 1, 10, 122 S Ct 2005 (2002) ("Otherwise, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated"); *OLRC Report*, 780.

[62] 462 US 345, 352–53, 103 S Ct 2392 (1983).

the statutory enactments that have occurred therein. Indeed, these statutory provisions which implement the class action tolling rule are examples of the usefulness of cross-fertilisation of class action theory among the jurisdictions, and also serve to overcome any judicial reluctance that may occur to suspend limitation periods in this context.[63]

Under the federal Australian regime, where certification is not required, suspension of the limitation period against all absent class members operates upon the filing of the application (at point B in Figure 10.1). However, for those jurisdictions which require that a class action be certified in order to progress, the difficult question has arisen as to what happens if the action is *not* ultimately certified. First scenario: is the suspension effective from filing of the claim at point B? Second scenario: is suspension deemed never to have occurred (so that time has been running against all class members throughout) because there is, ultimately, no class action on foot? In the second scenario, if the certification outcome was heard at point E, then the class members would be out of time and unable to commence individual actions if they had done nothing to protect their position in the interim (eg, file an individual claim before point C). On the other hand, if the first scenario applies, it will obviously be of great benefit to the class members, for time will start running again upon the decision not to certify at point E, and from that date, they will have whatever period was left to run of their limitation period (the period from B to C) to file individual actions. If that were to occur, the defendant would arguably be "punished" by the class members' ability to stop time running by grouping under the rubric of an action which did not satisfy the requirements of a class action and which thus had no validity.

The US Supreme Court answered this dilemma in *American Pipe and Construction Co v Utah*[64] by choosing the first scenario. That is, the commencement of a purported class action suspends the applicable limitation period for all absent class members at point B, regardless of whether the suit is denied certification after the limitation period would have elapsed at point C. In that case, the State of Utah commenced a civil antitrust action against the defendant,

[63] Difficult limitation issues have arisen in the US, where tolling has not been upheld. For example: whilst in *American Pipe*, the Supreme Court held that the statute of limitations in a subsequently filed federal question action should be equitably tolled during the pendency of a federal class action, on the other hand, Virginia has no statute providing that the statute of limitations in a subsequently filed state action should be equitably tolled during the pendency of either a state or a federal class action, and no Virginia court has ever applied such a rule; in *Wade v Danek Medical Inc*, 182 F 3d 281, 286–87 (4th Cir 1999), the 4th Circuit stated that "[a]lthough a number of states have allowed equitable tolling for class actions in their own courts, only a very few have even addressed the question of 'cross-jurisdictional' equitable tolling, much less allowed such tolling"; the verdict was that the Virginia Supreme Court would not adopt a cross-jurisdictional equitable tolling rule; "the Commonwealth of Virginia simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state"). For another unsuccessful claim that the limitation period should be tolled, see: *Sawtell v EI du Pont de Nemours and Co Inc*, 22 F 3d 248, 253–54 (10th Cir 1994).

[64] 414 US 538, 552–53, 94 S Ct 756 (1974).

on behalf of approximately 800 class members, 11 days prior to the expiry of the limitations period.[65] Approximately six months later, the certification judge in the District Court entered an order denying certification because joinder was practicable. Eight days after this, over 60 of the putative class members sought to intervene as named plaintiffs in Utah's action. In response, the District Court held[66] that the limitations period had expired against those petitioners. Judge Pence rejected the contention that commencing the class action had suspended the running of the limitation period until certification had been denied, leaving the petitioners 11 further days in which to intervene. On appeal, this decision was reversed by the Court of Appeals for the Ninth Circuit,[67] and this reversal was unanimously affirmed by the Supreme Court. As a result, the petitioners were just in time. As 11 days remained unexpired of the limitation period when the class suit was filed (points B to C), and the petitioners sought to intervene eight days after the denial of certification, that meant that they were in time by a mere three days. The Supreme Court considered the effect of its decision upon a defendant in this scenario, and concluded that the defendant would not be prejudiced because "[w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial . . . is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors".[68]

The *American Pipe* decision has been widely construed since. The suspension of the limitation period has been held to apply, regardless of whether the denial of certification occurred due to numerosity problems, inadequate representation, or for some other reason,[69] and until after all appeal avenues have been exhausted.[70] The principle of suspension applies to class members who chose to opt out of the class action (the limitation period commencing again upon opting out);[71] and in the case where the class suit was originally certified and is later decertified.[72]

The tricky problem of whether the limitation period should be tolled in the event that the action is not certified naturally has arisen in the Canadian provinces, where certification is also a feature. It is notable that the resolution of this issue has been marked by legislative differences among the Canadian

[65] Clayton Act, 15 USC § 15(b).

[66] *Utah v American Pipe and Construction Co*, 50 FRD 99 (CD Cal 1970).

[67] *Utah v American Pipe and Construction Co*, 473 F 2d 580, 584 (9th Cir 1973).

[68] *American Pipe and Construction Co v Utah*, 414 US 538, 555, 94 S Ct 756 (1974).

[69] *Haas v Pittsburgh National Bank*, 526 F 2d 1083, 1097 (3d Cir 1975) (*American Pipe* applied where district court held after its original certification of the class action that representative Haas could not represent cardholders at Equibank since she did not hold a card issued by it).

[70] *United Airlines Inc v McDonald*, 432 US 385, 392–95, 97 S Ct 2464 (1977).

[71] *Eisen v Carlisle and Jacquelin*, 417 US 156, 176 fn 13 (1974) ("Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in [*American Pipe*] which established that commencement of a class action tolls the applicable statute").

[72] *In re Rhone-Poulenc Rorer Inc*, 51 F 3d 1293, 1298 (7th Cir 1995).

provincial regimes. Indeed, a distinct lack of clarity in some of the statutory wording has justifiably attracted some criticism. This uncertainty—all the more unfortunate when one considers the explicit treatment of the topic by the US Supreme Court which was open to the Canadian provincial legislatures to either embrace or refute—comprises the first of two significant examples of inter-jurisdiction legislative disparity in the handling of limitation issues.

3. Legislative Disparity

(a) Denial of certification

Remarkably, there are three different types of legislative wording within the class action regimes implemented in Canada whereby the limitation period tolls in the context of a class action. At one end of the spectrum is that of Manitoba: "a limitation period applicable to a cause of action asserted in a proceeding commenced under this Act is suspended in favour of a class member . . . and resumes running against the member . . . when . . . (a) a ruling is made by the court (i) refusing to certify the proceedings as a class proceeding".[73] The wording could not be clearer—suspension of the limitation period runs from when the class claim was filed (point B), even if the class proceeding is not certified after the certification hearing at point E. This provision clearly reflects the *American Pipe* approach.[74]

At the other end of the spectrum is the British Columbia regime, in which it is provided that: "any limitation period applicable to a cause of action asserted in a proceeding *that is certified as a class proceeding* under this Act is suspended in favour of a class member on the commencement of the proceeding . . .".[75] Far more problematical for class members, this provision contemplates the outcome that suspension runs from the commencement of the proceeding, but *only* in cases where the proceeding is ultimately certified. If the class action does not meet the criteria and is not certified, then the limitation period as against the class members is deemed never to have stopped running, and in the circumstances described in Figure 10.1, the class members would be out of time at point E, the certification outcome, if they have not taken precautionary steps by point C. This less generous scenario has been enacted elsewhere in Canada in more recent regimes.[76] However, influential law reform opinion since the British Columbia regime was enacted has not followed this approach.[77]

[73] Class Proceedings Act, s 39(2)(a)(i).

[74] See also, Civil Code of Quebec, SQ 1991, c64, art 2908: "The suspension lasts until the motion is dismissed or annulled . . .".

[75] CPA (BC), s 39(1) (emphasis added). Judicially reiterated in: *Halvorson v BC (Medical Services Comm)* (2003), 227 DLR (4th) 644, 13 BCLR (4th) 205 (CA) [33].

[76] Class Actions Act 2001 (Sask), s 43(2); Class Actions Act 2001 (SNL), s 39(2).

[77] *ManLRC Report*, 72; *FCCRC Paper*, 94; *AltaLRI Report*, [417].

To make matters even more confusing, Ontario's provision is not quite explicit either way: "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member *on the commencement of the class proceeding* . . .".[78] Unfortunately, although the OLRC certainly anticipated that limitation periods against absent class members ought to be suspended, "whether certification is granted or denied",[79] the wording of this provision seemed to allow for a contrary argument.[80] Indeed, law reform commissions have been divided as to whether or not the Ontario provision did allow for suspension from the date of filing where certification was denied.[81] It was left to judicial clarification in 2003 that the provision embraces the class action tolling rule, whether or not the class action is ultimately certified. In *Logan v Ontario (Minister of Health)*,[82] Winkler J considered, in line with the *American Pipe* analysis, that:

> the *CPA* is remedial legislation aimed at providing judicial economy for the court system and access to that system for plaintiffs with non-economic claims. If potential class members are forced to commence individual actions while awaiting certification of class proceeding to protect individual limitation periods, it would defeat these purposes. The court system could be potentially burdened with volumes of claims, all of which would be redundant should the proceeding be certified as a class proceeding. Further, requiring each class member to file an individual claim could go a long way toward eliminating the economic advantage of class proceedings for any class member with a small claim.[83]

Of the various scenarios, the *American Pipe*/Manitoba statutory provision/Ontario *Logan* view appears by far the more satisfactory. In addition to the vehement criticisms mooted by Winkler J that suspension only in the case of successful certification detracts from efficiency and access to justice, being the principal goals of a class proceeding,[84] it perpetuates unreasonable uncertainty on the part of class members as to whether certification is likely, and the likely time to elapse until the certification issue is decided.[85] None of these is a desirable feature of a procedural regime.

[78] CPA (Ont), s 28(1) (emphasis added).

[79] *OLRC Report*, 779, and cl 35(1)(c) of the Draft Bill. The precise terminology of cl 35 was not reproduced in CPA (Ont), s 28.

[80] That argument being that a "class proceeding" meant a certified proceeding.

[81] According to the *ManLRC Report*, "[t]he Ontario rule *might* be broad enough to stop the tolling of limitation periods when a claim is filed, even if it is not ultimately certified": at 72. However, Alberta Law Reform Institute was insistent that Ontario did suspend limitation periods, whether or not the proceeding was ultimately certified: *AltaLRI Memorandum*, [133] and *AltaLRI Report*, [415]. Note also the lack of certainty noted in JA Prestage and SG McKee, "Class Actions in the Common Law Provinces of Canada" in C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [14.46].

[82] (2003), 36 CPC (5th) 176 (SCJ).

[83] *Logan*, *ibid*, [23].

[84] These concerns were also noted in *AltaLRI Report*, [417], and see recommendation 24.

[85] *OLRC Report*, 779.

(b) Resumption triggers

A further example of marked legislative disparity among the focus regimes is their treatment of resumption triggers. Suspension of the limitation period under class action statutes runs unless and until one of certain events ("resumption triggers") occurs, which essentially has the effect of finishing the class action insofar as that class member is concerned. The philosophy is that, when class members can regain control of prosecuting their individual claims, then the limitation period should resume running, and individual members should then be responsible for complying with the applicable time requirements.[86] Thus, class action regimes contemplate that "individual claims" are not entirely subsumed by the class action, in that the running of the limitation period affecting the claim of a class member is suspended while, in effect, the class action remains unresolved.[87]

As Table 10.2 illustrates, those statutes which expressly deal with resumption of the limitation period take a quite disparate view of what constitutes a "resumption trigger" (or, at least, the extent to which they should be statutorily described). The Canadian statutes are more comprehensive in their description of these events than is their Australian counterpart.

Unless one of the statutory resumption triggers occurs, then the limitation period against class members remains suspended. This can cause the very problems for the defendant which a statute of limitations was designed to avoid. As noted by the Federal Court of Australia,[88] the ongoing suspension (in the absence of any resumption trigger as defined by the relevant statute) has the distinct disadvantage for the defendant that "the proceeding is without end" and the defendants "can never know whether they have resolved all claims". This is, of course (to quote the defendant's lawyers), quite contrary to the usual situation "where the defendant can resolve the claims of the actual plaintiffs and end that litigation and, when the limitation period has expired, be satisfied no more like claims can be pursued by any further litigation."

The brevity of Australia's description of resumption triggers has prompted some unfortunate uncertainty in that jurisdiction as to precisely when a class member's limitation period starts to run again. Clearly, dismissal of class proceedings for want of prosecution, or where a self-executing or guillotine order is made and comes into effect upon the representative plaintiff's default, will "determine" the proceedings for the purposes of s 33ZE,[89] which has the same effect as dismissal of the proceedings without an adjudication of the merits to which the Canadian statutes refer. However, in *Bright v Femcare Ltd*,[90] the question arose as to whether an order that the proceeding no longer continue in

[86] *FCCRC Paper*, 94.
[87] *King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd)* [2002] FCA 1560, [9].
[88] *McMullin v ICI Aust Operations Pty Ltd* (1998) 84 FCR 1, 4.
[89] *Lowe v Mack Trucks Aust Pty Ltd* [2001] FCA 388, [17].
[90] [2002] FCA 11.

Table 10.2 ***Resumption triggers***

Resumption triggers	Australia[91]	British Columbia[92]	Ontario[93]
class member opts out of the class	✓	✓	✓
class action determined without finally disposing of class member's claim	✓		
certification order amended—class member excluded from class action		✓	✓
class action decertified at some point after certification order made			✓
class action dismissed without an adjudication on the merits		✓	✓
class action abandoned/discontinued with court approval		✓	✓
class action settles (unless settlement says otherwise)		✓	✓

class action form[94] would result in a limitation period commencing to run again. This question clearly troubled the court. In the light of "broad statutory drafting", Stone J ventured that an order that the proceeding not continue as a class action did not "determine" the proceeding,[95] and that consequently, time should not start to run again.[96] From a practical point of view, Stone J considered, however, that it would seem to be contrary to the apparent policy of s 33ZE that the suspension of the limitation period should continue when the relevant class member could no longer participate in the proceedings because they were not on foot. In the end, his Honour noted that, "[i]t may be that the correct interpretation of the section is that an order under s33N is sufficient to determine the proceeding in so far as it relates to a group member's claim and that therefore such an order has the finality necessary to revive the running of a limitation period."[97]

[91] FCA (Aus), s 33ZE(2).
[92] CPA (BC), s 39(1)(a)–(f).
[93] CPA (Ont), s 28(1)(a)–(f).
[94] Pursuant to FCA (Aus), s 33N.
[95] For this proposition, the court cited: *Silkfield Pty Ltd v Wong* [1998] FCA 1645 (O'Loughlin and Drummond JJ) 2.
[96] *Bright v Femcare Ltd* [2002] FCA 11, [6].
[97] *Ibid*, [7].

Doubts about the effect of a s 33N discontinuance upon the resumption of limitation periods have been judicially noted elsewhere.[98] Clearly, the limitations provision under Pt IVA would benefit from a more explicit description of the resumption triggers, in line with the greater clarity afforded by the Canadian regimes.

These examples of legislative disparity within the conundrum of limitation issues emphasises why it is vitally important to examine different legislative approaches in light of the case law decided under them in order to properly assess how feasible and workable their enactment has proven to be. A comparative assessment in the above instances indicates that the Canadian approach to the definition of resumption triggers is to be preferred to that employed by the Australian legislature, and that the British Columbia approach to suspension in the case where certification is denied lacks merit in comparison to both the superior interpretation in Ontario and statutory enactment in Manitoba. Therefore, with limitation periods, as with several other topics considered earlier—from multiple defendants to adequacy of the representative—an analysis of the legislative differences and judicial applications undertaken in a comparative study of key regimes is very instructive, and provides a rich scope for the development of class action jurisprudence generally.

4. The Interplay Between Representative and Class

For convenience, one example is taken from each of the focus jurisdictions to illustrate the complexity of the interplay between the class members and class representative where limitation issues arise. Each of the chosen examples which follow also illustrates how important is the role of the court in assessing the interests of absent parties and monitoring the conduct of the representative.

Replacement of the representative plaintiff. In Ontario, the following dilemma arose: the representative plaintiff wished to be replaced (prior to the certification hearing) because she wanted to proceed with her own individual action and no longer felt able to represent the class members for that reason. New representative plaintiffs desired to be substituted, who had, up to that point, been merely unidentified class members. They applied for substitution and the current representative plaintiff applied for court-sanctioned withdrawal.

The problem: this application was made after the expiry of the limitation period applying to the new representative plaintiffs' causes of action. The class was "in limbo" during this period, neither certified nor denied certification, simply awaiting a certification decision for which they would require an adequate

[98] *Tian v Minister for Immigration, Local Govt and Ethnic Affairs* (1994) 33 ALD 451 (Full FCA) 452. The court assumed that time did begin to run again upon an order under s 33N, but did not need to determine the point for the purposes of those proceedings.

representative. The claims of the new representative plaintiffs would be statute-barred, and their representation of the class impossible, but for the suspension of the limitation periods against those new representatives as class members. In *Logan v Ontario (Minister of Health)*,[99] a putative class action which concerned allegedly defective temporomandibular joint implants, the Attorney-General objected to the purported substitution on the basis that the claims asserted by the new representatives were out of time, and argued that the limitation period had not been suspended as against them unless and until certification was granted.

The court disagreed, and upheld the suspension of the limitations period (and hence, effective substitution) on various grounds. One of the more significant reasons was that, at all times from the issuance of the claim until the outcome of certification, an intended class proceeding brought by a proposed representative plaintiff on behalf of a putative class of plaintiffs was *not* an individual action on the part of the representative plaintiff that "metamorphosised" to a class action once certified. Rather (the court held), the proceeding changed from an intended class proceeding, which was commenced as such, to a "certified" class proceeding which would then be conducted accordingly on behalf of others similarly situated claiming relief in respect of an alleged common wrong.[100] It was thus consistent with the overall operation of the Act and with the goals of judicial economy and access to justice to enable the new representative plaintiffs to claim the benefit of a suspension of limitation periods between filing and certification hearing.[101]

Other judicial authority in Ontario supports, both particularly[102] and generally,[103] the proposition that suspension of limitation periods is operative prior to the certification decision. Thus, this was an illustration whereby to permit the representative plaintiff to pursue her desired course of conduct did not, upon analysis, adversely affect the class members' (or defendant's) interests.

The defendant drops out of the action. Under FRCP 23, a different type of dilemma has arisen: the dropping out of a defendant without the class members' knowledge.[104]

[99] (2003), 36 CPC (5th) 176 (SCJ).

[100] *Logan*, *ibid*, [13]. See also: *Gariepy v Shell Oil Co* (2003), 63 OR (3d) 91 (SCJ) [12] (Nordheimer J).

[101] *Logan*, *ibid*, [16].

[102] For an earlier successful motion to add a co-representative plaintiff, again over the objections of the defendant that the co-representative was statute-barred, see *Egglestone v Barker* (2001), 9 CPC (5th) 304 (SCJ).

[103] See: *Ford v F Hoffmann-LaRoche Ltd* (2001), 15 CPC (5th) 76 (SCJ) [16], noting that "a putative class member has certain statutory benefits because of the class proceeding prior to certification (for example, there is a stay of the running of the limitation of action time period: s 28 of the *CPA*)". In addition, suspension prior to certification was clearly anticipated by Shaughnessy RSJ in *Chopik v Mitsubishi Paper Mills Ltd* (2003), 29 CPC (5th) 277 (SCJ) [13].

[104] The example is also given in *Newberg* (4th) § 17.19 pp 369–70 to illustrate tolling problems in mass torts.

A class suit was filed against, inter alia, Ernst & Young, but later, another class action complaint was filed which superseded (and rendered ineffective) the earlier complaint, and which crucially did not name Ernst & Young as a defendant. Some of the former class members later sued Ernst & Young in a separate suit, and alleged that the limitation period was still tolled because they were not told by the class representative that the later class action was not being pursued against that defendant. Confronting these plaintiffs was authority to the effect that limitations periods are tolled only as to defendants named in the class action.[105] Thus, once Ernst & Young were deleted from the complaint, the suspension of limitation periods no longer applied in respect of plaintiff class members who wished to allege claims against that defendant.

The District Court held in *Lindner Dividend Fund Inc v Ernst & Young*[106] that "decisions by class counsel to drop certain defendants from individual suits . . . are within counsel's discretion and do not necessarily require notice to the class."[107] The question therefore was: should the limitations period as against those class members who wished to sue a defendant remain suspended until the members discovered that the potential defendant was no longer a party to the class action, or would continuing suspension act unfairly to penalise that defendant for the plaintiff class members' failure to stay informed of the proceedings to which the plaintiffs were technically parties? The latter view prevailed. This was on the basis that

> a class complaint puts defendants on notice not only of the claims against them but also of the number and generic identities of the potential plaintiffs. However, at the time when a defendant is dropped from the class action, that defendant is no longer notified of any claims against it, and a potential plaintiff is then required to act upon any claims it hopes to assert.[108]

The decision emphasises that resumption of a limitation period has serious consequences for absent class members, particularly where they may not be aware of the effective termination of the class action or other resumption trigger and thus not take appropriate action to protect such rights as they may have. In this case, the court did not dictate that the representative plaintiff had a responsibility to keep the class members informed of that resumption trigger for the ultimate protection of the absent class members.

Notice of resumption triggers. The difficulty of whether notice ought to be provided to class members upon the occurrence of a resumption trigger has also troubled Australian courts administering class actions under Pt IVA.

[105] *Arneil v Ramsey*, 550 F 2d 774, 782 fn 10 (2nd Cir 1977).

[106] 880 F Supp 49 (D Mass 1995).

[107] *Ibid*, 54. The court further cited (*ibid*, 54) *Longden v Sunderman*, 123 FRD 547, 558 (ND Texas 1988) as authority for the proposition that the requirement of FRCP 23(a)(4) that the representative parties fairly and adequately protect the interests of their class does not remove decisions to drop certain defendants from counsel's discretion.

[108] *Ibid*.

This problem manifested particularly in *Lowe v Mack Trucks Australia Pty Ltd*.[109] A class action was brought by the representative plaintiffs on behalf of all other persons who had purchased a Mack truck (the trucks were alleged to be of a defective design or construction). The representative plaintiff was ordered to file and serve an amended statement of claim in order to correct deficiencies in it, but this was not done within the time stipulated, and as a consequence of a guillotine order, the action was dismissed. Where a self-executing or guillotine order is made, the Federal Court noted that there may be class members whose rights would be adversely affected by the revival of limitation periods.[110] However, as a counter to this argument, the defendant argued that it surely should not be prejudiced by the revival of an action in which the class representative had manifested ongoing problems pleading any interest common to the class.

Although the provisions of Pt IVA did not make notice a prerequisite to an application for a self-executing order, the court held that, bearing in mind the possible consequences for class members of an order of this kind, some consideration should have been given in this case to the question whether general notice[111] ought first to have been given to class members before the guillotine order was made. "Generally speaking, a self-executing order should not be made in a representative proceeding unless the Court has first considered whether notice should be given to group members, either of the respondent's application or of any self-executing order to be made, or otherwise."[112] Thus, the failure of the representative plaintiff to comply with the order which had the effect of dismissal of the action did not, in this particular case, irretrievably harm the interests of class members who may have been out of time, had the action ceased and limitation periods resumed to run without their knowledge. The court accepted that "there may well be unknown persons who believe[d] that they were represented in the [class action] and who might, by reason of limitation periods, be adversely affected by the dismissal of the proceeding pursuant to the [guillotine] order."[113] The decision further reflects the monitoring and protective role cast upon, and assumed by, courts in proceedings of this nature.[114]

[109] [2001] FCA 388.
[110] *Ibid*, [17].
[111] Pursuant to FCA (Aus), s 33X(5).
[112] *Lowe* [2001] FCA 388, [17].
[113] *Ibid*, [18].
[114] For similar sentiments, see: *Williams v FAI Home Security Pty Ltd (No5)* [2001] FCA 399, [20].

11

Monetary Relief

A INTRODUCTION

As WITH ALL damages litigation, class actions may ultimately provide monetary relief to the representative plaintiff and to class members by either a settlement agreement or an adjudication on the merits in favour of the representative plaintiff.

In the event of a decision on the merits, it is a unanimous feature of the class action regimes of the focus jurisdictions, indeed an "essential adjudicatory characteristic of representative litigation",[1] that absent class members should be bound by a class action judgment, whether favourable to the class or unfavourable, unless the class member has opted out. Accordingly, and in common, this is expressly provided for in the regimes of Australia,[2] Ontario,[3] British Columbia[4] and the US.[5] The binding effect of judgment has been variously described as the "pivotal provision",[6] "central feature",[7] or "mechanism at the heart"[8] of a class action regime. Without it, a class action would lose a great deal of its utility and achievement of judicial economy.

The saving of judicial time and resources is also served by settlement. As litigators will attest, lengthy and complex litigation to trial and judgment will increase the defendant's costs and may consequently reduce the amount available to class members. However, due to various features associated with class litigation, the class action regimes of the focus jurisdictions[9] have uniformly implemented a special device of protection: judicial approval of the settlement agreement in order to render it binding and enforceable. In this way, the court's discretionary powers can subvert the control which the representative plaintiff otherwise exerts over the cessation of the litigation.[10]

The focus jurisdictions have manifested, within their statutes and judicial consideration, a marked cross-fertilisation of ideas with respect to aspects of

[1] *Newberg* (4th) § 1.6 p 28.
[2] FCA (Aus), s 33ZB(b).
[3] CPA (Ont), s 27(3).
[4] CPA (BC), s 26(1).
[5] FRCP 23(c)(2)(B) and (c)(3).
[6] *Femcare Ltd v Bright* [2000] FCA 512, 100 FCR 331 (Full FCA) [25].
[7] Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 7, cited in *OLRC Report*, 766.
[8] *Harrington v Dow Corning Corp* (2000), 193 DLR (4th) 67, 82 BCLR (3d) 1 (CA) [8].
[9] CPA (Ont), s 29(2); CPA (BC), s 35(1)(a); FCA (Aus), s 33V(1); FRCP 23(e)(1)(A).
[10] *Bright v Femcare Ltd* (1999) 166 ALR 743 (FCA) [11].

class action settlements, and monetary relief consequent upon a judgment. The purpose of this chapter is to explore the similarities and differences pertaining to: the role of judicial approval in class settlements, particularly the criteria used when assessing the settlement agreement (section B); the statutory provisions and judicial opinion governing the *assessment* of monetary relief consequent upon judgment given in favour of the class by the court (section C); and the statutory provisions and judicial opinion governing the *distribution* or award of that monetary relief (section D).

B JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

1. The Role of the Court

The requirement of judicial approval of class settlement agreements is contrary to the usual practice of unitary litigation, where cessation of the action without court approval is permitted. Indeed, this is one of the factors that most sets class actions apart. There are two prongs to the process within each of the focus jurisdictions: (1) court approval of any settlement agreement, and (2) notice of the settlement to the class members. The first of these is unanimously required throughout the various focus jurisdictions, but surprisingly, the second is not. The different philosophy in the case of class actions compared to unitary actions is attributed to various factors.

First, the interests of class members are affected by the result, and the court must ensure that their interests have been served by the settlement.[11] This is especially the case where the class members are not likely to be the beneficiaries of legal advice as the representative plaintiff is, are likely to have little real appreciation of what the status of "represented party" entails, and are likely not to fully understand that any settlement approval given in a representative proceeding will be binding upon them.[12] Secondly, representative plaintiffs must be prevented from using the class action to improve their own bargaining positions to settle their individual claims on terms more favourable than for the other class members (the "sweetheart" settlement).[13] Thirdly, court approval seeks to preclude class lawyers from benefiting themselves while obtaining minimal benefit for their clients. There is a risk that class lawyers will settle for less than the action is worth in order to gain what counsel views as a satisfactory fee, a

[11] *AltaLRI Report*, [323]; *ALRC Report*, [218], *FCCRC Paper*, 85; *OLRC Report*, 788–89; MA McCabe, "Class Backwards: Does the Fairness, Adequacy and Reasonableness of a Negotiated Class Action Settlement Really Have Any Effect on Approval?" (1997) 28 *Texas Tech L Rev* 159 (criticising in-kind, non-cash settlements that result in windfall profits for defendants and insufficient compensation for plaintiffs).

[12] *Lachance v Harrington*, 965 F Supp 630, 645 (ED Pa 1997); *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, [15].

[13] *SALC Report*, [5.20.4]; *OLRC Report*, 788; M Wilcox (the Hon), "Class Actions in Australia" (13th Commonwealth Law Conference, Melbourne, 2003) 6.

problem which has been both judicially[14] and academically[15] recognised. Fourthly, court approval of settlements is a means for the court to monitor extortionate settlements to prevent profiteering from vulnerable defendants.[16] A court-approved settlement agreement shields the defendant from further litigation related to the issues that are the subject of the settlement.[17]

When all these factors are taken into account, the principles upon which class action settlement statutory provisions are based might be said (according to some judges) to be those of the court's "protective jurisdiction . . . not unlike the principles which lead the court to require compromises on behalf of infants or persons under a disability to be approved."[18] Notably, by virtue of the 1 December 2003 amendments to FRCP 23, the process of reviewing proposed class action settlements has been strengthened.[19] Previously, the importance of adequate and complete judicial scrutiny of a proposed class action settlement was highlighted by the asbestos-related personal injury class action in *Georgine v Amchem Products Inc*,[20] which evoked this damning indictment of its particular fairness hearing and settlement approval:

> I write to bear witness to what went wrong in this case: the collusion between class counsel and the defendants; the district court's willingness to turn a blind eye to the facts and neglect the law; the spectacle of lawyers telling contradictory stories about

[14] The problem was eloquently expressed by the US Supreme Court in *Ortiz v Fibreboard Corp*, 527 US 815, 853, fn 30, 119 S Ct 2295 (1999) ("In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant"). Also: *Reynolds v Beneficial National Bank*, 288 F 3d 277, 279 (7th Cir 2002) (Posner J) (instructing district judges "to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions").

[15] For other concerns about self-interested class lawyers, see: JC Coffee, "Class Wars: The Dilemma of the Mass Tort Class Action" (1995) 95 *Columbia L Rev* 1343; JC Coffee, "The Regulation of Entrepreneurial Litigation" (1987) 54 *U Chicago L Rev* 877; B Hay, "Asymmetric Rewards: Why Class Actions (May) Settle for Too Little" (1997) 48 *Hastings LJ* 479. As other commentators note, for the defendant, acceptance of such a settlement can be attractive, as it is usually less expensive to pay off the lawyers than the litigants: S Sharpe and J Reid, "Aspects of Class Action Securities Litigation in the United States" (1997) 28 *Canadian Business LJ* 348, 358. It has also been argued that class lawyers are monopolists who wield tremendous power in class members' rights to sue and recover, and that judicial scrutiny of class settlements is a discipline upon that power: RA Nagareda, "The Preexistence Principle and the Structure of the Class Action" (2003) 103 *Columbia L Rev* 149, 162, 168ff.

[16] *Final Woolf Report*, [79]; J Donnan, "Class Actions in Securities Fraud in Australia" (2000) 18 *Company and Securities LJ* 82, 90. The term "blackmail settlements" has been used in this context: *In re Rhone-Poulenc Rorer Inc*, 51 F 3d 1293, 1298 (7th Cir 1995), citing Judge Friendly, *Federal Jurisdiction: A General View* (New York, Columbia University Press, 1973).

[17] *FCCRC Paper*, 86.

[18] See: *Dabbs v Sun Life Ass Co of Canada* (Ont Gen Div, 24 Feb 1998) [9]; *Tasfast Air Freight Pty Ltd v Mobil Oil Aust Ltd* [2002] VSC 457, [4].

[19] The motivation for these amendments was expressed by the Advisory Committee in these terms: "Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement": as reproduced in *2004 Federal Civil Rules Booklet* (Harvard, Dahlstrom Legal Publishing, 2004) 16.

[20] 83 F 3d 610 (3d Cir 1996).

> their actions to a tribunal that didn't seem to care which story the lawyers told or how often the story changed; the presentation and admission of testimony at the fairness hearing on what result other federal judges might like to see in this case; and the mistreatment of the widows who served as named representatives for the class—people whose experiences illustrate how the interests of class members were subordinated to the interests of persons not parties to this suit. I also write to expose the serious defects in the Georgine model, a model that invites defendants who harm large groups of people to pay a premium to the first victims who file claims in exchange for lower and more limited liability to all future claimants.[21]

Indeed, the process of judicial scrutiny of class settlements under FRCP 23 has prompted adverse academic comment.[22] Criticisms of the present requirement of judicial scrutiny include the following: minimal information to the court, the urgings of adversaries-turned-"fellow cheerleaders", judicial time pressures in which to review settlements, and all courts are seeking to do is make sure that the settlement is not manifestly unjust—all serve to ameliorate the degree of examination which settlements should properly bear. It has further been contended that, although "ostensibly the court stands in for the client to ensure that the settlement is fair to the client and does not merely serve the lawyer's interest . . . this arrangement simply replaces one imperfect agent (class lawyers) with another (the court)", because the latter's interests are not perfectly in line with the interests of class members in any event.[23] It is an unaccustomed role which the courts are asked to bear in this instance—"relinquish[ing] the role of

[21] SP Koniak, "Feasting While the Widow Weeps" (1995) 80 *Cornell L Rev* 1045, 1048. The settlement was ultimately set aside.

[22] See J Klusas, "Saving the Class Action: Developing and Implementing a Model Rule of Professional Conduct for Class Action Litigation" (2003) 16 *Georgia J of Legal Ethics* 353, 353–54 ("The questioning intensifies with news of class action lawsuits where the attorneys receive millions of dollars in attorney's fees, but class members receive, for example: a $1,000 coupon toward the purchase of a new truck but no repair for the explosion-on-impact prone fuel tank in their current truck; the assurance that a donation will be made to charity but no direct compensation for the years of price gouging they suffered; the ability to claim part of a settlement but only if they can produce credit card receipts from several years ago; or nothing because they contracted cancer too late"). Klusas notes (fn 14) that empirical analysis has shown that, on average, judges spend 34.5 hours per certified case while only 2.8 hours of that time is spent considering and ruling on proposed settlements: TE Willging *et al*, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996), cited in: DM Franklin, "The Mass Tort Defendants Strike Back: Are Settlement Class Actions a Collusive Threat of Just a Phantom Menace?" (2000) 53 *Stanford L Rev* 163, 180. Also: JC Coffee, "Class Wars: The Dilemma of the Mass Tort Class Action" (1995) 95 *Columbia L Rev* 1343, 1369 ("courts are eager to see such cases settled and may tend not to examine the basis for settlement with the same skepticism"); SM Kim, "Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?" (1998) 66 *Tennessee L Rev* 81, 126 ("When the parties as former adversaries appear before the court as fellow cheerleaders for the amicable disposal of their dispute, the circumstances are hardly conducive to scrutinizing judicial review"); as cited in Klusas (fn 16). Also: J Bronsteen and O Fiss, "The Class Action Rule" (2003) 78 *Notre Dame L Rev* 1419,1448 ("When a court reviews a settlement, however, it gives great deference to the parties' choices in the bargaining process and does not exercise its independent judgment for the remedy. It essentially decides only whether the settlement is manifestly unjust").

[23] SP Koniak and GM Cohen, "In Hell There Will be Lawyers Without Clients or Law" (2001) 30 *Hofstra L Rev* 129, 150.

passive, neutral mediator in favour of a more activist, managerial stance, particularly when creative solutions to complex problems require intervention."[24]

It should also be stated, however, that for all the criticisms of how class action settlements can be potentially abused, the empirical evidence available in respect of the longstanding FRCP 23 practice indicates that such concerns do exist, but may tend to be overstated,[25] and in any event, are hardly restricted to class actions jurisprudence.

Notably, the exceptional view that there is no place for judicial monitoring of class action settlement has also been espoused. The Scottish Law Commission considered that judicial approval should *not* be required in respect of class action settlements on the bases that: it is anomalous to impose upon a judge a special and onerous task which is not imposed in unitary litigation; the judge may not have adequate information upon which to assess whether the proposed settlement is reasonable or prejudicial for absent class members; the requirement of judicial approval is unnecessary if due importance is attached to ensuring the competence of the class representative and legal advisers thereto; and the quid pro quo of class members gaining advantages from using a group procedure which they would not enjoy if they sued individually is that they should allow for corresponding disadvantages inherent in class actions.[26] However, this contrary SLC view, whilst cited since by law commissions charged with reform of class actions procedure,[27] has never been followed in other jurisdictions for which a class action has been considered. Moreover, the advantages accruing from court approval of class action settlements has been judicially recognised and endorsed in the US,[28] Australia,[29] British Columbia,[30] and Ontario.[31]

[24] JB Weinstein, "Ethical Dilemmas in Mass Tort Litigation" (1994) 88 *Northwestern U L Rev* 469, 483. Also: JT Molot, "An Old Judicial Role for a New Litigation Era" (2003) 113 *Yale LJ* 27, 51 ("When judges review proposed class settlements in these mass tort cases under the Federal Rules of Civil Procedure, they perform a function dramatically different from the traditional adjudicative role . . . Instead of evaluating arguments advanced by the litigants, judges often must frame arguments themselves, as plaintiffs' attorneys (who stand to receive large fees) and defendants (who stand to achieve 'global peace') have little incentive to argue on behalf of absent class members whose rights might be undermined by a proposed settlement").

[25] See BL Hay and D Rosenberg, "Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy" (2000) 75 *Notre Dame L Rev* 1377 (arguing that blackmail settlements may be overstated, that critics generally base concerns on anecdotes rather than empirical studies; and that concerns can be handled through judicial safeguards without resorting to the drastic remedy of reducing availability of class actions).

[26] *SLC Report*, [4.92] and recommendation 19; and see the earlier provisional views in *SLC Paper*, [7.49]–[7.54].

[27] *SALC Report*, [5.20.7]; *ManLRC Report*, 93.

[28] *In re General Motors Corp Pick-Up Truck Fuel Tank Prod Liab Litig*, 55 F 3d 768, 784, 802, 805 (3d Cir 1995); *Lachance v Harrington*, 965 F Supp 630, 637 (ED Pa 1997); *Carson v American Brands Inc*, 450 US 79, 101 S Ct 993 (1981).

[29] *Tasfast Air Freight Pty Ltd v Mobil Oil Aust Ltd* [2002] VSC 457, [4]; *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, [16]; *Wong v Silkfield Pty Ltd* [2000] FCA 1421, [16]; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 (FCA) [21].

[30] *Scott v TD Waterhouse Investor Services (Canada) Inc* (2001), 94 BCLR (3d) 320 (SC) [115]–[116]; *Brogaard v Canada (A G)* (2002), 7 BCLR (4th) 358 (SC [in Chambers]) [140], factor (i).

[31] *See over*.

The court's function is to assess the settlement proposal that has been presented. Under the statutory provisions of the class action regimes, courts have no express power to amend or modify the proposed settlement agreement. In line with this view, it has been judicially stated that a court may only approve or reject the terms of a settlement offer.[32] However, practically speaking, courts have been prepared to indicate areas of concern and to allow parties to then make changes to the settlement. Once the perceived deficiencies are corrected, another hearing can then be sought for the purposes of obtaining judicial approval.[33] Indeed, the court may (despite admonitions not to recraft a settlement agreement) provide suggestions as to a replacement clause where an existing clause of the settlement agreement is considered not to be fair or adequate.[34]

In any application for approval of a settlement agreement,[35] there may be numerous "players"—the representative plaintiff seeking the court's approval, objectors from the class who are opposed to the terms of settlement, the defendant to the action, other defendants who are not parties to the settlement agreement and object to its terms, absent class members, and class lawyers. The court's task in sifting through this array of persons and interests is indeed an onerous one, especially where the application is not opposed by either defendant or objectors. Primarily, however, the court "is concerned with safeguarding the interests of the absent class members through an analysis of the fairness and reasonableness of the settlement as it relates to those interests."[36]

The timing of the settlement process for which court approval is required may occur either in conjunction with the certification hearing (except in Australia where certification is not a necessary step in the proceedings), or following certification and prior to trial. Where certification is sought for the purpose of settlement,[37] the court must determine whether the representative plaintiff has

[31] *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (SCJ) [75], [79]; *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman* (2002), 22 CPC (5th) 346 (SCJ) [17].

[32] Eg, in the US: *Jeff D v Andrus*, 888 F 2d 617, 622 (9th Cir 1989); *Bowling v Pfizer*, 143 FRD 141, 151 (US Ohio 1992); in BC: *Sawatzky v Société Chirurgicale Instrumentarium Inc* (1999), 71 BCLR (3d) 51 (SC) [20], *Harrington v Dow Corning Corp* (BC SC, 16 Feb 1999) [7], *Haney Iron Works Ltd v Manufacturers Life Ins Co* (1998), 169 DLR (4th) 565 (BC SC) [22]; in Ontario: *Dabbs v Sun Life Ass Co of Canada* (Ont Gen Div, 24 Feb 1998)[10]; *Gariepy v Shell Oil Co* (2002), 26 CPC (5th) 358 (SCJ) [48]–[58].

[33] Eg: see earlier: *McCarthy v Canadian Red Cross Soc* (2001), 8 CPC (5th) 341 (SCJ) (20 Feb 2001), and later: *McCarthy v Canadian Red Cross Soc* (2001), 8 CPC (5th) 350 (SCJ) (22 Jun 2001).

[34] As occurred in *Parsons v Canadian Red Cross Soc* (1999), 40 CPC (4th) 151 (SCJ) [100] ("The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class"). The changes were made and the settlement was subsequently approved.

[35] Sometimes termed a "fairness hearing".

[36] Noted in *McCarthy v Canadian Red Cross Soc* (2001), 8 CPC (5th) 341 (SCJ) [16]; *Endean v Canadian Red Cross Soc* (1999), 68 BCLR (3d) 350 (SC) [13]–[14], [18].

[37] Often called a "settlement class" to denote that the representative plaintiff has reached a settlement with the defendant prior to certification, and certification is being sought as a condition of settlement in order to bind the class members to it. "Temporary settlement classes" occur where the

made out a prima facie case for certification. All North American focus jurisdictions agree that this demands that the adjudicating court must be especially vigorous in ensuring that all certification requirements have been met before certifying a class for settlement purposes. If a prima facie case for certification has been made out, only then can the court move on to consider the terms of the settlement.

The care which must be taken by the court when scrutinising settlement agreements which have been reached prior to class certification has been oft-reiterated under FRCP 23.[38] In particular, in *Amchem Products Inc v Windsor*,[39] the US Supreme Court addressed the requirements of settlement-only class certification on the basis that the certification court need not enquire whether the case would present intractable manageability problems at trial (for there will not be any), but all other requirements for certification must still be satisfied. In that case, the requirements of predominance and adequacy of representation were not met, and in the circumstances, the Supreme Court noted that the safeguards provided by these criteria "are not impractical impediments—checks shorn of utility—in the settlement-class context."[40] Instead, such requirements "served to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." Additionally, "both class counsel and court would be disarmed" if a fairness enquiry controlled certification, eclipsing the certification requirements of Rule 23(a) and (b), and permitting class designation in spite of the impossibility of satisfying those requirements.[41] Similarly, Canadian courts have reiterated the need for classes to satisfy the certification criteria before the fairness and adequacy of the settlement will be considered,[42] although it has been academically noted[43] that Canadian courts have been slow to rule on the threshold for certification when the parties consent to certification through a settlement agreement.

Whether a statutory notice is mandatorily required to be given to absent class members where an application is made for court approval of a settlement

parties agree that the defendant reserves its right to object to certification if the settlement is not approved. Although settlement classes is outside the scope of this book, see *Rand Executive Summary*, 27, for a discussion of this "hotly debated issue".

[38] *In re General Motors Corp Pick-Up Truck Fuel Tank Prod Liab Litig*, 55 F 3d 768, 794 (3d Cir 1995); *Lachance v Harrington*, 965 F Supp 630, 635 (ED Pa 1997); *Mars Steel Corp v Continental Illinois National Bank & Trust Co of Chicago*, 834 F 2d 677, 681 (7th Cir 1987); *Weinberger v Kendrick*, 698 F 2d 61, 73 (2nd Cir 1982). Also, see: *Kamilewicz v Bank of Boston Corp*, 100 F 3d 1348, 1352 (7th Cir 1996) (Easterbrook J, noting that the parties "may even put one over on the court, in a staged performance" if certification requirements not adhered to).

[39] 521 US 591, 620, 117 S Ct 2231 (1997).

[40] *Ibid*, 621.

[41] *Ibid*. Previously, *Georgine v Amchem Products Inc*, 83 F 3d 610, 626 (3d Cir 1996) had held that the FRCP 23 certification requirements "must be satisfied without taking into account the settlement, as if the action were going to be litigated."

[42] Eg: *Haney Iron Works Ltd v Manufacturers Life Ins Co* (1998), 169 DLR (4th) 565 (BC SC) [16].

[43] MJ Somerville and F Gowling, "These Plaintiffs Have No Class: A Defendant's Perspective to Defeating or Avoiding Certification" (County of Carleton Law Association conference, Quebec, 2–3 Nov 2001) [14].

agreement differs across the regimes. Under the amended FRCP 23(e)(1)(B), the court "must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement". This carries forward the practice under the previous FRCP 23(e)(1). According to *In re Prudential Insurance Co of America Sales Practices Litigation*,[44] settlement notice must inform the class "of the nature of the pending litigation, the general terms of the settlement, that complete information is available from the court files, and that any class member may appear and be heard at the fairness hearing". That hearing, to afford to absent class members the opportunity to object to the fairness and adequacy of the settlement, is now (as a result of the December 2003 amendments) mandated.[45]

Under Australia's Pt IVA regime,[46] notice of a proposed class action settlement is also mandatory, unless the court considers it "just" to dispense with that notice. Despite the legislative caveat, judicial interpretation indicates that notice will usually be mandated on the basis that such notice is a "key element" which protects the interests of members of a particular class,[47] so that class members are provided an opportunity to voice objections or concerns.

Somewhat surprisingly, the Canadian position is not as strict as these jurisdictions, requiring only that the court must consider whether notice of settlement should be given before court approval is granted.[48] The Ontario Superior Court of Justice has approved[49] of the developed practice of giving notice of an intended settlement and hearing representations by objectors and intervenors before granting approval, but the legislation remains silent in that regard. Occasionally, it has been suggested in Canada[50] to toughen this position and mandate notice prior to court approval of a settlement, and thereby give all class members a statutorily-assured opportunity to participate in the hearing on the settlement terms, but this has not been implemented. Thus, various views as to the importance of settlement notice manifest on the face of the relevant legislation.

[44] 177 FRD 216, 230 (DNJ 1997), citing *Newberg* (3rd) §8.32 (now §11.53), and earlier, by the S Ct: *Mullane v Central Hanover Bank and Trust Co*, 339 US 306, 314, 70 S Ct 652 (1950).

[45] See FRCP 23(e)(1)(C), and the Advisory Committee's Notes that the provision "confirms and mandates the already common practice of holding hearings as part of the process of approving settlement": *2004 Federal Civil Rules Booklet* (Harvard, Dahlstrom Legal Publishing Inc, 2004) 17.

[46] See FCA (Aus), s 33X(4).

[47] *Wong v Silkfield Pty Ltd* [2000] FCA 1421, [16].

[48] CPA (Ont), s 29(4); CPA (BC), s 35(5). These provisions embody the OLRC recommendation to reject a mandatory notice requirement where settlement was contemplated, and to leave matters of that kind entirely to the discretion of the court: *OLRC Report*, 806–7.

[49] *Brimner v Via Rail Canada Inc* (2000), 50 OR (3d) 114 (SCJ) [28].

[50] See the debate canvassed in the *AltaLRI Report*, [264] although with the eventual recommendation that the court consideration of notice of settlement before court approval of the settlement agreement is granted be discretionary only: recommendation 9(1)(c). Also: *FCCRC Paper*, 55.

2. Factors Guiding the Court's Discretion

One of the most notable features of the class action regimes in all focus jurisdictions is the complete lack of statutory guidance by which the court should exercise its discretion in approving settlement agreements. No guidelines are provided whatsoever. This statutory silence stands in direct contrast to numerous recommendations by law reform commissions, such as those of Victoria,[51] Manitoba,[52] Alberta[53] and Australia,[54] that the provision of some guidelines would be desirable. The absence of any such guidance has been subject to judicial chagrin[55] and law reform[56] and other academic[57] calls for revision of the class action statute. Given the preponderance of settlements of class actions (as with unitary litigation),[58] the fact that high appellate authority on the subject is conspicuously absent in any of the focus jurisdictions,[59] and the inconsistent reference by lower courts to some factors and not to others which have been previously noted,[60] it is strongly arguable that statutory criteria (with a catch-all

[51] *VLRAC Report*, [6.39] and recommendation 10.

[52] *ManLRC Report*, 95–96 and recommendation 38.

[53] *AltaLRI Report*, [323], [328] and recommendation 14.

[54] *ALRC Report*, [222], and see cl 28 (3) of the Draft Bill which outlined various relevant factors, but this clause did not make it into the enacted statute.

[55] Eg: *Gagarimabu v Broken Hill Proprietary Co Ltd* [2001] VSC 517, [41]; *Dabbs v Sun Life Ass Co of Canada* (Gen Div, 24 Feb 1998) [8].

[56] See, eg: ALRC, *Managing Justice* (Rep No 89, 999) [7.108], in which the commission noted that the drafting of specified criteria for judges to take into account in approving a settlement could be considered in the context of a review of Pt IVA. Also: ALRC, *Review of the Federal Civil Justice System* (DP No 62, 1999) [10.18].

[57] US commentators have particularly called for the amendment of FRCP 23(e) to provide guidelines for settlement: WW Schwarzer, "Settlement of Mass Tort Class Actions: Order out of Chaos" (1995) 80 *Cornell L Rev* 837, 842–43; C Menkel-Meadow, "Ethics and the Settlements of Mass Torts: When the Rules Meet the Road" (1995) 80 *Cornell L Rev* 1159, fn 208; MC Weber, "A Content-Based Approach to Class Action Settlement: Improving *Amchem Products, Inc v Windsor*" (1998) 59 *Ohio State LJ* 1155; RA Nagareda, "Turning from Tort to Administration" (1995) 94 *Michigan L Rev* 899, 902–3; JT Molot, "An Old Judicial Role for a New Litigation Era" (2003) 113 *Yale LJ* 27, 110–11. In Aust: V Morabito, "Taxpayers and Class Actions" (1997) 20 *UNSWLJ* 372, 385.

[58] Noted in "Leading Cases: II Federal Jurisdiction and Procedure" (2002) 116 *Harvard L Rev* 332, 332 ("Researchers from the Federal Judiciary Center found that, in a sample of four federal district courts, 62% to 100% of certified class actions settled", citing TE Willging et al, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996) 60); J Resnik, "Litigating and Settling Class Actions: The Prerequisites of Entry and Exit" (1997) *U of California, Davis L Rev* 835.

[59] In fact, neither FRCP 23 nor the Supreme Court specifies the criteria a judge should use in determining what is "fair, adequate and reasonable" under r 23(e): S Hultman Dunn, "The Marisol A v Giuliani Settlement: 'Innovative Resolution' or 'All-Out Disaster'?" (2002) 35 *Columbia J of Legal and Social Problems* 275, 288. Neither the SCC nor the HCA has had cause yet to identify the crucial factors that should guide the courts when deciding whether a class settlement agreement should be approved.

[60] Eg, in Australia, compare the minimal factors identified in *Wong v Silkfield Pty Ltd* [2000] FCA 1421, [18] with the much broader range of factors in: *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 (FCA) [19]. The disparity of treatment under FRCP 23(e) has also been commented upon: J Resnik, "Judging Consent" (1987) *U of Chicago Legal F* 43, 87.

clause[61]) and reasoned judgments that apply such criteria to the facts of the proposed settlement, should be encouraged.

What factors, then, are relevant to the enquiry about the settlement agreement? Before descending to the particularity of guidelines as such, it is worth noting that the most recent amendments to FRCP 23 provide the standard for approving a proposed settlement—it must be "fair, reasonable, and adequate".[62] The US jurisdiction is alone now in its explicit notation of these standards, although they had already been fairly widely recognised, both academically[63] and judicially[64] (albeit with criticism about the elasticity of these concepts[65]). Judicial scrutiny requires, however, an infusion of realism: "[f]airness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation."[66] As has been frequently cited: "the settlement must fall within a zone or range of reasonableness."[67] In addition:

> 'any settlement is the result of a compromise—each party surrendering something in order to prevent unprofitable litigation, and the risk and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial.'[68] Further, the court must engage in an independent evaluation of the agreement, 'eschewing a rubber stamp approval.'[69]

These aforementioned principles appear to have relevance for each of the focus jurisdictions.

[61] Eg, "any other matter the court considers relevant", proposed by the *ManLRC Report*, 96.

[62] FRCP 23(e)(1)(C).

[63] Eg: Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) § 30.42; *ManLRC Report*, 96 and recommendation 38; *AltaLRI Report*, [323] and recommendation 14(2); J Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Toronto, Butterworths, 1997) 105.

[64] Aust: *Neil v P & O Cruises Aust Ltd* [2002] FCA 1325, [36]. BC: *Endean v Canadian Red Cross Soc* (1999), 68 BCLR (3d) 350 (SC) [13], [14]; *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [20]; *Haney Iron Works Ltd v Manufacturers Life Ins Co* (1998), 169 DLR (4th) 565 (BC SC) [16]. Ont: *Dabbs v Sun Life Ass Co of Canada* (Gen Div, 24 Feb 1998) [11]; *Parsons v Canadian Red Cross Soc* (1999), 40 CPC (4th) 151 (SCJ) [71]. US: *Grunin v Intl House of Pancakes*, 513 F 2d 114, 123 (8th Cir 1975); *In re General Motors Corp Pick-up Truck Fuel Tank Prods Liab Litig*, 55 F 3d 768, 782, 785 (3d Cir 1995); *Plummer v Chemical Bank*, 668 F 2d 654, 658 (2nd Cir 1982).

[65] *Rand Institute Report*, ch 3, and ch 16, 489, and *Rand Executive Summary*, 32; ALRC, *Managing Justice* (Rep No 89, 1999) [7.108]; JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, [32].

[66] *Dabbs v Sun Life Ass Co of Canada* (1999), 40 OR (3d) 429 (Gen Div)[30]. Or, as one US court memorably put it: *In re Warner Communications Securities Litig*, 618 F Supp 735, 740 (SD NY 1985) (policy is so strongly in favor of settlement that there is a "familiar axiom that a bad settlement is almost always better than a good trial").

[67] *Ontario New Home Warranty Program v Chevron Chemical Co* (1999), 46 OR (3d) 130 (SCJ) [89]; *Smith v Tower Loan of Mississippi Inc*, 216 FRD 338, 365 (SD Miss 2003).

[68] *Greenspun v Bogan*, 492 F2d 375, 381 (1st Cir 1974), cited in *Dabbs v Sun Life Ass Co of Canada* (Ont Gen Div, 24 Feb 1998)[14].

[69] *US v Seymour Recycling Corp*, 554 F Supp 1334, 1337–38 (SD Ind 1982).

It is evident that there is a high degree of cross-fertilisation of ideas in specific relevant factors in class action jurisprudence, with Australian,[70] Ontario[71] and British Columbia[72] courts recognising the helpful elicitation of factors which has been espoused by courts and commentators under FRCP 23(e).[73] Several of these criteria that have emerged across the class action regimes (although not necessarily with the adoption of the various precise words used in the lists) are itemised and then expanded upon below. It is not necessary that all of the enumerated factors be present in each case, nor is it necessary that each factor be given equal weight in the consideration of any particular settlement.[74]

The terms of the settlement. If the settlement does not, by its terms, disadvantage any class members or favour any members;[75] if it is imaginative in overcoming the problems associated with a "once and for all settlement";[76] if the compensation is adequate for the claims of the class members from which the

[70] *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925, 180 ALR 459, [19].

[71] *Dabbs v Sun Life Ass Co of Canada* (Ont Gen Div, 24 Feb 1998)[13], and see further: *Gariepy v Shell Oil Co* (2002), 26 CPC (5th) 358 (SCJ) [42]; *Directright Cartage Ltd v London Life Ins Co* (2001), 17 CPC (5th) 185 (SCJ) [53]. Cross-fertilisation also academically recognised as vitally important: RL Hayley, "Book Review" (1999) 57 *Advocate* 283, 285.

[72] *Haney Iron Works Ltd v Manufacturers Life Ins Co* (1998), 169 DLR (4th) 565 (BC SC) [23]–[25], also citing *Dabbs*, *ibid*, and the US authorities cited therein with approval. See also the discussion in F Maczko (the Hon), *Class Proceedings Act: Annotated* (Vancouver, Continuing Legal Education Society of BC, 2000) [looseleaf] 82–85.

[73] To assess the fairness of a proposed settlement agreement, the Second Circuit developed a balancing test with 9 oft-cited criteria, which are evident from the following decisions: *County of Suffolk v Long Island Lighting Co*, 907 F 2d 1295, 1323–24 (2nd Cir 1990); *Robertson v National Basketball Assn*, 556 F 2d 682, 684 fn 1 (2nd Cir 1977); *City of Detroit v Grinnell Corp*, 495 F 2d 448, 463 (2nd Cir 1974). In *Girsh v Jepson*, 521 F 2d 153 (3d Cir 1975), the Third Circuit Court of Appeals provided district courts with a very similar list of factors. See also *Newberg's* oft-cited 8-item list at (4th) §11.43–§11.51. The headings that follow in the text are drawn and/or reworked from all of these lists in combination, to particulary cover the factors that have arisen across *all* focus jurisdictions.

[74] *Carom v Bre-X Minerals Ltd* (2001), 15 CPC (5th) 33 (SCJ) [8]; *Parsons v Canadian Red Cross Soc* (1999), 40 CPC (4th) 151 (SCJ) [73].

[75] Aust: *JF Yandle & Co Pty Ltd v CSN Pty Ltd* [2000] FCA 1823, [7] ("given that on its face the settlement does not disadvantage any group member but on the contrary advantages them by relieving them of the need to establish liability, it is I think obvious that the settlement is in the interests of group members"). Ont: *Dabbs v Sun Life Ass Co of Canada* (Ont Gen Div, 24 Feb 1998) [11], [14] ("The role of the court is to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member"); *Carom*, *ibid*. BC: *Endean v Canadian Red Cross Soc* (1999), 68 BCLR (3d) 350 (SC) [13]; *Sawatzky v Société Chirurgicale Instrumentarium Inc* (1999), 71 BCLR (3d) 51 (SC) [19]; *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [20]. Also: *Newberg* (4th) §§11.46, 11.50: Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) § 30.41 (referring to whether "the named plaintiffs are the only class members to receive monetary relief, or are to receive relief that is disproportionately large; . . . [or] particular segments of the class are treated significantly differently from others").

[76] *Parsons v Canadian Red Cross Soc* (1999), 40 CPC (4th) 151 (SCJ) [75] ("The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. . . .The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen [and] addresses the concern . . . with respect to the uncertainty and unfairness of a once and for all settlement").

defendants will be released under the settlement agreement;[77] and if the agreement purports by innovative ways to incorporate the notion of litigation risk for different class members in a fair and efficient fashion;[78] then these and similar considerations will render judicial approval more likely. On the other hand, if any of the terms of the proposed settlement are likely to be unenforceable;[79] if the settlement involves the extinguishment of the class members' claims with absolutely no benefit accruing to them in exchange;[80] or if the settlement entails disparate treatment of class members;[81] then judicial approval will not be forthcoming. Whether the same agreement has been approved by the courts of other jurisdictions,[82] and the comparison between the terms of the instant settlement agreement and the terms of other similar settlement agreements,[83] have also

[77] *Bowling v Pfizer Inc*, 143 FRD 141, 170 (SD Ohio 1992) ("Class members have only given up their right to sue for the emotional distress arising out of the fear that a properly functioning heart valve may fracture. . . . this is an extremely speculative claim. . . . Thus, class members not only receive numerous benefits, but also keep most of their rights").

[78] *Dabbs v Sun Life Ass Co of Canada* (1998), 40 OR (3d) 429 (Gen Div) (if a class member could point to an agent's written representation about how fast the premium would "vanish", the insurance company would honour that representation. An oral representation would have to be proved by affidavit, with the agent confirming the representation, for a class member to also get full compensation. The compensation descended from there into three further categories of proof, which resulted in a sophisticated alternative claims approval process for different categories of class members that varied with the cogency of the proof available).

[79] *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 [20] (settlement scheme provided for solicitors' firm to determine quantum of damages for each class member; decision not subject to review; court dissatisfied whether provision to oust court's jurisdiction enforceable).

[80] *In re Ford Motor Co Bronco II Products Liability Litig CA MDL-991*, 5–6 (ED La 1995), cited in *Newberg* (4th) § 11.46 p 139 (alleged design defect which made the vehicle unduly prone to roll over; settlement provided for a "utility vehicle video", a sunvisor warning sticker, a utility vehicles owner's guide supplement, and an inspection of the vehicles; "The value of the settlement to the plaintiffs based on their original complaints is thus effectively zero. Moreover, Ford is already required by the NHSTA to provide to Bronco II owners the kind of safety information provided to the proposed settlement. . . . The proposed settlement . . . merely provides plaintiffs with information to which they were already entitled and confers no additional value in consideration for the release of the plaintiffs' claims").

[81] Eg: *Petruzzi's Inc v Darling-Delaware Co Inc*, 880 F Supp 292, 299 (MD Pa 1995) ("the fact that the Moyer 'premium certificates' are distributable only to those class members who were Moyer 'accounts' during the relevant timeframe is a fatal defect in the settlement plan. Approximately 50% of the class will not receive any 'premium certificates', but their claims against Moyer will be discharged. This disparate treatment of class members . . . is sufficient reason in and of itself to disapprove the proposed settlement").

[82] *Dabbs v Sun Life Ass Co of Canada* (Ont Gen Div, 24 Feb 1998) [10]; *Fischer v Delgratia Mining Corp* (BC SC [in Chambers], 7 Dec 1999), where the court's position was set out thus: "I also note that the settlement and precisely the terms which are before me has been approved by the court of competent jurisdiction in the State of Nevada. That is a factor which I must take into account. Nevertheless, the fact that that court has approved the settlement does not absolve me, or this court, of the statutory obligation which rests with this court when dealing both with a certification application and with the approval of a settlement": at [6]. Query, though, whether too much weight ought to be given to this factor: JC Kleefeld, "Class Actions as Alternative Dispute Resolution" (2001) 39 *Osgoode Hall LJ* 817, fn 105.

[83] Comparison especially undertaken in *Haney Iron Works Ltd v Manufacturers Life Ins Co* (1998), 169 DLR (4th) 565 (BC SC) [8], [22]; *Gariepy v Shell Oil Co* (2002), 26 CPC (5th) 358 (SCJ) [46f]; *Directright Cartage Ltd v London Life Ins Co* (2001),17 CPC (5th) 185 (SCJ) [57]; *Knowles v Wyeth-Ayerst Canada Inc* (2001), 16 CPC (5th) 330 (SCJ) [38].

been considered relevant in the overall judicial assessment, where applicable. In fact, in combining various factors together in the one enquiry, some American courts have reduced the assessment of "reasonableness" to a formulaic enquiry, whether:

> the likelihood of establishing liability
>
> × (times)
>
> expected damages (ie, maximum recoverable damages)
>
> × (times)
>
> likelihood of recovering maximum damages in the event liability is established
>
> is less than or greater than the proposed settlement figure.[84]

Likely duration, cost and complexity of the action if approval were not given. The likely duration and costs of the class action, if it were to continue to judgment, has been held to be a particularly relevant factor when deciding whether to grant judicial approval to a settlement agreement or not, across the focus jurisdictions of Australia,[85] the US[86] and Canada.[87] The fact that full-scale litigation might outlive many of the class members involved has been particularly pertinent.[88] Even the fact that, "by settling, the plaintiffs also gain the benefit of receiving their money immediately, rather than waiting for what might be years before the litigation is actually concluded", has been recognised to have an assessable benefit.[89]

[84] *Lachance v Harrington*, 965 F Supp 630, 638 (ED Pa 1997) (plaintiffs had about 50% chance of establishing their maximum damages of $6M; thus expected damages $3M; probability of establishing liability 30%; by formula, expected value of settlement approx $900,000; settlement offered $1.15M; court "believes that such a settlement offers a fair recovery in light of what the plaintiffs might have expected had they gone to trial. Although the calculation of the expected value of the settlement can only be an estimate, the estimate in this case is well within the range of that which the plaintiffs are actually receiving").

[85] *Neil v P & O Cruises Aust Ltd* [2002] FCA 1325, [9]; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 (FCA) [19].

[86] *In re General Motors Corp Pick-Up Truck Fuel Tank Prods Liab Litig*, 55 F 3d 768, 785 (3d Cir 1995); *In re Dennis Greenman Securities Litig*, 622 F Supp 1430, 1436 (SD Fla 1985) ("massive" securities fraud class action; testimony presented to the effect that a similar complex class action took 14 years to complete). Even continuing negotiations can affect a court's view about the advantages of settlement: *In re Drexel Burnham Lambert Group Inc*, 960 F 2d 285, 292–93 (2nd Cir 1992) ("This is a complex case. There are many plaintiffs trying to maximize their own recovery, and there is a defendant with a limited fund to satisfy all claims. Prolonging the negotiation process will increase Drexel's litigation costs, with a consequent decrease in the size of the fund").

[87] *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman* (2002), 22 CPC (5th) 346 (SCJ) [30]; *Wong v Silkfield Pty Ltd* [2000] FCA 1421, [18]; *Fischer v Delgratia Mining Corp* (BC SC [in Chambers], 7 Dec 1999) [20]; *Carom v Bre-X Minerals Ltd* (2001), 15 CPC (5th) 33 (SCJ) [8].

[88] *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [27] (many class members were ill or dying and in immediate financial need); *In re Armoured Car Antitrust Litig*, 472 F Supp 1357, 1369 (ND Ga 1979).

[89] *RK Greenfield v Footwear Investors Inc*, 1986 WL 10806, 2 (ED Pa 1986), cited *Lachance*, n 84 above, 643.

Amount offered to each class member in relation to the likelihood of success in the class action. Ordinarily the court will take into account the amount offered to each class member, and the prospects of success in the proceeding. In other words, this requires the weighing of the strength of the plaintiff's case on the merits (the "bird in the bush") against the settlement offer (the "bird in the hand") represented by the settlement offer. This factor has been cited as relevant in Australian authority,[90] and is one of the factors that has been judicially[91] recognised as significant under FRCP 23. For example, in the *Agent Orange* litigation,[92] a settlement of $180 million was judicially approved where exposure to dioxin during the Vietnam war was alleged. The settlement was considered to be reasonable, fair and adequate, given the extensive problems which the class faced: "the problems of proving causation, establishing liability, and surmounting the military contractor defense. Evidence did not support allegations concerning the effect of exposure to Agent Orange, and the fact of exposure would be difficult to prove. The question of which state's product liability law would apply was also at issue."[93] In the words of one Ontario court, a settlement offer is more likely to receive judicial approval where "plaintiffs' counsel state that the defendants with the 'deepest pockets' have the strongest defences".[94] The factor requires that the court make some rational appraisal of the merits of the action, falling short of the consideration of the merits that would be required in the event of contested trial of the action.[95]

Even if the class won at trial, judgment amount not significantly in excess of settlement offer. Another relevant factor is whether it is likely that the class members will obtain judgment for an amount significantly in excess of the settlement offer. This requires a very pragmatic assessment, as the following statements of Ontario and British Columbia courts respectively demonstrate: "the estimate is that a trial of the common issues could well last at least a year with much of the insurance monies otherwise available being consumed in legal costs";[96] and

[90] *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 (FCA) [19]; *Wong v Silkfield Pty Ltd* [2000] FCA 1421, [19].

[91] *In re General Motors Corp Pick-Up Truck Fuel Tank Prods Liab Litig*, 55 F 3d 768, 785 (3rd Cir 1995); *Dawson v Pastrick*, 600 F 2d 70, 75 (7th Cir 1979); *Isby v Bayh*, 75 F 3d 1191, 1196–97 (7th Cir 1996); *Oppenlander v Standard Oil Co (Indiana)*, 64 FRD 597, 624 (D Colo 1974).

[92] *In re Agent Orange Product Liab Litig MDL No 381*, 818 F 2d 145 (2nd Cir 1987).

[93] *Ibid*, 170–74.

[94] *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman* (2002), 22 CPC (5th) 346 (SCJ) [29]. Also: *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [20].

[95] *Carson v American Brands Inc*, 450 US 79, 88 fn 14, 101 S Ct 993 (1981) (courts judging the fairness of a proposed compromise "do not decide the merits of the case or resolve unsettled legal questions"); *Fickinger v CI Planning Corp*, 646 F Supp 622, 630 (ED Pa 1986); *Reed v General Motors Corp*, 703 F 2d 170, 172 (5th Cir 1983); *City of Detroit v Grinnell Corp*, 495 F 2d 448, 456 (2nd Cir 1974).

[96] *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman* (2002), 22 CPC (5th) 346 (SCJ) [27]. Also: *Delgrosso v Paul* (2001), 10 CPC (5th) 317 (SCJ) [8] ("mounting legal costs paradoxically has tended to erode the available insurance coverage. Class counsel determined that as a practical matter, if [defendant] were to be found liable after a trial, that recovery against [defendant] personally beyond the insurance coverage was problematical"); *Carom v Bre-X Minerals Ltd* (2001), 15 CPC (5th) 33 (SCJ) [10] ("Given the extent of Bresea's current assets, and the ongoing costs which

"[t]he payments to claimants in this category will be modest but the claims, even if successful at trial, would be modest as well, and it is sensible in the circumstances to maximize the 'settlement benefits' to the primary plaintiffs."[97] The ability (or otherwise) of a defendant to withstand a judgment greater than the settlement offer is a relevant consideration under Australia's Pt IVA regime.[98] Similarly, the risk of continued litigation forcing the defendant into bankruptcy, thus undermining whatever benefits the class members may derive, even if their suit is successful, has also been judicially recognised to be important when assessing the fairness and adequacy of a settlement offer in British Columbia[99] and under FRCP 23.[100]

The recommendations and experience of class legal representatives. It has been judicially recognised in Australia,[101] Canada[102] and the US[103] that the recommendation of class lawyers is entitled to significant weight, following arms-length negotiations. The US *Manual for Complex Litigation* has observed that "[i]n evaluating the settlement, the judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation".[104] It is apparent too that the opinions and recommendations of class representatives may be given credence and weight when determining whether a settlement should be given judicial approval, as Canadian[105] and US[106] authorities demonstrate.

The recommendations of neutral parties, if any. The opinions of neutral parties towards the fairness, reasonableness and adequacy of the settlement are

may dissipate those assets, the plaintiffs' counsel estimate that Bresea will have approximately $12M in total available to satisfy any judgment that may issue at the conclusion of the anticipated litigation. In their estimate, a settlement of $9M at this point is reasonable when weighed against the total potentially available and the attendant risk of the litigation").

[97] *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [23].

[98] *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, [17] (defendant "hopelessly insolvent").

[99] *Fischer v Delgratia Mining Corp* (BC SC [in Chambers], 7 Dec 1999) [18] "there is really no money and given the possibility that once these actions are resolved that the company can recover to some extent, if it recovers at all, it would appear arguably that the claimants will be better off [accepting the settlement] than if they simply pursue their action, which would probably result in the company becoming bankrupt, and even if they succeeded then they would have an empty judgment".

[100] *In re Pacific Enterprises Securities Litig*, 47 F 3d 373, 378 (9th Cir 1995). The costs to a risk-averse plaintiff of the concerns of going to trial have also been noted: *Mars Steel Corp v Continental Ill National Bank & Trust Co of Chicago*, 834 F 2d 677, 682 (7th Cir 1987).

[101] *Neil v P & O Cruises Aust Ltd* [2002] FCA 1325, [7]; *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, [16]; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 (FCA) [19].

[102] *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [20]; *Knudsen (Guardian ad Litem of) v Consolidated Food Brands Inc* [2001] BCSC 1837, [20]; *Carom v Bre-X Minerals Ltd* (2001), 15 CPC (5th) 33 (SCJ) [8]; *Dabbs v Sun Life Ass Co of Canada* (1999), 40 OR (3d) 429 (Gen Div) [32] (the court considered the high reputation of class counsel who had negotiated the agreement).

[103] *Fisher Bros v Phelps Dodge Industries Inc*, 604 F Supp 446, 452 (ED Pa1985); *In re Chicken Antitrust Litig*, 560 F Supp 943, 962 (ND Ga 1979); *Weinberger v Kendrick*, 698 F 2d 61, 74 (2nd Cir 1982); *Austin v Pennsylvania Dept of Corrections*, 876 F Supp 1437, 1472 (ED Pa 1995).

[104] Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) § 30.42.

[105] *Carom v Bre-X Minerals Ltd* (2001), 15 CPC (5th) 33 (SCJ) [8]; *Dabbs v Canada Life Ins Co of Canada* (2001), 111 ACWS (3d) 681 (SCJ) [17].

[106] *In re New Mexico Natural Gas Antitrust Litig*, 607 F Supp 1491, 1507 (D Colo 1984).

relevant. For example, the relevance of terms of any advice received from any independent expert in relation to the issues which arise in the proceeding has been cited in Australia;[107] actuarial evidence is frequently referred to in the context of class action settlement in Canada;[108] and Newberg notes that, in respect of suits under FRCP 23, "if a state or federal governmental agency has been involved in litigation concerning substantially the same defendants and subject matter, the court may ask for the agency's opinion of [the settlement]."[109]

The attitude of the class members to the settlement (including the number of objectors). The reaction of the class to the settlement is a vital factor in the matrix of factors relevant to judicial approval. The fact that the class members expressly consent to the offer has been judicially recognised as important in Australia,[110] Canada[111] and the US.[112] The fact that all of the opted-out class members have completed forms requesting that they be allowed to opt into the settlement,[113] and other positive expressions of support from the class, are crucial.[114]

More controversially, some courts in Canada[115] and the US,[116] particularly, have also considered that the lack of, or small number of objections[117] to the set-

[107] *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 (FCA) [19]. Also: *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [20].

[108] *Haney Iron Works Ltd v Manufacturers Life Ins Co* (1998), 169 DLR (4th) 565 (BC SC) [33]; *CF Kingsway Inc v Goetz* (2002), 32 CCPB 226 (SCJ) [7]; *Reichhold Ltd v Boyer* (2000), 43 CPC (4th) 263 (SCJ) [14]; *McKrow v Manufacturers Life Ins Co* (1998), 28 CPC (4th) 104 (Gen Div) [13].

[109] *Newberg* (4th) § 11. 49 p 154.

[110] *Neil v P & O Cruises Aust Ltd* [2002] FCA 1325, [8]; *Wong v Silkfield Pty Ltd* [2000] FCA 1421, [22].

[111] *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [27] ("Further, the representative plaintiff, after consultation with a committee comprised of other members of the class, urges the Court to approve the settlement. . . . their reasons include . . . that some class members are tired of the fight and want to bring it to an end"); *CC&L Dedicated Enterprise Fund (Trustee of) v Fisherman* (2002), 22 CPC (5th) 346 (SCJ) [32] ("Class counsel have met with some twenty institutional investors who are class members and who expressly support the settlement").

[112] *County of Suffolk v Long Island Lighting Co*, 907 F 2d 1295, 1323 (2nd Cir 1990); *City of Detroit v Grinnell Corp*, 495 F 2d 448, 463 (2nd Cir 1974); *In re Michael Milken and Associates Securities Litig*, 150 FRD 57, 65 (SD NY 1993).

[113] *Windsor Utilities Comm v Ontario Hydro* (SCJ, 31 May 2001) [9].

[114] *Neil v P & O Cruises Aust Ltd* [2002] FCA 1325, [8] (court informed that each class member expressly consented to settlement agreement); *CF Kingsway Inc v Goetz* (2002), 32 CCPB 226 (SCJ) [8] ("there has been frequent and informative communications with the members of the class and they have overwhelmingly (94%) approved the settlement").

[115] *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [20]; *Endean v Canadian Red Cross Soc* (1999), 68 BCLR (3d) 350 (SC) [24]; *Haney Iron Works Ltd v Manufacturers Life Ins Co* (1998), 169 DLR (4th) 565 (BC SC) [23]; *Carom v Bre-X Minerals Ltd* (2001), 15 CPC (5th) 33 (SCJ) [8]. The absence of any objections has been noted to be important: *Delgrosso v Paul* (2001), 10 CPC (5th) 317 (SCJ) [9].

[116] Eg: *Lachance v Harrington*, 965 F Supp 630, 645 (ED Pa 1997); *Fickinger v CI Planning Corp*, 646 F Supp 622, 631 (ED Pa 1986); *In re Art Materials Antitrust Litig*, 100 FRD 367, 372 (ND Ohio 1983); *Lake v First Nationwide Bank*, 900 F Supp 726, 732 (ED Pa 1995); *Bell Atlantic Corp v Bolger*, 2 F 3d 1304, 1313–14, fn 15 (3d Cir 1993).

[117] Note the explicit recognition within FRCP 23(e)(4)(A) of the right to object to a proposed settlement that requires court approval, as a result of the 1 Dec 2003 amendments, and that court approval is required for the withdrawal of said objections under 23(e)(4)(B).

tlement is a further reason for judicial approval of the offer, although it has conversely been noted that the absence of objectors or silence of class members does not relieve the judge of his duty, and in fact, adds to the court's responsibility.[118] In the words of one court, "[a]cquiescence to a bad deal is something quite different than affirmative support . . . [Parties] may not have the time, money or knowledge to safeguard their interests by presenting evidence or advancing arguments objecting to the settlement."[119] One of the most notable instances where silence did not equal support occurred in *In re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation*,[120] where the district court considered a proposed settlement class action in which only 5,203 class members, out of a class of 5.7 million, chose to opt out (< 0.01 %). Just over that same fraction objected to the settlement. The Court of Appeals held that it was "an abuse of discretion" to find that this factor counted in favour of settlement.[121] It refused to draw any inferences from silence in cases where class members "have an insufficient incentive to contest an unpalatable settlement agreement because the cost of contesting exceeds the objector's pro rata benefit."[122] Additionally, it did not assist the settlement proposal that "those who did object did so quite vociferously".[123]

Good faith, absence of collusion and consistency with class action objectives. Courts under FRCP 23 will presume the absence of fraud and collusion, and will deem settlement agreements to be the product of good faith and arm's length bargaining, unless evidence to the contrary is presented.[124] This grouping of factors has also been cited (separately or otherwise) as relevant in several Canadian decisions.[125] The lastmentioned was responsible for the court's dismissal of the proposed settlement agreement in *Epstein v First Marathon Inc*,[126] in which the court remarked that

> [A]pproval of the settlement would violate the public-policy objectives underlying the Legislature's enactment of the CPA. The important policy objectives of the statute are to foster access to justice, judicial economy and behaviour modification.

[118] For academic criticisms that any lack of objections is not necessarily correct to infer agreement, see, eg: D Rhode, "Class Conflicts in Class Actions" (1982) 34 *Stanford L Rev* 1183, 1234–36, and cited in: S Hultman Dunn, "The Marisol A v Giuliani Settlement: 'Innovative Resolution' or 'All-Out Disaster'?" (2002) 35 *Columbia J of Law and Social Problems* 275, 295–96 (arguing that lack of response is explainable by other factors when the class consists of minors).

[119] *In re General Motors Corp Engine Interchange Litig*, 594 F 2d 1106, 1137 (7th Cir 1979).

[120] 55 F 3d 768 (3d Cir 1995).

[121] *Ibid*, 812–13.

[122] *Ibid*, 812, citing *Bell Atlantic Corp v Bolger*, 2 F 3d 1304, 1313, fn 15 (3d Cir 1993).

[123] *Ibid*, 813.

[124] *In re Chicken Antitrust Litig*, 560 F Supp 957, 962 (ND Ga 1980); *Priddy v Edelman*, 883 F 2d 438, 447 (6th Cir 1989), and see further: *Newberg* (4th) §11.51.

[125] *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [20]; *Carom v Bre-X Minerals Ltd* (2001), 15 CPC (5th) 33 (SCJ) [8]; *Directright Cartage Ltd v London Life Ins Co* (2001), 17 CPC (5th) 185 (SCJ) [53]; *Knowles v Wyeth-Ayerst Canada Inc* (2001), 16 CPC (5th) 330 (SCJ) [37]; *Parsons v Canadian Red Cross Soc* (1999), 40 CPC (4th) 151 (SCJ) [72].

[126] (2000), 41 CPC (4th) 159 (SCJ) [69].

> The plaintiff's class proceeding is counterproductive to all these objectives. Mr. Epstein's action is in the nature of a "strike suit" seen more commonly in the United States.

Whether distribution of settlement benefits satisfactory. The ALRC expressly recommended that a court have regard to whether satisfactory arrangements had been made under the settlement agreement for the distribution of money to be paid to the class members,[127] and this factor has been explicitly approved as important in the overall decision to approve the settlement agreements in Canadian decisions[128] since.

Where the settlement is intended to provide coupons rather than cash, judicial approval may not be forthcoming if the class members had different abilities to use the coupons. This difficulty manifested in *In re General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation*,[129] in which the coupons provided to class members provided no cash value, made no provision for repairing the allegedly life-threatening defect in the vehicle's fuel tank, and where it was foreshadowed that only 14% of the class reported that they would "definitely" or "probably" buy a new truck. There were also considerable doubts that fleet buyers would use the coupons: statutory and regulatory constraints often restricted fleet buyers' purchase patterns, budgetary constraints could prevent some of them from replacing their entire fleets within the 15 month redemption period, and if the defendant was not the lowest bidder at that time, then competitive bidding requirements would mean that the coupons would not be used. The over-valuation of settlements where class clients receive coupons as part of settlements has been oft-criticised,[130] with one US senator decrying the practice with this analogy: "if coupons are better for the clients, then why aren't the lawyers paid in coupons?"[131] The suggestion that class

[127] *ALRC Report*, [222], and see FCA (Aus), s 33 V(2).

[128] See reference to the "user friendly" settlement agreement in *MacRae v Mutual of Omaha Ins Co* (2000), 2 CPC (5th) 121 (SCJ) [10]; *Killough v Canadian Red Cross Soc* (2001), 91 BCLR (3d) 309 (SC) [24].

[129] 55 F 3d 768, 781–82 (3d Cir 1995), where the various objections that were made to the proposed settlement are outlined. GM reached a similar agreement with class of C/K pickup truck owners who were Texas residents; that settlement approved by trial court; judgment reversed on appeal, primarily for reasons having to do with adequacy of notice to class members and amount of attorney fees: *Bloyed v General Motors Corp*, 916 S W 2d 949 (Tex 1996).

[130] CR Leslie, "A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation" (2002) 49 *U of California at Los Angeles L Rev* 991, 996 ("In most cases, coupons are not punishment; they are promotional. Settlement coupons are the economic equivalent of a court-supervised promotional campaign"); also citing in nn 5, 6, 15 similarly themed commentary and which contains useful legal, antedotal and empirical examination: Note, "In-Kind Class Action Settlements" (1996) 109 *Harvard L Rev* 810, 811; S Borenstein, "Settling for Coupon" (1996) 39 *J of Law and Economics* 379; F Gramlich, "Scrip Damages in Antitrust Cases" (1986) 31 *Antitrust Bulletin* 261, 272–74 (discussing 20 scrip settlements 1976–86).

[131] Sen Grassley, *Class Action Fairness Act of 1999: Hearings on S 353 Before the Senate Judiciary Comm Administrative Oversight and the Courts Subcomm*, 106th Cong 77 (1999) 2, cited in NC Scott, "Don't Forget Me! The Client in a Class Action Lawsuit" (2002) 15 *Georgetown J of Legal Ethics* 561, 592. Senator Grassley also is noted to have said, when relating a story about a staffer who received a coupon for $100 off the next financing as a purported class settlement against a mortgage

lawyers "be paid in the same currency as the class" has been academically suggested also, with the aim of realigning the interests of lawyers and class members—so that the former's "own rational self-interest will motivate it to negotiate either a cash-based settlement or, in the event of a coupon settlement, marketable coupons that actually confer value on the class."[132]

C ASSESSMENT OF MONETARY RELIEF

1. Types of Damages Awards

Where liability of the defendant is established upon contested litigation, and monetary awards are necessary to compensate the successful class members for their loss or damage, there are various choices open to a court when it comes to determine the issue of quantum of damage.

Individual damages assessment. The first is that, by means of adversarial proceedings between defendant and individual class members, the court will determine the amount due to each class member on an individual by individual basis. In this way, the quantum of damages forms one of the individual issues associated with the class action. As a result of the proceedings, there will be a specified or ascertainable amount awarded in respect of each class member, depending upon oral evidence, submitted claim forms, a Scott schedule prepaed by the class lawyers, or some other appropriate means. Individualised proof of damages is implicitly foreshadowed in the Canadian[133] schemas as one instance of an individual issue, and is expressly provided for in the Australian[134] schema. If it is practicable and possible for the class members to prove their damages by individualised proof, particularly where the class is small enough, then an individual-by-individual damages assessment will be permitted.[135]

Class-wide, aggregate assessment. A second possibility is that the court will determine in adversarial proceedings the damages payable by means of an aggregate award against the defendant, so that the damages sustained by the class as a whole can be computed by class-wide proof. Aggregate assessment may practically occur either by a global or lump sum award against the defendant, or may

company, "But he doesn't want to refinance his mortgage at this time, and certainly not with the company that ripped him off in the first place—so you tell me of what use to him is this coupon?".

[132] CR Leslie, "A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation" (2002) 49 *U of California at Los Angeles L Rev* 991 Pt V, 997 (quote).

[133] CPA (Ont), s 25; CPA (BC), ss 27, 28. As the *AltaLRI Report* noted (at [332]), the Canadian class action regimes do not specify a procedure for determining the monetary relief to which each class member is entitled if all/some of the defendant's liability is to be dealt with through individual proceedings, and thus, it appears that this quantification would proceed in accordance with the provisions which deal generally with the procedure for disposing of individual issues.

[134] FCA (Aus), s 33Z(1)(e), (2).

[135] Eg: individual assessment undertaken with small class numbers in *Marks v GIO Aust Holdings Ltd* (1996) 63 FCR 304.

be achieved by the application of formulae to individual class members' claims, either of which means that the class members are not required to individually prove their actual loss or damage in separate trial proceedings.

Under the latter of these options[136] is the possibility of establishing individual entitlement to damages, not by the class members appearing one by one to prove them, but by individual assessment by some other way. Examples may include: determining the quantum of damages for each class member from the defendant's own records; using an economic and statistical model to assess the inflationary impact affecting each purchase, thus computing individual damages by formula; or determining the unit overcharge for the product, and requiring class members to come forward only with proof of quantity purchased.

Following aggregate assessment, then ensues the question of what procedures may be employed to determine the amount of compensation due to individual class members, and the means by which that compensation should be distributed to the class members. Often, these procedures can be informally conducted and (after it has probably contested the fact and the amount of aggregate assessment) the defendant commonly is *not* an adversarial party to the procedures governing assessment of individual class members' entitlement and distribution to them.[137] That distribution may variously (depending on the statutory wording) consist of individual compensation to class members for their precise loss, average distribution or cy-pres distribution. In other words, the fact and the quantum of aggregate assessment will usually be contested, but the distribution of amounts per class member will not.

Aggregate assessment of the damages payable by a defendant to the class is expressly permitted by the Australian federal regime,[138] and by the regimes in British Columbia[139] and Ontario.[140] By contrast, FRCP 23 is silent on the matter. Aggregate assessment is judicially sanctioned under FRCP 23, but only in suitable cases.[141] While some courts have expressed the view that aggregate assessment should be the exception rather than the rule,[142] the decision in *In re*

[136] Note the caution by Du Val that these two concepts were blurred by the OLRC in its report: B Du Val, "Book Review" (1983) 3 *Windsor Ybk of Access to Justice* 411, 416 fn 10.

[137] See: *Newberg* (4th) § 10.17 p 517 ("A third stage of litigation remains to determine the distribution of the classwide damage award. This stage is a non-adversary proceeding"). Also: *OLRC Report*, 532, 559.

[138] FCA (Aus), s 33Z(1)(f).

[139] CPA (BC), s 29(1).

[140] CPA (Ont), s 24(1).

[141] *Allapattah Services Inc v Exxon Corp*, 157 F Supp 2d 1291, 1304 (SD Fla 2001); *Six (6) Mexican Workers v Arizona Citrus Growers*, 904 F 2d 1301, 1306 (9th Cir 1990); *Robinson v Metro-North Commuter RR Co*, 267 F 3d 147, 162, fn 6 (2nd Cir 2001) (acknowledging that "some cases may require class-wide, rather than individualized, assessments of monetary relief"); *Catlett v Mo Highway & Transport Comm*, 828 F 2d 1260, 1267 (8th Cir 1987).

[142] *Robinson*, *ibid*; *Shipes v Trinity Indus*, 987 F 2d 311, 318 (5th Cir 1993) ("Where possible, there should be . . . a determination on an individual basis as to which class members are entitled to [recovery] and the amount of such recovery"); *In re Fibreboard Corp*, 893 F 2d 706, 710 (5th Cir 1990) (rejecting trial court's aggregation of asbestos damages as a "surrealistic cast").

Cardizem CD Antitrust Litig,[143] for example, shows a more robust view being adopted. In response to the defendant's claims that the use of an aggregate approach to measure class-wide damage was inappropriate, the District Court approved of Newberg's commentary that "[a]ggregate computation of class monetary relief is lawful and proper. Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis".[144] It also noted that aggregate judgements had been widely used in antitrust, securities and other class actions;[145] and to the extent that individual variations had to be accounted for in the plaintiffs' damage analysis, techniques could be adopted by which to estimate damages.

Drafting issues. There is a curious statutory drafting feature of the class action regimes, concerning what precisely it is that a court may order in monetary terms. The US federal rule is silent on the issue. The Australian schema refers to the courts' making an award of "damages", whether on an individual or aggregate basis, whereas the Canadian common law schemas uniformly refer to class members' entitlement to "monetary relief".

The latter would conceivably include actions for payment of sums due under a contract; restitutionary causes of action, such as actions for the value of services rendered (*quantum meruit*) or for money paid under mistake or compulsion (money had and received); and actions for payment of money under a statute, particularly where claims for payment arise from a dispute as to the interpretation of the statute.[145a] The wider terminology employed in the Canadian focus regimes is borne out by the fact that, in Ontario and British Columbia, actions seeking restitution of moneys paid and received have been instituted over the years of the regimes' operation.[146]

Unfortunately, an equal degree of clarity is not to be found in the Australian regime. In *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd*,[147] Brooking JA noted[148] that the OLRC carefully distinguished between damages and other forms of monetary relief,[149] that its draft Bill provided for an

[143] 200 FRD 297, 324 (ED Mich 2001).

[144] *Newberg* (3rd) § 10.05.

[145] Citing *In re NASDAQ Market-Makers Antitrust Litig*, 169 FRD 493, 525 (SDNY1996).

[145a] *OLRC Report*, 521 and fn 8.

[146] Eg: *Smith v Canadian Tire Acceptance Ltd* (1995), 19 OR (3d) 610 (Gen Div) (alleged credit card overcharges); *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) (underpaid and unpaid interest); *Edmonds v Actton Super-Save Gas Stations Ltd* (1996), 5 CPC (4th) 101 (allegedly incorrect collection of GST on gasoline purchase); *Nanaimo Immigrant Settlement Soc v BC* (2001), 84 BCLR (3d) 208 (CA) (class of charitable and religious organisations seeking return of licence fees), discussed further in: DA Crerar, "The Restitutionary Class Action" (1998) 56 *U of Toronto Faculty of Law Rev* 47.

[147] (2000) 1 VR 545 (CA). The CA was considering the validity of Order 18A of ch 1 of the Supreme Court (General Civil Procedure) Rules 1996, entitled "Group Proceeding", in operation 1 Jan 2000.

[148] See *ibid*, [17]. Whilst commented upon, this issue was ultimately not resolved in *Schutt*, as no argument was directed to monetary relief other than damages.

[149] *OLRC Report*, 520–21 (distinction also drawn out in *SLC Paper*, [7.64]).

aggregate award, not of damages, but of monetary relief,[150] but that the ALRC appeared to treat the terms "damages" and "monetary relief" as interchangeable.[151] The draft Bill proposed by the ALRC authorised aggregate assessment where the payment of money is claimed,[152] but ultimately, the Australian regime as enacted only refers to an award of damages. It has been academically noted that Brooking JA's comments leave the question of monetary relief other than damages at large.[153]

A further issue is whether the class action provisions permit the award of exemplary damages against a class action defendant in an appropriate case, or whether awards of damages in class proceedings are to be confined to compensatory damages. In *Nixon v Philip Morris (Australia) Ltd*,[154] the defendants argued that, although an award of exemplary damages in respect of negligent conduct could be made under the general law (albeit in rare circumstances), Pt IVA evinced an intention to exclude such an award in class proceedings. The defendants based their argument on two limbs: that the ALRC did not envisage a deterrent or punitive effect as a result of the class action regime,[155] and that the powers of the court as articulated in the regime[156]did not provide for an award of exemplary damages. This contention was rejected (and was not dealt with on appeal[157]) on the basis that it would be strange to impose a serious limitation on plaintiffs' substantive rights by means of a provision designed to provide an additional procedure for the litigation of claims; and that there was nothing in either the *ALRC Report* or the second reading speech that evinced that intention.[158] Thus, it was held that the statutory empowerment for the court to "make an award of damages for group members" was not to be read down so as to exclude the award of exemplary damages in a proper case.[159]

Moreover, the Supreme Court of Canada has confirmed[160] that an award of punitive damages can, in an appropriate case but not always, be dealt with as a common issue. In circumstances where first, an award of punitive damages "is founded on the conduct of the defendant, unrelated to its effect on the plaintiffs",[161] and secondly, an allegation of negligence against the defendant is systemically based, that is, "negligence not specific to any one victim but rather to

[150] See cl 22. Ultimately, this clause was not reproduced precisely in the CPA (Ont), but is substantially encompassed within s 24(1).

[151] In *Schutt*, Brooking JA cited (at [17], fn 12) *ALRC Report*, [225], [227], [229] and [231].

[152] See cl 30.

[153] IF Turley, "Group Proceedings" (2001) 75 *Law Institute J* 44, 48.

[154] (1999) 95 FCR 453.

[155] See *ALRC Report*, [116], [323].

[156] Under FCA (Aus), s 33Z(1).

[157] The Full Court expressed no opinion on the point: *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487 (Full FCA) [185] (Sackville J).

[158] *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453, [115]–[117].

[159] *Ibid*, [118].

[160] *Rumley v BC* [2001] SCC 69, 205 DLR (4th) 39 (SCC) [34].

[161] Eg: *Endean v Canadian Red Cross Soc* (1997), 148 DLR (4th) 158, 36 BCLR (3d) 350 (SC) [48]; *Carom v Bre- X Minerals Ltd* (2001), 196 DLR (4th) 344, 51 OR (3d) 236 (CA) (15th common issue).

the class of victims as a group",[162] the fact and quantum of punitive damages is a question amenable to resolution as a common issue. Of course, notwithstanding the finding of a common issue of punitive damages, they will not proceed for assessment under a class action if otherwise, a class action is not the superior means of dealing with the dispute.[163] Similarly, punitive damages issues (entitlement and amount) can constitute common issues for class action determination under r 23(b)(3) class actions.[164]

2. Principles Governing Aggregate Assessment

Court powers in respect of damages assessment in class actions are very wide. This has been endorsed on several bases, from the fact that class proceedings are not traditional litigation and that it is inappropriate to impose upon them the "strictures derived from earlier times and traditional powers in litigation between individual parties",[165] to the reasoning that, if it is to be accepted that class actions are proper procedural devices where individual suits are not economically feasible because insignificant amounts are involved, then that must also implicitly recognise that individualised proof of damages of the type in traditional litigation may not be practical or economically feasible either.[166]

The power to make an aggregate award of damages has, with limited exception,[167] been endorsed by law reformers[168] as a means of avoiding costly, time-consuming and inefficient exercises in individual damages assessment, thereby benefiting both class members and defendants. In practice, as these commissions admit, the ability to perform an aggregate assessment and distribution of damages, should liability against the defendant be established, is an important factor in the certification process. The judicial economy to be gained by having the common issues determined in a single trial is even more patently obvious where

[162] Eg: *Chace v Crane Canada Inc* (1996), 26 BCLR (3d) 339 (SC [in Chambers]) [30] (punitive damages certified as common issue on basis that plaintiffs' negligence claim "advance[d] . . . as a general proposition" rather than by reference to conduct specific to any one plaintiff). Notwithstanding, the punitive damages may ultimately be assessed as an amount per class member: *Peppiatt v Nicol* (2001), 148 OAC 105 (CA) ($5,000/member upheld on appeal). Cf: *Controltech Engineering Inc v Ontario Hydro* (1998), 72 OTC 351 (Gen Div) (claims for punitive damages were dependant upon allegations of misrepresentation which did not give rise to common issues among class members; thus, punitive damages not a common issue either).

[163] Eg: *Hollick v Metropolitan Toronto (Municipality)* 2001 SCC 68, 205 DLR (4th) 19 (SCC).

[164] *Newberg* (4th) § 17.39 pp 441–42.

[165] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 (HCA) [267], commenting upon the array of orders possible under s 33Z(1), including an award of aggregate damages.

[166] *Newberg* (4th) § 10.5 pp 486–87.

[167] *SLC Report*, [4.102]–[4.103] (on the bases that aggregate assessment is not an essential feature of a class action procedure, and the opt-in regime it recommended would result in less need for such a procedure).

[168] *SALC Paper*, 44–45; *ALRC Report*, [227]; *VLRAC Report*, [6.40] and recommendation 11; *ManLRC Report*, 98; *AltaLRI Report*, [334]–[335].

aggregation of damages assessment is envisaged to be possible and practicable,[169] and an aggregate approach overcomes defendant's objections that there is insufficient commonality or that the number of individual issues renders the class action unmanageable.[170] Law reformers have been keen to reiterate the further advantage of finality, that, after an aggregate assessment has been made, the defendant's liability to the class will have been completely and finally determined. It will have no further obligations in relation to the class action[171] (subject to any requirement that the defendant distribute the aggregate sum to class members directly[172]). The approval of law reformers of the propriety of aggregate assessment has been reflected in the tendency to make express provision for aggregate assessment of monetary relief where applicable, in preference to leaving the regime silent on the matter as FRCP 23 does.

(a) Degree of accuracy required

Where damages are awarded in an aggregate amount, that amount is necessarily specified, and the amount of the judgment is the total amount to which the class will be entitled under the judgment: the class as a whole will never be entitled to either more or less than that figure. As has been pointed out,[173] aggregate proof of damage may actually be more accurate than the summation of individual proofs of damages—a defendant's records of sales/transactions/charges, for example, may be mathematically a far more accurate measure of monetary relief per class member than the estimates of loss by individual class members who have inadequate or simply non-existent records of overcharging and the like. Further (as the OLRC explained), for some class members, the method of calculation of their particular damages may be extremely complicated and thus off-putting, which may well cause the total amount of damages proved in separate proceedings by individual class members to fall substantially below the amounts that the defendant's records would show to be owing to the class members in aggregate, which indicates that, in such a scenario, aggregate assessment will provide a more exact measure of harm done by the defendant than any system of individual proof.

Aggregate assessment will, however, usually be an imprecise exercise, because an aggregate award may be made at a time when the number and identity of class members are unknown, and when it is not known how many class

[169] Eg: *1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd* (2002), 62 OR (3d) 535 (SCJ) [53] ("if [defendant] is found to be liable for failure to fully distribute the Rebates, since it must treat all franchisees the same, that liability may be calculated in the aggregate. . . . Further, a proportionate distribution of any aggregate assessment of damages would be consistent with the manner in which the initial rebate and allowance program . . .was distributed"); leave to appeal not granted with respect to this issue: (2003), 64 OR (3d) 42 (Div Ct).

[170] *OLRC Report*, 532.

[171] *ALRC Report*, [227]; *OLRC Report*, 532.

[172] See pp 423–26.

[173] *Newberg* (4th) § 10.3 p 479; *OLRC Report*, 550.

members will establish entitlement to share in the damages or even come forward. In that scenario, it has been judicially noted in Victoria that there will be two variables—the number of class members and the damage which individual members have suffered, and that, in most cases, one or other or both of these variables will be present, making any aggregate assessment an imprecise one.[174] For this reason, aggregate computation of class monetary relief has thrown up challenges in more than one jurisdiction, with various allegations that it affects substantive law or violates the defendant's due process.

Earlier authority under FRCP 23 suggested that aggregate damage proofs were *per se* improper as violations of due process.[175] However, more recent judicial authority[176] has recognised that there are occasions when it is feasible and reasonable to prove aggregate monetary relief for the class by reasonable approximation with proper adherence to evidentiary standards.[177] Although it was academically asserted[178] earlier in the life of rule 23 that aggregate assessment prejudicially compromised the defendant's substantive rights, and thus caused the schema to thereby contravene the Rules Enabling Act,[179] the US Supreme Court has since implicitly endorsed the validity of determining aggregate monetary liability of a defendant to the class.[180] Further, Newberg notes persuasively that "just as an adverse decision against the class in the defendant's favour is binding against the entire class in the aggregate without any rights of individual class members to litigate the common issues individually,[181] so too an

[174] As discussed by Brooking JA in *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Aust Ltd* (2000) 1 VR 545 (CA) [28].

[175] Eg: *Eisen v Carlisle and Jacquelin*, 479 F 2d 1005, 1017–18 (2nd Cir 1973); *Kline v Coldwell, Banker & Co*, 508 F 2d 226, 236 fn 8 (9th Cir 1974); *Windham v American Brands Inc*, 565 F 2d 59, 68 (4th Cir 1977).

[176] *Allapattah Services Inc v Exxon Corp*, 157 F Supp 2d 1291, 1313–14 (SD Fla 2001); *In re Cardizem CD Antitrust Litig*, 200 FRD 297, 324 (ED Mich 2001); *Chisolm v TranSouth Financial Corp*, 184 FRD 556, 566 (ED Va 1999).

[177] Also: *Newberg* (4th) § 10.2 p 477 ("the evidentiary standard [under FRCP 23] for proof of monetary relief on a classwide basis is simple—the proof submitted must be sufficiently reliable to permit a just determination of the defendant's liability within recognized standards of admissible and probative evidence").

[178] Simon, "Class Actions—Useful Tool or Engine of Destruction" (1972) 55 FRD 375, 377–86; Malina, "The Search for the Pot of Gold, Fluid Recovery as a Consumer Remedy in Antitrust Cases" (1972) 41 *Antitrust* 301; Handler, "Twenty-Fourth Annual Antitrust Review" (1972) 72 *Columbia L Rev* 1, 34–42, both noted and criticised by *Newberg*, *ibid*, § 10.5 n 2.

[179] See Rules Enabling Act, 28 USCA § 2072, which authorises the Supreme Court to promulgate rules of civil procedure, provides, inter alia, that procedural rules may not "abridge, enlarge, or modify any substantive right".

[180] See *Boeing Co v Van Gemert*, 444 US 472, 479, 481 n 6, 100 S Ct 745 (1980), in which the defendant appealed on the point as to whether the "common fund" exception to the American costs rule applied, and no objection was noted by the Supreme Court to the aggregate assessment of damages which had been entered by the Second Circuit Court of Appeals earlier in the action: *Van Gemert v Boeing Co*, 553 F 2d 812 (2nd Cir 1977). Considered a vindication by, eg, *OLRC Report*, 543; *Newberg* (4th) §10.5 p 487.

[181] In the context of a r 23(b)(3) action the focus of this text, that effect is provided for in r 23(c)(2)(B).

aggregate monetary liability award for the class is binding on the defendant without offending due process."[182]

In contrast to the silence of FRCP 23 (or perhaps because of this), class action statutes elsewhere in the focus jurisdictions have variously recognised the potentially imprecise nature of the assessment. The Australian schema provides that the court is not to make an aggregate award "unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment",[183] which provision is in line with the majority of law reform opinion.[184] The Ontario regime provides that a court may determine aggregate liability where 'the aggregate . . . can reasonably be determined without proof by individual class members',[185] albeit that this provision was directly in conflict with the OLRC's recommendation that aggregate damage assessments are to be governed by the same standards by which individual awards are decided.[186] In spite of an already existing aggregate assessment provision in Quebec that explicitly recognised that absolute precision was not required,[187] early Ontario academic commentary[188] exhibited discomfort with the notion of aggregate liability on this basis, reminiscent of the reservations expressed under FRCP 23.

Consistent with doubts as to the propriety of aggregate assessment provisions that had been expressed elsewhere, the question as to whether aggregate assessment provisions authorise a departure from the substantive principles governing damage assessment was canvassed in Australia in the context of the Victorian state schema, which reproduces the federal regime's aggregate assessment provision for all material purposes. In *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd*,[189] it was argued that there are two potential meanings that may be attributed to a "reasonable assessment" in this context.

[182] *Newberg* (4th) § 10.5 p 486.

[183] FCA (Aus), s 33Z(3).

[184] See: *ALRC Report*, [228] ("The question is the degree of accuracy that should be required to justify an aggregate assessment. The OLRC recommended (*OLRC Report*, 555) that aggregate assessment should be permitted where the same degree of accuracy could be obtained as in an individual action of the same kind. This may be too strict given the potential benefits of grouping proceedings. The appropriate test to be satisfied as a condition of the Court making an aggregate assessment of the respondent's liability should be that the assessment is reasonably accurate"); *SALC Report*, [5.13.3]; *SLC Report*, [4.98].

[185] CPA (Ont), s 24(1)(c).

[186] *OLRC Report*, 552–56, and see cl 22(c) of the Draft Bill, which authorised aggregate assessment only where the total amount of the defendant's liability could be assessed "with the same degree of accuracy as in an ordinary action". However, the CPA, as ultimately enacted, imposed a less stringent test, and the Ontario A-G's Advisory Committee did not explain why the draft Bill was not followed in this respect.

[187] CCP (Que), art 1031 allows "collective recovery if the evidence produced enables the establishment with sufficient accuracy of the total amount of the claim of the members" of the class. Note the SLC's criticism of this provision, "sufficient for what?", cited in *Multi-Party Actions: Court Proceedings and Funding* (DP No 98, 1994) [7.71, fn 2].

[188] WA Macdonald and JW Rowley, "Ontario Class Action Reform: Business and Justice Systems Impacts" (1984) *Canadian Business LJ* 351, 357.

[189] *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Aust Ltd* (2000) 1 VR 545 (CA). In this case, the court was discussing Ord 18A r 25(3), which was in very similar terms to s 33Z(3).

On the one hand, a reasonably accurate assessment does not contemplate any departure from the principles governing assessment of damages, for in some cases where a plaintiff is seeking compensation for injuries suffered, "the best that a tribunal of fact can ever do is make a reasonably accurate assessment." Thus, a "reasonably accurate assessment" is meant to indicate one that is not precise, but "good enough in law" (the first meaning).

On the other hand, such provisions may be construed as permitting an aggregate award to be made, notwithstanding that it is at the time of assessment impossible to make the kind of assessment which would be legally appropriate if the court was seeking to assess the damages to be awarded to each individual class member.[190] If it is this second meaning which is to be attributed to the class actions aggregate award provisions, then (the defendant argued) they were invalid. It will be arguably impossible to arrive at a class assessment which gives individual class members what they would be entitled to on individual assessments according to law, and that such provisions therefore intended to authorise for class actions an unacceptable departure from the substantive principles governing individual assessment. In particular, the argument runs[191] that "each person having a right of action against the defendant is entitled to have his, her or its damages assessed by the application of rules of substantive law governing damages"; that an aggregate award, in many cases, "will not correspond to the sum which would be awarded if a series of individual assessments were made in the light of the evidence relevant to the particular claim"; that aggregate provisions "authorise the court to deprive each class member of the right to have damages assessed and awarded according to law"; and to replace that right "with some amount that may differ, and differ greatly, from the damages that would have been assessed on ordinary principles". Therefore (concludes the argument), aggregate assessment of a defendant's liability "will be less accurate—less reliable or sound—than the product of individual assessments", and should not be authorised under class action regimes unless a standard similar to that of individual assessment can be achieved.

This second argument has certain judicial[192] support, but did not prevail in *Schutt Flying Academy* and elsewhere for two reasons. It has been said that there is nothing in aggregate award provisions which requires damages to be assessed otherwise than in accordance with recognised legal principles.[193] Alternatively, the insertion in statute of a "reasonably accurate assessment" is intended to infer that the award will necessarily contain a wide discretionary element and may be made in a manner in which precision is impossible, but will be "good enough in law".[194] This decision has been academically said to show

[190] As discussed by Brooking JA in *Schutt*, *ibid*, [19]–[28].

[191] See especially the defendant's arguments in *Schutt*, *ibid*, [18].

[192] *Schutt*, *ibid*, [28] (Brooking JA).

[193] *Ibid*, [35]–[37] (Ormiston JA).

[194] Eg: *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424, 448 ("'assessment of damages' imports an element of judicial discretion: assessing damages is not the application of mathematical formulae. When it is qualified by the words 'reasonably accurate' . . . the judicial discretion has been

a "cautious but pragmatic approach",[195] and certainly, the interpretation invoked by the Victorian Court of Appeal in *Schutt Flying Academy* (cited with approval by the High Court[196]) provides the Pt IVA regime with the sort of utility and workability which the drafters of the regime appeared to contemplate.

Thus, challenges to the propriety of aggregate assessment of class damages have not ultimately discounted the efficacy of aggregate proof in the rightful scenario. In particular it is apparent that the legislatures whose responsibility it has been to enact the regimes post-FRCP 23 appear little troubled by the prospect of any departure from ordinary assessment principles. However, it is not for every case that proof of aggregate monetary relief will be feasible and reasonable, as the following section demonstrates.

(b) The circumstances of aggregate assessment

Under no regime is the award of aggregate damages prescribed in specified circumstances. It remains a matter for the court's discretion as to whether this method is the preferable and appropriate one.[197] However, there have also been judicial admonitions for the parties to give adequate attention to the formulation of aggregate claims, where the separate calculation of individual loss claims of all class members appears to be unmanageable.[198]

There are a variety of circumstances in which determination of damages by class-wide aggregate assessment are feasible and have been either advocated or employed across the focus jurisdictions. The first such scenario (commonly identified by law reform agencies[199]) is where the number of class members is relevant to the calculation, but where that number, and the amount of their claims, can be ultimately determined without need for any information from the class members. For example, where there has been an overcharge rendered, and where the relief claimed is hence restitutionary rather than for unliquidated damages, the total of the defendant's liability to all class members can usually

widely extended. . . . the practical application of the provisions of Pt IVA is not to be read down through any evidentiary inability to identify every member of the group and the relevant amount of damage that each member has or may have suffered").

[195] P Spender, "Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability" (2003) 25 *Sydney L Rev* 223, 241.

[196] *Mobil Oil Aust Pty Ltd v State of Vic* (2002) 211 CLR 1 (HCA) [23]–[24].

[197] Cf cl 22 of Ontario's Draft Bill, which required the court to make an aggregate award where three circumstances were met.

[198] *Bray v F Hoffman-La Roche Ltd* [2002] FCA 1405, [28] (alleged cartel involving vitamin and other similar products manufactured and sold by defendants).

[199] *SALC Paper*, [5.36], and *SALC Report*, [5.13.2], with a similar example also cited in *SLC Paper*, [7.65] and *SLC Report*, [4.96]; *ALRC Report*, [224]–[225], citing examples of such restitution in *Re Grace Bros Financial Services Ltd* (1987) ASC 55-591 (credit card charges refunded to card holders by retailer who had invalidly imposed charges without the requisite credit provider's license), and *Chastain v BC Hydro and Power Authority* (1973), 32 DLR (3d) 443 (power supplier improperly required security deposits, and was ordered to credit to the account of each customer the amount of the deposit held).

be calculated from its own records or from other existing record.[200] Another similar scenario where aggregate assessment is possible is where the amount of claim per member is determinable, not from an overcharge, but from the value of the product which the class member owns, and the value of what the class member *could* have owned, but for the defendant's wrongful conduct.[201] Any situation in which the monetary liability of the defendant for the entire class can be demonstrated by a formulaic calculation per class member lends itself to an aggregate proof of monetary relief.[202]

The second scenario is where the defendant's total liability can be established without determining either the number of class members or each member's loss or damage. This has been applied, for example, where the amount of damages can be calculated for the economy as a whole,[203] or purely by reference to the amount of product sold by the defendant,[204] or by a statutory imposition of

[200] *ALRC Report*, [225], *OLRC Report*, 550. Eg: *Partain v First National Bank of Montgomery*, 59 FRD 56 (MD Ala 1973) (unlawful compound interest on credit; damages could be calculated from defendant bank's computerised records; no need for class members to file proof of claim forms); *Landau v Chase Manhattan Bank*, 367 F Supp 992 (SDNY 1973) (overcharges by bank on credit cards could be proved for the credit card holders on a class-wide basis from the defendant's computerised records; defendant had record of each class member's address and history of account); *Samuel v U of Pittsburgh*, 538 F 2d 991 (3rd Cir 1976) (overcharge of tuition fees; university's records allowed identification of class members and amounts by which they were overcharged).

[201] *ALRC Report*, [226]. Eg: *Van Gemert v Boeing Co*, 553 F 2d 812 (2nd Cir 1977) (company did not give adequate notice of intention to call convertible debentures; non-converting debenture holders entitled to class-wide damages assessment on the basis that aggregate equalled number of unconverted debentures multiplied by the differences between the redemption price of each debenture and the market value of the stock into which the debentures could have been converted).

[202] *Newberg* (4th) §10.3 p 479–80, § 10.6. Eg: *Blackie v Barrack*, 524 F 2d 891, 905 (9th Cir 1975) ("the process of computing individual damages will be virtually a mechanical task"); *Newberg* (4th) § 10.3 p 479–80 § 10.6. Under FRCP 23, class-wide proof of damages by application of mechanical formulae has been approved in a variety of contexts: antitrust claims: *In re Cardizem CD Antitrust Litig*, 200 FRD 297, 324 (ED Mich 2001); securities claims: *In re SmithKline Beckham Corp Securities Litig*, 751 F Supp 525 (Ed Pa 1990), and see Note, "Estimating Aggregate Damages in Class Action Litigation Under Rule 10b-5 for Purposes of Settlement" (1991) 59 *Fordham L Rev* 811; employment discrimination: *Pettway v American Cast Iron Pipe Co*, 494 F 2d 211, 260–61 (5th Cir 1974); consumer credit actions: *Roper v Consurve Inc,* 578 F 2d 1106, 1115 (5th Cir 1978). Also see: *Schweyer v Laidlaw Carriers Inc* (2000), 44 CPC (4th) 236 (SCJ) [48] (formula would eliminate need for class member employees to give accounting information concerning their entitlement under profit-sharing plan).

[203] See, eg: *VitaPharm Canada Ltd v F Hoffman-LaRoche Ltd* (2000), 4 CPC (5th) 169 (SCJ) [29], [31] (several Canadian and American economists retained to develop theory for assessment of damages re alleged conspiracy re vitamin supply; their advice that damages resulting from the alleged conspiracies could/should be assessed globally for whole Canadian economy accepted by court).

[204] *Allapattah Services Inc v Exxon Corp*, 157 F Supp 2d 1291, 1314 (SD Fla 2001) (aggregate damages awarded to class for breach of contract by defendant; aggregate based on a finding of cents per gallon; "[t]he proof was sufficiently reliable to permit a just determination of Exxon's liability within recognized standards of admissible and probative evidence in response to what Exxon, itself, represented to Class Dealers"). The scenario was also illustrated in the *ALRC Report*, [226], by reference to *Alberta Pork Producers Marketing Board v Swift Canadian Co Ltd* (1984), 34 Alta LR (2d) 274 (aggregate damages equalled price differential caused by anti-competitive conduct multiplied by the number of hogs sold; class members' entitlement unnecessary to determine at this stage).

fixed liability.[205] A third scenario is where the size of the class is large, but approximately determinable, and the size of the individual claims is small but more or less uniform (the class members' entitlements can be determined later when they come forward to prove their individual losses). Aggregate assessment in these circumstances has been employed at the conclusion of a class action trial in Australia,[206] and foreshadowed at certification stage as a realistic option for damages assessment in Ontario.[207] The award of a lump sum to the class as a whole under a statute, where the sum awarded bears no relationship to the actual loss sustained by the class members, is a fourth example of aggregate assessment.[208] Finally, where the total amount of money available with which to satisfy a damages payout to the class is substantially less than the actual losses suffered, and where a pro rata share in the eventual payout amount is all that the class members can realistically hope for, an aggregate rather than individualised assessment of damage is called for.[209]

Experience under the various regimes has demonstrated that aggregate assessment of class damages will not be appropriate for every case, however, and in these scenarios, individual assessment of class members' entitlement will need to occur, whether by mini-hearings or other appropriate device.[210]

In Ontario, for example, provisions dealing with aggregate assessment of monetary relief apply only when liability has been established, and provide a method to assess the quantum of damages on a global basis. However, they cannot be relied upon to prove *the fact* of damage to establish liability, where proof of damage is required to make out the cause of action.[211] This was a crucial

[205] *Six (6) Mexican Workers v Arizona Citrus Growers*, 904 F 2d 1301 (9th Cir 1990) (aggregate proof permitted where plaintiff class sought statutory damages, so each class member not required to prove actual injury).

[206] *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424 (representative plaintiff based calculations on loss of $50 per class member, on basis that there some class members will have suffered no loss, whilst others will be found to have suffered full possible loss of $150 each; assessment per class member not contradicted by defendant; number of class members rounded and approximated to 11,000; hence aggregate damages award of $550,000).

[207] *Anderson v Wilson* (1997), 32 OR (3d) 400 (Gen Div) [52] (Jenkins J determined that compensatory damages for all class members except those who experienced very serious illness be determined by aggregate assessment, and that compensatory damages for class members who experienced very serious illness should be assessed individually, possibly by a mini-hearing process); certification varied: *Anderson v Wilson* (1999), 175 DLR (4th) 409, 44 OR (3d) 673 (CA) [18], [23] to include class of persons who received notice of the possibility of infection, were tested, and were uninfected; nature of this claim also lent itself to aggregate treatment because individual reactions would likely be similar responses of fear of infection and of anxiety during the period waiting for a test result.

[208] Eg: US courts have made lump sum awards in Truth in Lending Act suits: *Barber v Kimbrell's Inc*, 424 F Supp 42 (WD NC 1976) (Truth in Lending Act suit on behalf of 740 class members alleging misleading labels and failure to disclose finance charges; lump sum of $100,000 awarded); *Eovaldi v First National Bank of Chicago*, 71 FRD 334 (ND Ill 1976) (TILA suit over billing procedure; lump sum of $127,899 awarded), and see further: *Newberg* (4th) §10.11.

[209] Eg: *Delgrosso v Paul* (2001), 10 CPC (5th) 317 (SCJ) [12] where an aggregate assessment of damages was approved on this basis.

[210] See pp 263–69.

[211] *Price v Panasonic Canada Inc* (2002), 22 CPC (5th) 379 (SCJ) [30].

finding in *Chadha v Bayer Inc*,[212] in which expert evidence filed by the representative plaintiffs opined that the illegal profits gained by the defendants as a result of an alleged cartel could be calculated on an aggregate basis because the loss to the class was equal to the gain of the defendants based on their illegal conspiracy. This was rejected on the basis that, by seeking to equate the defendants' gain with the class members' alleged loss, the representative plaintiffs effectively skipped over the process of determining who in the chain, from direct to indirect or end-purchasers, absorbed the loss. Instead, they sought to attribute the entire loss to the indirect or end-purchasers rather than to determine whether those parties actually suffered loss as required by the pleaded causes of action. Another court has stated that, if individual issues would abound in determining whether any given class member has suffered personal injury and/or property damage as a result of the defendant's wrongdoing, then aggregate assessment will be inappropriate.[213] Aggregate damages provisions cannot be resorted to in order to resolve issues of liability, and do not provide a bridge to overcome obstacles revealed on the liability side.[214] Canadian case law demonstrates[215] that where the determination of class members' damages will be necessarily entirely individualistic, dependent upon a number of factors unique to the class member, then individual assessment of damages will be required (as part of the matrix of individual issues to be determined after the common issues are resolved) and aggregate assessment will not be countenanced.

[212] *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) [24] (it is "not claims or entitlement to damages that can be assessed on an aggregate basis under the Act, but rather, the quantum of damages which can be so assessed": Somers J), approved on appeal: (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA) [24]. The Div Ct overruled motions judge Sharpe J on this point: *Chadha v Bayer Inc* (2000), 45 OR (3d) 29 (SCJ).

[213] *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) (alleged environmental contamination; exposure to contamination, time between exposure and onset of illness, varied for each individual; would require determination of other potential causes for the illness, risk factors peculiar to the individual; additionally, in respect of alleged property damage, individual issues arose as to whether contaminants affected property value and prices; other reasons for downward trend in housing prices in area).

[214] *Ibid*, [129].

[215] Aggregate assessment was mooted but rejected in each of the following: *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [122] (even if property value impact causally linked to particular environmental factor, further individualised analysis—when a property owner bought, sold, and/or refinanced his home and knowledge or perception of the parties at the time—required to determine actual economic effect the impact had on individual property owner); *Samos Investments Inc v Pattison* [2001] BCSC 1790 (court agreed with defendant's submission at [140] that representative plaintiff purported to treat damages purely as function of length of time during which class member held its shares; but the assumption that loss was suffered evenly through the defined periods untenable; assumption will favour some members at expense of others, without reference to their personal situations), decision to refuse certification, aff'd: (2003), 10 BCLR (4th) 234 (CA); *Bywater v Toronto Transit Comm* (1999), 27 CPC (4th) 172 (Gen Div) [17]–[20] (subway fire; assessment of damages in each case idiosyncratic, depending upon individual plaintiff's time of exposure to smoke, extent of any resultant injury, general personal health and medical history, age, any unrelated illness, and other individual considerations such as concurrent other illnesses; property damage claims of class members also to be assessed individually); *Sutherland v Canada (A G)* (1997), 15 CPC (4th) 329 (BC SC) (damages held at [41] to be essentially individualistic and would inevitably reduce to discrete adjudications for each plaintiff).

It is noteworthy that one of the reasons for the OLRC's recommendation that the aggregate assessment provision should specify that the defendant's liability must be assessed with the same degree of accuracy as in an individual action of the same kind was to "eliminate the possibility of extended litigation concerning the propriety of aggregate assessment of monetary relief and the requisite standard of proof."[216] As noted previously, the Australian and Canadian focus regimes do not encompass this stringent standard of proof, but permit a lesser "reasonable" standard. Although there has only been limited case law to date under these particular regimes concerning monetary relief, there has been no evidence yet of litigious debates as to whether the margin of error in aggregate assessments of damages are within acceptable margins. Rather, the courts have adopted a robust approach of rejecting aggregate assessment where the facts of the case are so individualised that individual proof of monetary relief by class members is essential. Further decisions will be necessary before it is possible to tell whether the concerns manifested by the OLRC are borne out by disputes over the requisite standard of proofs for which the legislatures opted.

(c) Use of statistical evidence

Interestingly, the treatment of statistical evidence varies across the focus jurisdictions. In class suits under the longer-standing US regime, and as permitted by relevant Federal Rules of Evidence,[217] courts have been willing to admit statistical material as evidence. It was observed[218] earlier in the life of FRCP 23 that if aggregate proof of damages through statistical methods "modifies preexisting practice, it is a modification that results from the congressional enactment" of the statutory Federal Evidence Rules. Since then, courts have approved the computation and distribution of aggregate class damages through reliable accepted statistical methods[219] and by use of representative samples.[220] Statistical computation for aggregate awards of monetary relief has been held to be useful where, for example, calculation by manual examination of the circumstances of each class member would be cumbersome, expensive and

[216] *OLRC Report*, 555.

[217] Federal Rules of Evidence 703, 1006.

[218] *In re Sugar Industry Antitrust Litig*, 73 FRD 322, 351 (ED Penn 1976), and see *OLRC Report*, 836–38.

[219] *In re Domestic Air Transport Antitrust Litig*, 137 FRD 677, 690, 692 (ND Ga 1991); *Windham v American Brands Inc*, 565 F 2d 59, 68 (4th Cir 1977). For further authorities, see: K Roosevelt, "Defeating Class Certification in Securities Fraud Actions" (2003) 22 *The Review of Litigation* 405, 432, fn 154.

[220] *Long v Trans World Airlines Inc*, 761 F Supp 1320, 1323–25 (ND Ill 1991) (class proof of aggregate damages permissible using statistical sampling proofs); *In re Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions*, 333 F Supp 278 (SDNY 1970). As the OLRC explained, sampling statistics are based upon information gathered about a smaller number of individuals or objects within the universe (the class), for the purpose of estimating particular characteristics of the universe as a whole: *OLRC Report*, 830.

ultimately almost impossible to determine.[221] By corollary, however, where the type of harm suffered by the class members varied substantially, that will make statistical calculation of the average damages suffered impermissible, and certification will be denied.[222] Additionally, according to Newberg, "the rules of evidence have long permitted use of samples and statistics to provide proof of all aspects of liability" in class suits under FRCP 23.[223]

The class action statutes of Ontario[224] and British Columbia[225] each expressly permits statistical evidence to be used by the court in determining "issues relating to the amount or distribution of" an aggregate monetary award. However, the further and recently-posed question is whether that statutory authorisation extends to proof of liability. Parties who sought to invoke the Ontario provision to permit statistical evidence to prove the fact of loss and damage, for example, were initially disappointed.[226] However, more recently, the Ontario Court of Appeal has indicated, by reference to US authority, that it may be more receptive to statistical evidence for the purposes of establishing liability:

> Finally, the Divisional Court concluded that s 23 of the Class Proceedings Act, which contemplates the use of statistical evidence to determine the amount or distribution of a monetary award, would not allow the issue of liability to be proved through otherwise inadmissible statistical evidence. I do not adopt this comment by the Divisional Court. In the American cases, . . . expert evidence that includes an analysis of statistical data has been used to establish loss on a class-wide basis. The admissibility of any such evidence will have to be considered when the issue arises.[227]

This issue is a pertinent one, as the restrictions upon the use of statistical evidence imposed by the legislatures of the Canadian provinces "[f]or the purposes of determining issues relating to the amount or distribution of a monetary

[221] *Eovaldi v First National Bank of Chicago*, 71 FRD 334, 336–37 (ND Ill 1976) (note that it was the *defendant* here and not the class action advocate who favoured the use of statistical evidence; judicially approved, because mailed questionnaire would lead to speculative or perjured responses and would be expensive, and plaintiff's mechanical formula would arrive at mere estimate; thus, other practical options would produce no better results than the statistical computation used by the defendant's expert).

[222] *Continental Orthopedic Appliances Inc v Health Ins Plan of Greater NY Inc*, 198 FRD 41, 47 (EDNY 2000) (certification of antitrust case denied; damages not susceptible to common proof using a formula or economic model); *Broussard v Meineke Discount Muffler Shops Inc*, 155 F 3d 331, 343 (4th Cir (NC) 1998) (average loss of individual plaintiffs improper where substantial variation; actual losses necessary); *In re Fibreboard Co*, 893 F 2d 706, 710–12 (5th Cir 1990) (denying certification of 2990 asbestos plaintiffs where type of harm suffered varied substantially; statistical calculation of average damages impermissible), and see Roosevelt, *ibid*, with further relevant authorities and discussion, at 432 and fn 159.

[223] *Newberg* (4th) § 10.5 pp 482–83, citing Federal Rules of Evidence 703.

[224] CPA (Ont), s 23.

[225] CPA (BC), s 30.

[226] *Chadha v Bayer Inc* (2001), 200 DLR (4th) 309, 54 OR (3d) 520 (Div Ct) (s 23 "does not render otherwise inadmissible statistical evidence admissible for other purposes, such as determining liability": at [25]). Also see: *Price v Panasonic Canada Inc* (2002), 22 CPC (5th) 379 (SCJ) [31].

[227] *Chadha v Bayer Inc* (2003), 223 DLR (4th) 158, 63 OR (3d) 22 (CA) [51].

award" was in direct contradiction to the recommendation of the OLRC.[228] That reform agency took explicit note of the US experience to that point,[229] and advocated that the statutory provision permitting statistical evidence should not restrict the use of such evidence to any particular purpose. In light of the recent abovementioned judicial comments, the case for following the OLRC's recommendation appears to be, in hindsight, even stronger.

The use of statistical evidence in class actions under Australia's Pt IVA regime, surprisingly not considered by the ALRC in its seminal reports on the development of a class action regime for that jurisdiction, has yet to become an issue in the case law to date. Whilst the use of such evidence is permitted in the Australian federal jurisdiction, the lack of both class action advocation for its use and judicial consideration of its permissibility in the class action context indicates that an argument for an express statutory provision within Pt IVA of the type contained in the Ontario legislation, with its built-in checks and balances, is strongly tenable. The party wishing to introduce statistical evidence under the class action provisions of the aforementioned Canadian regime[230] must meet several conditions. For example, he/she must give the other side notice of that intention and of details respecting its source and must introduce it through an expert.[231] These and other stated conditions will be stringently enforced by the court before statistical evidence can be used,[232] and by their imposition, enable others to know whether the court's reliance on statistical reports was appropriate.[233]

Moreover, for several reasons, the express inclusion of provisions governing the admissibility and use of statistical evidence appears sound. The authorisation of reliable statistical evidence, with the "consequent variation from the normative quantification of losses and damages on an individual by individual basis", has been said in Ontario to be of benefit, not only to the parties, but also for the ultimate furtherance of the underlying objectives of a class action regime, namely, to enhance access to justice, judicial efficiency and behaviour modification.[234] Its admissibility has generally been advocated by law reform bodies on the basis that it can play a valuable role in reducing unnecessary administrative and evidentiary burdens for courts and parties alike.[235] Although

[228] *OLRC Report*, 845, and see Draft Bill, cl 49.

[229] See particularly, *OLRC Report's* discussion of the statutes or rules that had been drafted to deal with the problem to the date of that report, at 840, and reference to the "preoccupation of American commentators and legislators with the use of statistical evidence in aggregate assessments of monetary relief": at 845.

[230] Quebec adopts the more general view that, in the absence of express statutory reference, the use of statistical evidence has been considered possible via the provisions giving the court broad powers to prescribe measures to simplify proof: noted in *ManLRC Report*, 99.

[231] See, eg: CPA (Ont), s 23(3)–(7).

[232] As manifested in *Parsons v Canadian Red Cross Soc* (2000), 51 OR (3d) 261 (SCJ) [33]–[35].

[233] A Roman and C Brothers, "Case Comment: *Thibaudeau v Minister of National Revenue*" (1994) 167 NR 216 fn 25.

[234] *Blatt Holdings Ltd v Traders General Ins Co* (2001), 9 CPC (5th) 256 (SCJ) [16].

[235] *OLRC Report*, 841; *ManLRC Report*, 99; *VLRAC Report*, [6.40]. See also: p 264 fn 288.

the need for an explicit provision in a class action statute has been occasionally questioned,[236] the utility of statistical evidence in both the US and Canadian regimes indicates that such an omission in a modern class action statute should not be countenanced.

D DISTRIBUTION OF MONETARY RELIEF

Once a damages award has been made (whether individually assessed or by aggregate assessment), the court must decide the most appropriate way for it to be distributed to individual class members, within the confines of the particular legislation under which the class proceedings has been determined. Where an aggregate assessment of damages has been adopted in one of the scenarios that lends to that approach, the management difficulties avoided in the assessment may arise again at distribution stage. The Australian[237] and Ontario[238] regimes (British Columbia is seemingly an exception[239]) are notable for the broad discretion which the legislatures have expressly conferred upon the courts in determining how damages awards are to be distributed. Such explicit discretion has been said to have been motivated by a desire to ensure that some of the judicially-erected barriers to effective recovery of awards in class proceedings that have been evident in the US are overcome.[240]

1. Direct Distribution to Class Members

One of several persons may be responsible for the actual distribution of compensation (whether that compensation arises via judgment or judicially-approved settlement). In some cases, it will be appropriate for the *defendant* to distribute the damages award directly to class members.[241] Such a course is

[236] *AltaLRI Report*, [340]: "a court that held that statistical evidence was inadmissible under the common law rules of evidence would be explicitly or implicitly concluding that the evidence was either unnecessary or unreliable. It is difficult to imagine that the same court would then be prepared to turn around and admit the statistical information under [class action provision dealing with statistical evidence]".

[237] FCA (Aus), ss 33Z, 33ZA.

[238] CPA (Ont), s 26. By virtue of s 26(1), this section applies to s 24 (aggregate assessment) and s 25 (determination of individual issues, including damages entitlements).

[239] The provisions of the BC statute concerning issues that can arise regarding distribution/residue are limited to where the award has been calculated on the basis of aggregate assessment: see CPA, Div 2—Aggregate Awards. The *FCCRC Paper* (at 81–82) notes that the reasons for this limitation are not clear, and stand in stark contrast to the Ontario regime.

[240] *ManLRC Report*, 100, citing the observations of J Campion and V Stewart, "Class Actions: Procedures and Strategies" (1997) 22 *Advocates' Q* 20, 38–39. Also noted in *FCCRC Paper*, 78, fn 170, citing *OLRC Report*, 519.

[241] Discussed in, eg, *OLRC Report*, 561. Such would be covered by FCA (Aus), s 33Z(2), and is expressly authorised by CPA (Ont), s 26(2), and in the case of aggregate awards, by CPA (BC), s 33(2)(a).

especially appropriate where the names of class members and their entitlements are verifiable from the defendant's records.[242] Alternatively, the defendant may be required to pay the award into a *court fund* or other repository, from which a designated party[243] will administer and distribute the amounts ordered to be paid to class members. In addition to successful use in the US,[244] this has proven to be a popular arrangement in both Ontario[245] and in Australia,[246] and is potentially applicable both where the money can be distributed to the class members immediately, but the defendant does not have the relevant information or resources to do so, or where the proof of each class member's entitlement to payment of money must be established prior to distribution.[247] A third option is that a *non-party* (such as a trust company) may be required to distribute directly to class members. All three options are expressly permitted by the Canadian common law regimes,[248] but the third is not expressly provided for in Australia's schema.[249]

The main goal in the distribution of monetary relief is to minimise the cost to absent class members of asserting their claims. Therefore, as the very first option, if class members' damages entitlement could be assessed on the basis of the defendant's records, then distribution by the defendant (or by the court) via use of those same records will be effective, and indeed, this method has been extensively approved, especially under FRCP 23.[250] In such cases, it is possible

[242] *ALRC Report*, [230]. Where restitution of overcharges is ordered, there will be no need to create a fund: *ALRC Report*, [225].

[243] The statutes are not explicit about the relevant party, but clearly, the role could be assumed by a court representative, a court-appointed administrator, or a party agreed to between the parties, such as a party's legal representative. See also: *ALRC Report*, [232].

[244] See, eg, the discussion of the antibiotics antitrust price-fixing class settlements, and the distribution of the settlement fund in "Operation Money Back", discussed in detail in *OLRC Report*, 564–67, and the subject of the work by TC Bartsh *et al*., *A Class-Action Suit That Worked: The Consumer Refund in the Antibiotic Antitrust Litig* (Lexington, Mass, Lexington Books, 1978).

[245] Eg: *Peppiatt v Nicol* (SCJ, 27 Nov 1991) (defendant ordered to pay sum into court; transferred to trust fund held by representative plaintiff's lawyer for distribution to class members; with order that any monies not distributed from monetary award by stipulated date to be paid back into court for court to determine who shall be entitled to these funds).

[246] Eg: *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424, order 9 (account ordered to be opened at financial institution as determined by court-appointed trustee; class member to establish eligibility for payment out of fund by providing within the period specified evidence by way of statutory declaration or other information affirming his or her identity and membership number in the Golden Sphere scheme).

[247] As noted in *ALRC Report*, [231].

[248] CPA (Ont), s 26(2)(c); CPA (BC), s 33(2)(c). See, for further discussion: *ManLRC Report*, 100.

[249] FCA (Aus), s 33ZA(1), probably because the *ALRC Report* did not refer to it.

[250] For recent examples, see: *Tenuto v Transworld Systems Inc*, 2002 WL 188569 (ED Pa 2002) (settlement approval provided, inter alia, that "defendant shall pay $255,000 to be distributed equally among all class members who submitted claim forms before the date of the fairness hearing"; defendant shall pay the remaining costs of administration including distribution of payment checks to class members'); *Sandwich Chef of Texas Inc v Reliance National Indemnity Insurance Co*, 202 FRD 484, 489 (SD Tex 2001) (certification approved on the basis, inter alia, that "Phase three, applicable only if the class prevails, would involve distribution of damages to the class. Individual damages would be distributed on the basis of records obtained from Defendants and, if necessary, proof of claim forms submitted by members of the class").

and practicable for class members to be compensated for the precise amount of their loss or damage from an aggregate award, whether by payment of monies or by abatement or credit. As in the assessment phase, use of the defendant's records for distribution eliminates the requirement for proof of claims or for any other evidence of individual entitlement.

If the court considers that individual claims need to be made to give effect to an order for the distribution of an aggregate award among class members, then under the post-FRCP 23 regimes, the court has an expressly-conferred wide discretion to specify the procedures for determining the claims.[251] The variety of early case law experience garnered under the US regime[252] (which itself does not refer to any aspect of assessment or distribution of aggregate damages) prompted the Canadian provincial legislatures in Ontario and British Columbia to nominate a non-exhaustive series of measures by which class members may be required to participate in the distribution of a class judgment. These consist of standardised proof of claim forms, the use of affidavits in place of viva voce testimony, and auditing of a sample of claims in order to detect the existence and degree of fraudulent claims. In contrast, the Australian legislature chose not to provide any guidance, leaving the manner of distribution entirely to the discretion of the court.

However, where precise compensation to class members via one of these methods is not possible, an alternative (expressly permitted under the Canadian provincial schemas,[253] judicially practised in the US[254] and seemingly mooted as a possibility in Australia[255]) is to permit class members to receive an "average" or "proportionate" share of the award. The cases indicate that this is a feasible option where the class members are or can be rendered identifiable, but the amount of each member's claim is unable to be determined either from the defendant's records or from the class member's documents. In British Columbia, it is statutorily provided[256] that individual class members are permitted to opt out of the distribution of aggregate damages distribution on an

[251] FCA (Aus), s 33ZA(3)(b); CPA (Ont), s 24(4)–(9); CPA (BC), s 32(2), (3).

[252] These methods are described in: *OLRC Report*, ch 14(3)(c); Note, "Developments in the Law—Class Actions" (1976) 89 *Harvard L Rev* 1318, 1520–21; *Newberg* (4th) §10.12; and see also the procedures employed in the antibiotics price-fixing settlements described in *OLRC Report*, 564–67.

[253] CPA (Ont), s 24(2), (3); CPA (BC), s 31.

[254] *White v Carolina Paperboard Corp*, 564 F 2d 1073, 1084 (4th Cir 1977); *In re Chicken Antitrust Litig American Poultry*, 669 F 2d 228, 240 n 20 (5th Cir 1982) (settlement agreement approved; one class received the average return that other classes received; "Although admittedly unusual, this arrangement seems to be a fair response to the particular difficulties that this class would have in gathering and presenting evidence of damages. In addition, because of a fear that the costs of gathering such proof would exceed the amount received, the state attorneys general insisted upon this feature before relinquishing their claims against defendants").

[255] *ACCC v Golden Sphere Intl Inc* (1998) 83 FCR 424, order 28 (this option was only canvassed in the case where the fund could be insufficient to allow all class members full recovery for their losses, but indicates that the court was not adverse to the concept of a proportional distribution to class members in a given scenario).

[256] CPA (BC), s 31(2).

average or proportional basis and prove the amount of their individual claim, where they object to receiving an average share of the award. Such a provision is intended[257] to overcome any suggestion that the class action should be dismissed as unfair because, by giving all class members average damages, some may be receiving less than their due.

2. Non-direct (Cy-pres) Distribution

A further possible option is to embark upon a cy-pres distribution. In the context of class actions,[258] this refers to the application of an aggregate award or settlement in a way which may reasonably be expected "to compensate or benefit class members, where actual division and distribution of the award among the class members is impossible or impracticable."[259] Thus, cy-pres distributions have been utilised where class members are difficult to identify, or where they change constantly, or where the claims of the individual class members are so small in quantum that they will not be pressed or economically distributed.[260] Where permitted, a court can order a cy-pres distribution even if persons who are not class members under the terms of the class action may benefit.[261]

The South African Law Commission provided as illustrative examples two different scenarios, distribution to another like beneficiary, or price reduction:

[257] See discussion of *Ralston v Volkswagenwerk, AG*, 61 FRD 427 (WD Mo 1973) in *OLRC Report*, 571–72, where a class action was denied certification because of perceived unfairness to class members of average distribution. Whilst opting out and proving claims individually rather than accepting an average distribution was recommended by the OLRC in light of this case, *OLRC Report*, 572 and Draft Bill, cl 26(2), this is not referred to Ontario's statute, but was incorporated by the BC legislature.

[258] Originally a concept in the law of charitable trusts, whereby a court is permitted to direct that a fund dedicated to a charitable purpose that has become impossible or impracticable be applied instead to another charitable purpose that approximates "as nearly as possible" the settlor's original intention. Discussed further in *OLRC Report*, 573. The term "cy pres" is derived from the Norman French expression "cy pres comme possible", which means "as near as possible".

[259] See *SALC Paper*, [5.38].

[260] See, for elicitation of these various factors, eg, in US: *In re Airline Ticket Commission Antitrust Litig*, 268 F 3d 619, 625 (8th Cir 2001); *Powell v Georgia-Pacific Corp*, 119 F 3d 703, 706 (8th Cir 1997); *Democratic Central Comm of District of Columbia v Washington Metro Area Transit Comm*, 84 F 3d 451, 455 fn 1 (DC Cir 1996); *In re Matzo Food Products Litig*, 156 FRD 600 (D NJ 1994); and in Ontario: *Alfresh Beverages Canada Corp v Hoechst AG* (2002), 16 CPC (5th) 301 (SCJ).

[261] For this reason, and to reflect the distribution for the indirect benefit of class members, cy-pres distributions are sometimes called "fluid class recovery", although Newberg notes that this is an "imprecise and misleading phrase": *Newberg* (4th) § 10.17 p 519. Similarly, the OLRC decided to avoid use of the term altogether, noting that it was a case whereby "terminological confusion in the United States reache[d] its height", and that "fluid class recovery" was used in many different ways by various commentators: *OLRC Report*, 537. A notable instance of where fluid recovery was indicated to be wider than a strict cy-pres distribution was occurred in *State v Levi Strauss & Co*, 715 P 2d 564, 571 (1986), where it was stated that fluid recovery offers four approaches to the distribution of unclaimed settlement or damage funds: (1) reduction of the defendant's prices, (2) escheat to a governmental body for either specified or general purposes, (3) establishment of a "consumer trust fund" and (4) "claimant fund sharing".

> [W]here an award assessed in respect of damages suffered as a result of pollution of the environment is used to clean up the environment for the benefit of those affected, or to provide a health service to remedy the ills caused by the pollution. . . . [or] where the individual plaintiffs are regular users of a service in respect of which there has been an overcharge and the court orders compensation by way of a reduction in the charges for the service for a certain period of time.[262]

It is noteworthy that the Commission encompassed two quite distinct cy-pres distributions within its examples: price reduction, "a particular application of cy-pres distribution which is directed to individual persons engaged in future transactions," and which usually seeks to make the product or service the subject of the class action less expensive in the future, and a cy-pres aggregate distribution "to a third party entity for the indirect benefit of the injured class as a whole."[263] Price reduction under FRCP 23 has been judicially noted (and academically approved) to be "particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals."[264]

Cy-pres distribution of all or part of the judgment amount is not provided for or referenced under Australia's regime.[265] This followed strong criticism by the ALRC, according to which any cy-pres distribution was to be rejected on the bases that a class action procedure was intended to afford compensation to class members and was not intended to penalise defendants or to deter behaviour to any greater extent than provided for under substantive law;[266] that any damages award payable by the defendant ought to be matched as closely as possible to the class member's entitlement;[267] that a cy-pres distribution could result in a windfall result to non-class members;[268] and that the mechanism of damages distribution "has nothing to do with enhancing access to the courts."[269] Cy-pres price reduction distributions have also been criticised[270] for

[262] *SALC Paper*, [5.38].

[263] The distinction is drawn out by, eg, *Newberg* (4th) § 10.17 p 519; *OLRC Report*, 574–76.

[264] *Democratic Centre Committee of District of Columbia v Washington Metropolitan Area Transit Comm*, 84 F 3d 451, 455 (DC Cir 1996), and cited by *Newberg*, *ibid*, 523, also: *Bebchick v Public Utilities Comm*, 318 F 2d 187, 204 (DC Cir 1963). Overcharging is an oft-cited example of cy-pres distribution, eg: GD Watson, "Ontario's New Class Action Legislation" [1992] *Butterworths J of Intl Banking and Financial Law* 365, 366.

[265] Cf: Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 9, and cl 10 of the Draft Bill, which provided power to make cy-pres distributions.

[266] *ALRC Report*, [239].

[267] *Ibid*.

[268] *ALRC Report*, [237].

[269] *ALRC Report*, [239].

[270] For the various observations and criticisms listed in the text, see: *ALRC Report*, [239]: DA Crerar, "The Restitutionary Class Action" (1998) *56 U of Toronto Faculty of L Rev* 47, fn 223; *Newberg* (4th) § 10.18 p 524, §§10.20ff; S Karas, "The Role of Fluid Recovery in Consumer Protection Litigation" (2002) 90 *Californian L Rev* 959, fn 71 ("Price rollbacks are most appropriate where the defendant is a monopoly or offers products or services that are not easily substituted with others. Where a highly competitive market exists, however, a court-mandated price rollback may have the counter-productive effect of gaining the offender greater market share and harming competition. In competitive markets, therefore, price rollbacks must be minimal"); A Borrell and W Branch, "Power in Numbers: BC's Proposed Class Proceedings Act" (1995) 53 *Advocate*

possibly giving the defendant an unfair price advantage over its competitors (because the damages fund is being used to subsidise lower prices) which paradoxically may increase its business; for permitting double recovery by class members who participate in individual recoveries and then benefit from price reductions; and (as the obverse of the previous situation in which some class members would recover twice for the one injury sustained at the hands of the defendant) that the mode of compensation has considerably less value when consumers are not likely to make repeat purchases of the product or service on which the price has been lessened.

In contrast to the position under the Australian regime, other jurisdictions have been more receptive to cy-pres distribution. It is statutorily permitted in Ontario[271] by a provision which has been judicially described as "novel".[272] Such distribution has been approved in circumstances where, because of the large size of the class, the small damages per member, and the costs associated with distribution, the parties agreed to distribute the aggregate amount of the settlement by way of a cy-pres distribution to selected recipient organisations, hospitals and universities conducting research into thyroid disease which would be likely to serve the interests of the class members;[273] and where, because of significant problems in identifying possible plaintiffs below the manufacturer level, the monies allocated by settlement to intermediaries such as wholesalers and consumers were agreed to be paid by a cy-pres distribution to specified not-for-profit entities.[274] Although Ontario's provisions appear to be worded on the basis that any *undistributed residue* of an aggregate award can be distributed cy-pres,[275] the provision has been applied to entire judgments, as noted above, seemingly on the basis that it would be impracticable to provide a more direct benefit by distributing any part of the monetary award to individual class members.

Cy-pres distributions under FRCP 23 have received a mixed reception. Following from early authority,[276] on the one hand, some federal courts have

515, 524–25; *Eisen v Carlisle and Jacquelin*, 479 F 2d 1005, 1008, 1018 (2nd Cir 1973), which reversed the price reduction cy-pres distribution proposed by the district court below on the basis that it was a "fantastic procedure" and "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper").

[271] CPA (Ont), s 26(4), (6).

[272] *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 (Gen Div) [41].

[273] *Tesluk v Boots Pharmaceutical plc* (2002), 21 CPC (5th) 196 (SCJ) [9] (plaintiffs claimed damages due to misrepresentation on drug that treated hypothyroidism; 520,000 members; 5 recipients of the cy-pres distribution, University Health Network, Hospital for Sick Children, Dalhousie University, University of Alberta, Centre for Research into Women's Health, and Thyroid Foundation of Canada; monies to be used for specific research projects, education and outreach having to do with thyroid disease).

[274] *Alfresh Beverages Canada Corp v Hoechst AG* (2002), 16 CPC (5th) 301 (SCJ) [15].

[275] See, eg, the example of 20 direct plaintiffs and the residue left provided in: SJ Simpson, "Class Action Reform: A New Accountability" (1991) 10 *Advocates' Society J* 19, 22.

[276] *Market Street Railway v Railroad Comm*, 28 Cal 2d 363 (1946) (ordering streetcar company to use unclaimed funds to improve transportation facilities).

approved of the use of cy-pres distributions[277] to the "next best class",[278] although that situation has been noted to be rare in practice.[279] On the other hand, the Ninth Circuit noted[280] in an early decision under amended Rule 23 that fluid recovery significantly altered substantive rights under antitrust statutes and was "clearly prohibited" by the Rules Enabling Act promulgating the FRCP, whilst the Second Circuit in *Eisen v Carlisle and Jacquelin*[281] claimed that fluid recovery was an "illegal, [and] inadmissable as a solution" to damages distribution. Other federal courts have also disapproved of cy-pres proposals as an abuse of discretion, premature or too abstractly related.[282] To stir the pot further, there was significant early FRCP 23-related academic commentary supporting the creativity and flexibility that a cy-pres distribution provides,[283] and some state legislatures have expressly authorised employment of a fluid recovery remedy in class actions.[284] Also, it is notable that, although the use of a cy-pres distribution remains, according to Newberg, "controversial and unsettled in an adjudicated class action context, courts are not in disagreement that cy pres distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds."[285]

[277] Eg: *Powell v Georgia-Pacific Corp*, 119 F 3d 703 (8th Cir 1997) (cy-pres distribution for scholarship programme); *Jones v National Distillers*, 56 F Supp 2d 355 (SDNY 1999) (cy-pres distribution to Legal Aid Society Civil Division despite "thin" ties to purpose of litigation fund); *In re Wells Fargo Securities Litig*, 991 F Supp 1193 (ND Cal 1998) (cy-pres distribution to law school program instead of bar association); *Drennan v Van Ru Credit Corp*, 1997 US Dist Lexis 7776 (ND Ill 1997) (cy-pres distribution to a legal aid foundation), cited and described, and with several additional authorities noted, in: S Karas, "The Role of Fluid Recovery in Consumer Protection Litigation" (2002) 90 *Californian L Rev* 959, fnn 75, 195.

[278] *Democratic Centre Committee of District of Columbia v Washington Metropolitan Area Transit Comm*, 84 F 3d 451, 455 (DC Cir 1996).

[279] *Newberg* (4th) § 10.14 p 512, 519.

[280] *In re Hotel Telephone Charges*, 500 F 2d 86, 90 (9th Cir 1974).

[281] 479 F 2d 1005, 1018 (2nd Cir 1973).

[282] Cy pres distributions of unclaimed funds have been particularly controversial in the courts of appeals. See, eg, on the basis that it was an abuse of dicretion: *Six (6) Mexican Workers v Arizona Citrus Growers*, 904 F 2d 1301, 1307–9 (9th Cir 1990) (disallowed distribution to Inter-American Foundation "for distribution in Mexico"); *Wilson v Southwest Airlines Inc*, 880 F 2d 807, 809 (5th Cir 1989) (disallowed distribution to general charitable organisation); *In re Folding Carton Antitrust Litig*, 744 F 2d 1252, 1254 (7th Cir 1984) (disallowed distribution to establish an antitrust foundation); *Fogie v Thorn Ams Inc*, 190 F 3d 889 (8th Cir 1999) (disallowed creation of cy pres fund). Also: *Weber v Goodman*, 1999 US Dist Lexis 22832 (EDNY 1998) (fluid recovery premature until damage funds fully distributed to direct victims); *In re Airline Ticket Comm Antitrust Litigat*, 268 F 3d 619, (8th Cir 2001) (distribution to Minnesota law schools and charities set aside; case remanded to the district court to make distribution more closely related to origin of this nationwide class action case concerning caps on commissions paid to travel agencies).

[283] Note, "Developments in the Law—Class Actions" (1976) 89 *Harvard L Rev* 1318, 1522 (1976) ("Where funds cannot be delivered precisely to those with primary legal claims, the money should if possible be put to the 'next best' use"); NA DeJarlais, "The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions" (1987) 38 *Hastings LJ* 729, 730; and see nn 285–86 below.

[284] Eg: California Civil Procedure Code 8. [section § 384(b), enacted 1993.

[285] See: *Newberg* (4th) § 11.20 p 28, and the cases cited fnn 7–15. According to one author, the most prominent example was the multi-billion dollar US tobacco settlement, which earmarked a large portion of the settlement for smoking prevention and other non-compensatory programs: S Karas, "The Role of Fluid Recovery in Consumer Protection Litigation" (2002) 90 *Californian L Rev* 959, fn 69.

Whilst the same arguments as the ALRC raised against a cy-pres distribution have been noted in US jurisprudence, they have been responded to in a manner which provides a reasonable basis for the appropriate use of the method. For example, it has been academically[286] and judicially[287] recognised under FRCP 23 that, by operation of cy-pres schemes, a windfall may accrue to persons who are not members of the class and to class members who have already recovered upon individual claims, but that the potential for that windfall should *not* prompt "an outright ban on the device"; instead, the scheme should only be applied where there is "a reasonable overlap between the injured class members and those who will likely benefit from the cy-pres distribution." Such an overlap is not likely to occur, and cy-pres price reduction schemes are therefore unlikely to be realistically available where, for example, the defendant sells the sort of product which is not going to generate repeated sales to class members, or where the group of consumers who buys the defendant's product is fluctuating and variant since the wrongful conduct perpetrated by the defendant occurred.[288] Thus, where there is an insufficient degree of overlap between injured class members and those who will likely benefit from the cy-pres scheme, it is recognised under the US class action regime that the device is inappropriate.

This requirement of overlap was inserted by the Ontario legislature[289] as a proviso to be satisfied before any cy-pres order is made, on the recommendation of the OLRC[290] which was concerned with handling the propriety of "windfalls" by expressly setting a standard which the courts had to consider before deciding whether a cy-pres distribution was proper in all the circumstances. There has been no case law to date which has turned upon this proviso. Moreover, the legislature has referred explicitly to the fact that windfalls to non-class members or to already-compensated class members does not bar the order.[291] The incorporation of these express provisions, and the workability of such schemes under FRCP 23 in an appropriate case of overlap, indicate that perhaps the Australian legislature could reconsider in due course the express recognition of cy-pres distributions under that jurisdiction's federal regime.

[286] *Newberg* (4th) § 10.22 p 530–31 (quotes at 531); B Du Val, "Book Review" (1983) 3 *Windsor Ybk of Access to Justice* 411, 431–35; AL Durand, "An Economic Analysis of Fluid Class Recovery Mechanisms" (1981) 34 *Stanford L Rev* 173; SS Shepherd, "Damage Distribution in Class Actions: The Cy Pres Remedy" (1972) 39 *U of Chicago L Rev* 448; NA DeJarlais, "The Consumer Trust Fund" (1987) 38 *Hastings LJ* 729, 741–42.

[287] *City of Philadelphia v American Oil Co*, 53 FRD 45, 72 (DNJ 1971) ("The motorist who purchased gasoline from a retail station during the relevant period [1955–65] is still likely, if he has not moved out of the trading area, to continue his purchases of gasoline. However, he will be joined by many persons who were either not old enough to have had a driver's licence or were not residing in the trading area [then]"; class action not certified).

[288] Discussed in *OLRC Report*, 578.

[289] CPA (Ont), s 26(4).

[290] See *OLRC Report*, 581–82.

[291] CPA (Ont), s 26(6).

3. What If the Aggregate Award Remains Partially Undistributed?

Given the potential for inaccuracy in the assessment of aggregate damages awards, the possibility exists that, on occasion, a residue will remain after all plaintiffs entitled to a portion of the award have received their sums. A residue may occur where some class members cannot be identified or found, or do not come forward, or where there are fewer class members than was estimated, or where their collective loss was less than estimated. The longstanding experience under the US class action regime indicates that in the majority of cases, not all putative class members can be individually identified or located for the purposes of damages distribution. The practicalities involved in distributing notice of class judgment means that some putative class members will miss out on receiving the notice, and of those that do, not all will file proofs of claim so as to share in the recovery of damages from the liable defendant.[292] Even where notice has been received and a proof of claim submitted by absent class members, further problems can ensue—the claim may be filed too late,[293] or cheques for compensation may be mailed but returned as undeliverable or uncashed.[294] The appropriate approach to deal with the undistributed portion of an aggregate award (or where a class settlement agreement is silent concerning the distribution of any surplus, and the court has to decide that as part of its settlement approval) has been noted to be "controversial".[295]

There are several possible options, and these have been variously implemented across the statutory regimes, not always in accordance with the respective law reform commissions' recommendations. The US regime is silent as to the possible or preferred methods by which to handle the unclaimed portion of a class action judgment. Perhaps in the light of judicially-created uncertainties under that regime about, for example, cy-pres distributions[296] and forfeit distributions,[297] and academic commentary which notes that "[t]he validity and priority of various approaches for the distribution of unclaimed class recovery funds await Supreme Court clarification",[298] the post-FRCP 23 schemas have

[292] These exigencies were outlined in *ALRC Report*, [236], *ManLRC Report*, 102, *Newberg* (4th) §10.14, *AltaLRI Report*, [347] and *FCCRC Paper*, 82–83.

[293] *In re Orthopedic Bone Screw Products Liability Litig*, 246 F 3d 315 (3d Cir 2001) (hundreds of late filings in settlement class).

[294] *Powell v Georgia-Pacific Corp*, 119 F 3d 703 (8th Cir 1997) (when initial distribution occurred, 125 cheques returned as undistributable).

[295] *AltaLRI Report*, [348]; *Newberg* (4th) § 10.16 p 514; AR Golbey, "Attorney's Fees, Unclaimed Funds, and Class Actions: Application of the Common Fund Doctrine" (1979) 48 *Fordham L Rev* 370, 391; *OLRC Report*, 559.

[296] Eg, in respect of cy-pres class recovery distribution schemes, the US Supreme Court has twice disposed of cases without ruling on the issue: *Eisen v Carlisle and Jacquelin*, 417 US 156, 172 fn 10, 94 S Ct 2140 (1974); *Boeing Co v Van Gemert*, 444 US 472, 480 n 6, 100 S Ct 745 (1980).

[297] Eg: in *Van Gemert v Boeing Co*, 553 F 2d 812 (2nd Cir 1977), the plaintiff sought that the unclaimed residue of the aggregate award should escheat to the State of New York. Both the Second Circuit Court of Appeals and the Supreme Court expressly reserved judgment on the matter.

[298] *Newberg* (4th) § 10.25 p 543.

carefully articulated the various procedures by which each considers it appropriate to dispose of any unclaimed residue.

The first option is a cy-pres distribution of the balance of a class recovery. This is not referred to in Pt IVA as a means of dealing with an unclaimed residue under the Australian schema (which has been criticised[299]), but is expressly permitted by the Canadian provincial regimes. Indeed, both Ontario and British Columbia statutes permit the court to make a cy-pres distribution as the first option in respect of any portion of an aggregate award that cannot be distributed directly to individual class members.[300] As noted above, cy-pres distribution is judicially permitted in the US (although usually applied in the context of settlement rather than judgment), whether by aggregate distribution to a third party for use for a designated purpose[301] or by price reduction.[302]

The second option is to return the residue to the defendant[303] (termed "a reversion" of the balance). A reversion has been statutorily mandated in Australia as the first preference by which to deal with a residue,[304] has been mandated in Ontario where any portion is undisposed of by individual or cy-pres distribution,[305] and has been statutorily designated as one of several options in British Columbia.[306] In this respect, the legislatures have demonstrated quite a difference in views with respect to a refund to the defendant. Whilst the Australian legislature has encouraged return of any unclaimed residue to the defendant, the "central argument" of the Canadian regimes, according to the Federal Court of Canada Rules Committee, is that a residue "should not be returned to the defendant until all reasonable efforts have been

[299] For post-enactment criticism of this lack of option by groups such as the Public Interest Advocacy Centre, see: A Cornwall, "Class Actions Get Go Ahead" (1995) 20 *Alternative LJ* 138, 139.

[300] CPA (Ont), s 26(4); CPA (BC), s 34(1).

[301] Eg: *Powell v Georgia-Pacific Corp*, 119 F 3d 703 (8th Cir 1997) (employment discrimination suit; unclaimed funds in a registry; court fashioned cy-pres remedy in the form of a scholarship fund for African-American high school students); *In re Motorsports Merchandise Litig*, 160 F Supp 2d 1392 (ND Ga 2001) (excess funds arising from settlement of antitrust class action which alleged price-fixing by sellers of stock car racing souvenirs; cy-pres distributions to a number of charities); *In re Three Mile Island Litig*, 557 F Supp 96 (MD Pa 1982) (of $25M settlement, $5M set aside for public health fund to study long-term radiation effects of a nuclear power plant accident).

[302] Eg: *Daar v Yellow Cab Co*, 67 Cal 2d 695 (1967) (defendant altered meters of its cabs to overcharge users; $1.4M settlement; defendant agreed to reduce its fares until amounts remaining after individual distribution eliminated); *Colson v Hilton Hotels Corp*, 59 FRD 324 (ND Ill 1972) (defendant levied improper charge on incoming calls to hotel rooms; settlement reached; defendant agreed to credit unclaimed balance for benefit of future guests at 50c per occupied room per stay).

[303] Although note *AltaLRI Report's* valid point at [348, fn 296] that "return" of the monies assumes that there is a fund to be returned, but that may not always be the case. It may be that all there will be is an outstanding judgment against the defendant that has been only partially satisfied because not all class members have come forward, for example, in which case "it would seem more accurate to say that the court would be authorised to extinguish the judgment".

[304] FCA (Aus), s 33ZA(5), following on the endorsement of this approach in *ALRC Report*, [240].

[305] CPA (Ont), s 26(10). Forfeiture to the government is not an option, despite concerns by the OLRC that the deterrent function of an aggregate damages award could be compromised if there was an automatic requirement to return the undistributed residue of such an award to the defendant: *OLRC Report*, 595–96.

[306] CPA (BC), s 34(5)(c).

expended to try to have the residue benefit members of the class in some manner"—the legislatures of the Canadian provinces prefer the view that all reasonable efforts to distribute a residue to the class members so as to increase the benefits to the class, even indirectly, will keep the money from being returned to the defendant who, because of the finding of and the assessment of the extent of liability, has by definition no right to that money.[307] A direction that any unclaimed funds following individual distribution revert to the defendant has also been judicially permitted in the US,[308] although the option has also been rejected on occasion as defeating the deterrence aims of the underlying contravened statute involved.[309]

A third alternative is to allow for a forfeit distribution. This entails the forfeiture of any unclaimed residue to the government's consolidated revenue fund,[310] a possibility which is also expressly permitted by British Columbia[311] and judicially permitted as an option under FRCP 23.[312] A majority of the OLRC would have permitted the court to order a forfeit distribution or return to the defendant, whichever the court considered proper,[313] but that was not enacted by the Ontario legislature. A further possibility, to apply surplus monies in contribution toward the cost of the class action, is also allowed in British Columbia,[314] but has not been widely enacted.[315] Another option by which to handle surplus unclaimed funds is to distribute that residue pro rata to class members.[316]

At the other extreme, the Victorian Court of Appeal observes that if the aggregate award of damages proves to be too small to satisfy all claims for payment which are established, "it is clear that the defendant cannot be required to make any further payment, either by way of additional contribution to a fund or by way of direct payment [to class members]. The liability of the defendant merges in the judgment and there is no provision for subsequent variation of the judgment"—in other words, the defendant is entitled to rely upon the court's judgment in planning its affairs and in achieving finality and freedom

[307] *FCCRC Paper*, 83.

[308] *Wilson v Southwest Airlines Inc*, 880 F 2d 807 (5th Cir 1989) (employment discrimination suit; reversion of unclaimed funds partly to defendant, whereby class and defendant split the excess); *Friedman v Lansdale Parking Authority*, Fed Sec L Rep (CCH) ¶98676 (ED Pa 1995) (settlement fund surplus reverted to the defendant), and also: *Newberg* (4th) §10.17.

[309] *In re Motorsports Merchandise Antitrust Litig*, 160 F Supp 2d 1392, 1395 (ND Ga 2001).

[310] Also termed a "forfeit distribution" in *OLRC Report*, 582.

[311] CPA (BC), s 34(5)(b).

[312] See *Jones v National Distillers*, 56 F Supp 2d 355, 358 (SD NY 1999), referring to 28 USCA §§ 2041, 2042; *Six (6) Mexican Workers v Arizona Citrus Growers*, 904 F 2d 1301 (9th Cir 1990); *Houck on behalf of United States v Folding Carton Admin Comm*, 881 F 2d 494 (7th Cir 1989), and also: *Newberg* (4th) §10.19 (referring to "an escheat of unclaimed funds to the state").

[313] *OLRC Report*, 596, and Draft Bill, cl 28.

[314] See: CPA (BC), s 34(5)(a).

[315] Recommended in *ALRC Report*, [240], but unimplemented in Pt IVA.

[316] Mooted as a possibility in *Powell v Georgia-Pacific Corp*, 119 F 3d 703, 706 (8th Cir 1997); and in *Fogie v Thorn Americas Inc*, 2001 WL 1617964 (D Minn 2001) but not ordered in either case.

from financial uncertainty.[317] As the Alberta Law Reform Institute noted,[318] once the court "has embodied its conclusion as to the appropriate amount of an aggregate award in a judgment, the defendant should at least have the assurance that its maximum liability has been fixed." This is, of course, a considerable advantage of aggregate assessment from the point of view of the defendant, especially if the amount was too little to meet all claims of identified class members.[319]

With respect to the apportionment between class members of an aggregate award that has already been quantified, it would be anomalous if the fact that a class member is allowed to make a late claim for a share of the aggregate award (as the class action regimes of Australia,[320] Ontario[321] and British Columbia[322] expressly permit) that has already been quantified should open up the possibility of the award being increased. The Australian schema best achieves this principle of express final liability by explicitly stating that a late claim is permitted *only* if, inter alia, the fund has not already been fully distributed.[323] Moreover, if the aggregate amount available to class members is not sufficient to compensate each in full for his or her loss, then in Ontario, at least, class members will be required to share on a pro rata basis whatever funds are available.[324]

[317] See: *Schutt Flying Academy (Aust) Pty Ltd v Mobil Oil Aust Ltd* (2000) 1 VR 545 (CA) [16] (Brooking JA). Also see: *ALRC Report*, [227]; *OLRC Report*, 558.

[318] *AltaLRI Report*, [343].

[319] *ALRC Report*, [238].

[320] FCA (Aus), s 33ZA(4).

[321] CPA (Ont), s 24(9).

[322] CPA (BC), s 27(6).

[323] FCA (Aus), s 33ZA(4)(a).

[324] See *OLRC Report*, 558, fn 192. Foreshadowed in: *Delgrosso v Paul* (2001), 10 CPC (5th) 317 (SCJ) [15].

12

Costs and Funding of Class Actions

A INTRODUCTION

CLASS LITIGATION HAS to be successfully funded! Whether this should be facilitated primarily by the representative plaintiff, by the class lawyers (for example, via contingency fees), by the class members, by public funding, or by third parties with no stake in the litigation, are matters which ultimately dictate how effectively the regime will provide access to the courts for those that have an alleged grievance in common with others similarly situated. The choice of costs regime, and the implementation of provisions which then adjust or reverse the costs exposure or protection of the class representative plaintiff vis-à-vis the defendant, are essentially policy issues, whereby the competing rights and interests of the various parties must be balanced. Against a background of respected judicial and academic commentary that costs and funding have been identified as "the single most important issue" of any expanded class action procedure,[1] and the manner in which costs inter partes is resolved is critical to a class action regime's success and utility,[2] the purpose of this chapter is two-fold. First, it will consider the particular costs regimes and funding mechanisms that apply in each of the focus jurisdictions (section B). Secondly, it will examine the particular express statutory provisions which have been variously incorporated within the class action statutes of the focus jurisdictions by which the class representative may seek to shift the financial burden of class action conduct to other players in the litigation (section C).

One of the most interesting features of the focus jurisdictions' regimes is the extent to which, via a combination of different legislative apparati or judicial reasoning, they have variously sought to remove or lessen the costs burdens on the representative plaintiff, protect the defendant against costs incurred where a class suit is unsuccessful, and encourage class lawyers to be the entrepreneurs and risk-takers.

B IMPLEMENTATION OF THE VARIOUS COSTS RULES

The employment within the focus jurisdictions of different general costs rules has inevitably had a significant impact upon the means by which costs exposure

[1] *OLRC Report*, 647.

[2] *Ibid*, cited, eg, in: *FCCRC Paper*, 97; *ManLRC Report*, 73; and also, see: *Samos Investments Inv v Pattison* (2002), 216 DLR (4th) 646, 5 BCLR (4th) 21 (CA) [24].

is adjusted. There are two primary costs rules used in class action regimes: the no-way costs rule[3] and the two-way costs rule.[4] A third possibility, the one-way costs rule,[5] has been both recommended[6] and disabused[7] in the context of class action litigation, but is not practised in any particular focus jurisdiction, and hence will not be considered further.

1. The Primary Costs Rules

The no-way costs rule. Under the "no-way" costs rule, the court does not award costs to the successful party, so that each party bears his or her own costs of the litigation, regardless of the outcome. The rule provides significant protection to a representative plaintiff in class litigation, for it removes the risk of the representative plaintiff having to pay the defendant's costs. On that basis, it has been considered "an important measure in removing the barriers to class proceedings".[8]

Of course, the quid pro quo is that both sides of the litigation have the risk of paying the others' costs removed, but also cannot recover in the event of success. In that event, concerns have been expressed,[9] and refuted,[10] that a representative plaintiff may incur considerable costs in pursuing a case successfully but, if no costs can be recovered, any monetary relief could arguably be eaten up by costs. Another concern expressed about the especial use of the no-way costs rule in the context of class litigation (where a two-way costs rule may otherwise

[3] Also called a "no-costs" regime, and the "American rule", in recognition of the fact that a no-way costs rule is the usual practice in that jurisdiction.

[4] Also termed (sometimes in loose fashion, as these are not all strictly speaking the same costs rules) a "two way" costs rule, the rule that "costs follow the event", the "losers pay winners" rule, the "costs-indemnity" rule, and the "English rule".

[5] Provides that, as a means of removing the risk that the class representative may become liable to pay the defendant's costs, an award of costs can be made against the defendant but not against the representative plaintiff.

[6] Favoured by the Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 8 ("[w]e appreciate the potential . . . for injustice to a defendant who defeats the class claim but nevertheless cannot recover his costs. It is palliated to some extent by the fact that the plaintiff must show bona fides and an appearance of merit to obtain the order to proceed and by the fact that the defendants to class actions will, almost without exception, be public authorities or large corporations which will not find the costs of litigation ruinous. Nevertheless, the potential for injustice is there and must be acknowledged").

[7] *ALRC Report*, [264] ("the principle of a 'heads I win, tails you lose' approach to costs is unacceptable . . . Respondents, whether large corporations, public authorities or individuals, should not be deprived of their entitlement to claim costs while they remain liable to pay the applicant's costs if the action succeeds"). Also rejected by *SLC Report*, [8.16]. Criticised further by TD Rowe, "Shift Happens: Pressure on Foreign Attorney Fee Paradigms from Class Actions" (2003) 13 *Duke J of Comp and Intl Law* 125, 146 ("may be unlikely to win acceptance in systems with a strong two-way loser-pays tradition"); V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, 262.

[8] *FCCRC Paper*, 104.

[9] *ALRC Report*, [267].

[10] *VLRAC Report*, [7.24].

apply in unitary suits) is the possibility for potential abuse, of plaintiffs taking advantage of instituting actions without risking the adverse costs orders, or being more inclined to bring unworthy actions, knowing that they will not have to pay the defendant's costs if they lose. Notably, the hypothetical example has been given of the family of five, injured as occupants of the one vehicle, preferring to sue as a class for the costs advantages that class litigation would provide,[11] a surely unlikely scenario, given the other requirements of a class action.[12]

Ultimately, after much analysis, a no-way costs regime was recommended by the OLRC;[13] however, and ironically, it was subsequently implemented, not in Ontario, but in British Columbia.[14] The no-way costs rule has since met favour also with several other law agencies[15] which have considered the design of a new class action regime, although it is fair to say that the two-way costs rule has been advocated with equal fervour by other law reform proponents.[16]

The two-way costs rule. Under the two-way costs rule (which will also be referred to hereafter as the costs-shifting rule), it is usual that the unsuccessful party will pay the successful party's costs. However, not all costs incurred by the successful party will be recoverable. Broadly speaking, whether it is the plaintiff or defendant who succeeds, there is likely to be a substantial discrepancy between the amount of the successful party's actual costs in pursuing or defending the action (solicitor and client costs) and the amount that he or she will be entitled to recover from the unsuccessful opponent (party and party costs).[17]

The costs-shifting rule has been perceived to pose considerable barriers to bringing a class action. The representative plaintiff faces two potential burdens: that of paying lawyers' fees and disbursements, of which he or she will receive only a portion of these total costs back if successful, and the double burden of being liable for the defendant's costs ordered by the court if the action is

[11] Submission to the Ministry of the Attorney General of British Columbia on Proposed Class Action Legislation—Canadian Bar Association, BC Branch, Civil Litigation (Vancouver) Section, cited in A Borrell and W Branch, "Power in Numbers: BC's Proposed Class Proceedings Act" (1995) 53 *Advocate* 515, 525.

[12] It would be highly debatable whether those plaintiffs would satisfy the superiority criterion. In any event, they would surely be unwilling to forfeit the possibility of recovering their own costs from the defendant in the event of success: noted *ibid*, 525.

[13] *OLRC Report*, 706.

[14] CPA (BC), s 37(1).

[15] *AltaLRI Report*, [394], having debated the pro's and con's of no-costs orders extensively: [380]–[390]; *ManLRC Report*, 76; *VLRAC Report*, [7.28] and recommendation 15; *FCCRC Paper*, 104.

[16] A preference for cost-shifting cost arrangements was shown by *ALRC Report*, [271]; *SLC Report*, [5.10] and *SLC Paper*, [8.12]; *Final Woolf Report*, ch 17, [58]; *SALC Paper*, [5.43] and *SALC Report*, [5.17.5].

[17] Typically about 40% in Ontario: A Armstrong, "Litigation: Ontario Class Proceedings Act" [1994] 3 *ICCLR* C-52, C-53, and slightly higher in Australia, variously described as between 50–75%: *VLRAC Report*, [7.2] and fn 4; BM Debelle, "Class Actions for Australia? Do They Already Exist?" (1980) 54 *Aust LJ* 508, 509, fn 8; V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, 232.

unsuccessful.[18] This coupling has caused one commentator to state that it is difficult to see "who, properly advised, would agree to become a representative plaintiff", and that a possible malpractice suit may be contingent if plaintiff class lawyers do not properly advise the representatives of the risks involved under a two-way costs rule.[19] On the other hand, others have opined that, in those jurisdictions in which the two-way costs rule normally applies, class actions "are not so significantly different from ordinary litigation as to justify a change" from the usual costs rule,[20] and that any alternative costs regime has "harmful side effects, such as the encouragement of weak claims".[21]

Before turning to a summary of the costs rules applicable in each of the focus jurisdictions, a broad tabular depiction of what occurs under each costs regime (in the absence of any statutory adjustment) is shown in Table 12.1.

Table 12.1 ***Entitlements and liabilities under various costs rules***[22]

Class action outcome	Representative plaintiff	Defendant
Two-way costs rule		
Class wins	Entitlement: to party and party costs from the defendant Liability: for its own solicitor's fees (solicitor and client costs)	Entitlement: none Liability: for (i) its own solicitor's fees; and (ii) representative plaintiff's party and party costs
Class loses	Entitlement: none Liability: for (i) its own solicitor's fees; and (ii) defendant's party and party costs	Entitlement: to party and party costs from the representative plaintiff Liability: for its own solicitor's fees
No-way costs rule		
Whether class wins or loses	Entitlement: none Liability: for its own solicitor's fees	Entitlement: none Liability: for its own solicitor's fees

[18] Uniform Law Conference of Canada, *Class Proceedings Act* (1997) 5C-35, cited in *ManLRC Report*, 73. Also: B DuVal, "Book Review" (1983) 3 *Windsor Ybk of Access to Justice* 411, 419; GD Watson, "Ontario's New Class Proceedings Legislation—An Analysis" [1992] *Butterworths J of Intl Banking and Financial Law* 365; Morabito, *ibid*.

[19] GD Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 275; G McKee, "Class Actions in Canada" (1997) 8 *Aust Product Liability Reporter* 84, 88; P Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) 31 *Common Law World Rev* 123, 144.

[20] *Final Woolf Report*, ch 17, [58]; WA Macdonald and JW Rowley, "Ontario Class Action Reform: Business and Justice Systems Impacts" (1984) *Canadian Business LJ* 351, 364.

[21] *ALRC Report*, [271]. For a comprehensive discussion of the pro's and con's of the costs-shifting rule, see *AltaLRI Report*, [380]–[383].

[22] The author acknowledges the derivation/adaptation of this schema from that presented in *SLC Report*, [5.6] and *SLC Paper*, [8.7]. As the SLC noted, the table assumes that there are no special

2. Disparate Implementation across the Focus Jurisdictions

United States. In the United States, only certain litigation expenses that constitute "costs"[23] may be awarded to a successful party.[24] Attorneys' fees are generally not allowed as "costs", although there are a great many statutory exceptions to this whereby both fees and costs can be awarded to the successful party,[25] the purpose of which is to encourage individuals to act as private attorneys-general.[26] However, in the absence of such statutory provision, the general position in American litigation (the "American Rule"[27]) is that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser".[28] To implement in that jurisdiction a costs-shifting system (such as applies in England) was seen as a serious deterrent to meritorious litigation, in Givens' words, "misplaced".[29] The American Rule therefore prima

circumstances justifying a departure from the general rule, that there are no contingency fee agreements between representative plaintiff and class lawyer, and that there are no arrangements between class members for funding the representative plaintiff. All of these will be discussed separately later.

[23] "Costs" include the costs of discovery, witness's fees and other disbursements. Note the entirely different terminology used in Australia and Canada, where "costs" refers to both lawyers' fees and disbursements. See, eg, *OLRC Report*, 664.

[24] By virtue of FRCP 54(d)(1), which provides in part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs".

[25] See, eg: Civil Rights Attorney's Fees Awards Act of 1976, 42 USCA § 1988(b) (1994), which expressly provides for the awarding of "a reasonable attorney's fee as part of the costs"; under the Civil Rights Act of 1964, 42 USCA § 2000e-5(k) (1994), a prevailing plaintiff ordinarily is to be awarded attorneys' fees in all but special circumstances; Clean Air Act, 42 USCA § 7604(d) (1994) also permits attorneys' fees "whenever [the court] determines that such an award is appropriate". Several other instances are referred to in, eg: *Buckhannon Bd & Care Home Inc v West Virginia Dept of Health & Human Resources*, 532 US 598, 624–5 fn 1, 121 S Ct 1835 (2001); Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) §24.11; RA Givens, *Manual of Federal Practice* (5th edn, Newark, NJ, Mathew Bender, as updated) §7.62; *Newberg* (4th) § 14.1 p 504 and fn 4.

[26] This phrase (not one that is particularly used in the other focus jurisdictions) is generally attributed to Judge Jerome Frank when he recognised the standing of a private litigant in an administrative law case on the basis that "[s]uch persons, so authorized, are, so to speak, private Attorney Generals": *Associated Industries of New York State v Ickes*, 134 F 2d 694, 704 (2nd Cir 1943).

[27] The "American Rule" principle of an 1853 statute now codified as 28 USC §§1920, 1923(a).

[28] *Alyeska Pipeline Service Co v Wilderness Soc*, 421 US 240, 247, 95 S Ct 1616 (1975).

[29] Indeed, RA Givens, *Manual of Federal Practice* (5th edn, Newark, NJ, Mathew Bender, as updated) § 7.62 has this to say about the loser-pays, two-way costs rule:

> Reliance on British experience with loser-pay fee shifting is misplaced because Britain has a legal aid system paying most legal fees for civil cases on a large scale, thus making it possible for impecunious litigants to proceed. The loser-pay approach is unequal in impact to an extent rarely recognized: A, who bought a worthless product from B, Inc., sues. A can pay out of A's own pocket $5,000 in legal fees at most; the recovery hoped for creates a prospect of $10,000 for the attorney if the suit is successful. B, with reputation of the product at stake and with ample funds for litigation, runs up fees of $100,000 including fees connected with preparation of experts. If A wins, A can recover $15,000, but if A loses, A may be liable for $100,000. A, however, could only afford $5,000 in legal fees, all of which has already been incurred. The deterrence to A's suit, even if brought in good faith, is enormous, given the uncertainty of all litigation and the catastrophic consequences if B should win. Nor can A assume that merely because A cannot pay $100,000, B

facie applies to attorney's fees in US federal litigation, including suits under FRCP 23.

Quite apart from the statutory fee-shifting provisions that are potentially applicable in class suits, there are also significant judicially-created exceptions to the American Rule. One of these longstanding exceptions[30] is the "common benefit" rationale. Under this exception, the court in the exercise of its historical equity power may "permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorney's fees, from the fund or property itself or directly from the other parties enjoying the benefit."[31] Where a fund is created, then under the "common fund" doctrine, those lawyers whose conduct of an action results in "the creation, preservation or increase of a fund in which others have an interest" are entitled to receive the costs of the litigation, including attorneys' fees, from the fund as compensation for their services on the others' behalf, in addition to any fees to which they may be entitled from their own client.[32] This equitable doctrine, a restitutionary concept, means that "when a class action successfully recovers a fund for the benefit of the class . . . then the lawyers who created that class recovery are entitled to be reimbursed from the common fund for their reasonable litigation expenses, including reasonable attorney's fees".[33]

The various elements of the common fund doctrine derived from the case law may be articulated thus:[34]

> first, the original client's attorney's fees are not shifted to or the attorney's personal claim for an extra fee is not lodged against the adversary-losing party; rather, fees are

will drop the matter: instead, B may seek to foreclose on A's house or other even minimal assets to teach A and anyone else considering suit against B a lesson 'perfectly legally' under the loser-pay concept. In the context of the United States, not Britain, such a concept is inherently and drastically unequal.

See also, for further reasons justifying the American rule: *Fleischmann Distilling Corp v Maier Brewing Co*, 386 US 714, 718, 87 S Ct 1404 (1967); JF Vargo, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice" (1993) 42 *American U L Rev* 1567, 1601–17 (discussing differences between the US legal system and the legal systems of England and Australia, respectively).

[30] The so-called "fountainhead cases" are: *Trustees v Greenough*, 105 US 527, 529–32 (1881) and *Central Railroad & Banking Co v Pettus*, 113 US 116, 5 S Ct 387 (1885). For further discussion: JP Dawson, "Lawyers and Involuntary Clients: Attorney Fees from Funds" (1974) 87 *Harvard L Rev* 1597, 1601–4.

[31] *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240, 257, 95 S Ct 1612 (1975).

[32] As summarised in: *Newberg* (4th) §14.2 p 512. See, for further detailed discussion, *OLRC Report*, 664–72, *VLRAC Report*, [7.7]–[7.9]. Re restitution: *Boeing Co v Van Gemert*, 444 US 472, 478, 100 S Ct 745 (1980) ("The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense"); *Vincent v Hughes Air West Inc*, 557 F 2d 759, 770 (9th Cir 1977). Also: JP Dawson, "Lawyers and Involuntary Clients: Attorney Fees from Funds" (1974) 87 *Harvard L Rev* 1597, 1597 (doctrine is "employed to realize the broadly defined purpose of recapturing unjust enrichment").

[33] Court Awarded Attorney Fees, *Report of the Third Circuit Task Force* (1985) 108 FRD 237, 241.

[34] As outlined in: *Vincent v Hughes Air West Inc*, 557 F 2d 759, 770 (9th Cir 1977).

shifted to third parties (the class members), people viewed as beneficiaries of the fund in some way. Second, no contractual relationship exists between the original attorney and the third parties. Rather, the common fund doctrine is rooted in concepts of quasi-contract and restitution. Third, the beneficiaries are expected to pay litigation costs in proportion to the benefits that the litigation produced for them. Fourth, as a general rule (to which there are exceptions[35]), if the third parties hire their own attorneys and appear in the litigation, the original claimant cannot shift to them his attorney's fees. Fifth, the third parties are not personally liable for the litigation costs. Any claim must be satisfied out of the fund. Sixth, a concomitant element of the doctrine, one of its foundation stones, is that there must exist some identifiable assets on which a court can impose a charge.

The doctrine has been highly influential in other jurisdictions, and has been statutorily invoked in somewhat similar fashion in class action statutes elsewhere, as will be shortly discussed. It relieves the financial burden upon the representative plaintiff by spreading attorney's fees (to be determined by the court, once the class lawyer's entitlement to remuneration from the fund is established) "proportionately among those benefited by the suit".[36]

While the common fund doctrine spreads the burden amongst class members in the event of success in the class suit, the employment of contingency fee agreements (under which the lawyer does not receive payment unless the claim is successful) also means that, in the event of loss, the risk is transferred from the class representative to the class lawyers.[37] In other jurisdictions in which law reform of class litigation has been proposed or enacted, the employment of lawyers' remuneration on a contingency basis, and the means by which lawyers' fees are to be determined generally in the US under FRCP 23 suits, have been widely acknowledged and discussed.[38]

British Columbia. In British Columbia, a no-way costs rule similar to the American Rule was enacted, in modified form, in its class action legislation.[39] Departure by the British Columbia legislature from the usual costs-shifting model, and the adoption of what was previously recommended by the OLRC for class litigation in its own province, was a deliberate election, as the legislative debates of the time indicate.[40] The adoption of the no-way costs rule for

[35] Eg: *Doherty v Bress*, 262 F 2d 20 (DC 1958).

[36] *Boeing Co v Van Gemert*, 444 US 472, 478, 100 S Ct 745 (1980) ("Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit").

[37] SC Yeazell, "Re-Financing Civil Litigation" (2001) 51 *DePaul L Rev* 183, 198–205.

[38] See, eg: *OLRC Report*, 664–67; *ManLRC Report*, 72–76; *SALC Paper*, [5.42]–[5.45]; Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 8–9; *VLRAC Report*, [7.7]–[7.28]; *ALRC Report*, [265], [275], [289].

[39] CPA (BC), s 37(1).

[40] BC, *Parliamentary Debates*, Second Reading Speech, 13 Jun 1995 (C Gabelmann, AG): "I have no way of knowing why the Ontario Legislature did not follow the recommendations of the [OLRC]. We felt that the [OLRC] recommendation that there be a no-way costs rule—in other

class suits has been judicially endorsed since by the British Columbia Court of Appeal on the basis that it is "seen as best ensuring that the purposes of the legislation, with an emphasis on access to the courts by plaintiffs, were met."[41] The no way costs rule also, it was said, avoided the necessity of creating a special class actions fund in British Columbia for class action litigation, for whilst representative plaintiffs would still be liable for their own disbursements, they were "freed from the fear of an adverse costs award."[42]

The application of the no-way costs rule in the context of class litigation has been clarified over the years of the British Columbia statute's operation.[43] It is statutorily provided,[44] however, that the representative plaintiff is not entirely immune from the risk of an adverse costs order—the no-way costs rule has been expressly modified, such that the court may award costs in any circumstances of vexatious, improper or abusive conduct. Additionally in British Columbia, court-supervised contingency fee agreements between the representative plaintiff and the class lawyer are permitted.[45] The result in that jurisdiction has been described thus: "a representative plaintiff has no exposure to costs, subject to exceptions, and the class lawyer is the risk taker through contingency fees."[46]

Ontario. The Ontario legislature did not follow the OLRC's recommendations, and elected to preserve the two-way costs regime for class litigation within that province. However, in exercising its discretion regarding costs,[47] the court can consider whether the class action was a test case, raised a novel point of law or involved a matter of public interest.[48] The inevitable difference between the party and party costs that may be recovered by the representative

words, that each party pay their own expenses, except under exceptional circumstances—was the appropriate way to go. Why the Ontario House did something else, I don't know. . . . We think as the [OLRC] thinks: that this cost rule is the best way to ensure fairest access to the justice system. Plaintiffs banding together know that with the exception of the exceptional circumstance provision [s 37(2)] they are not going to have to bear the costs of the defendant if they are unsuccessful. They are each going to bear their own costs. That's an access-to-justice question that I think is straightforward"), as cited in *Samos Investments Inc v Pattison* (2002), 216 DLR (4th) 646, 5 BCLR (4th) 21 (CA) [26].

[41] *Ibid*, [27].

[42] A Borrell and W Branch, "Power in Numbers: BC's Proposed Class Proceedings Act" (1995) 53 *Advocate* 515, 525.

[43] Eg: *Edmonds v Actton Super-Save Gas Stations Ltd* (1996), 5 CPC (4th) 101 (BC SC [in Chambers]) ([editorial comment] (if action dismissed prior to certification hearing, normal two-way rule applies); *Campbell v Flexwatt Corp* [1998] 105 BCAC 158 (no-way costs rule applies to appeals from orders certifying class action); *Samos Investments Inv v Pattison* (2002), 216 DLR (4th) 646, 5 BCLR (4th) 21 (CA) [30], [31] (no- way costs rule applies where appeals against decisions refusing to certify, or decertifying, class proceeding).

[44] CPA (BC), s 37(2).

[45] CPA (BC), s 38(2); Legal Profession Act, RSBC 1998, c 9, ss 65–67.

[46] *FCCRC Paper*, 99.

[47] Pursuant to Courts of Justice Act, RSO 1990, c C 43, s 131(1), costs are in the discretion of the court, and the several factors the court may consider in the exercise of that discretion are listed in r 57.01(1) of the Rules of Civil Procedure. Note that CPA (Ont), s 35 states that the "rules of court apply to class proceedings".

[48] CPA (Ont), s 31(1).

plaintiff in the event of success in the class action, and the solicitor and client costs actually incurred in the pursuit of the action, has been judicially noted in this costs-shifting regime.[49] Ontario courts[50] have also been willing to assert that special circumstances can justify the imposition of a harsher costs order against an unsuccessful party in the class action context, especially where some criticism can be made of the way in which the litigation was conducted by the unsuccessful party. In Ontario, contingency fees that are court-supervised are permitted.[51]

Additionally, the representative plaintiff can apply to the Class Proceedings Fund[52] for funding of disbursements but not for legal fees. The notable feature of this Fund (as discussed later) is that if the plaintiff has received any support from the Fund, and then loses, the successful defendant can only collect costs from the Fund and not from the representative plaintiff. In that event, the representative plaintiff is shielded from having to pay the costs of the defendant, which is a significant protection indeed.

Thus, as the Federal Court of Canada Rules Committee recognised, the two focus jurisdictions of Canada have implemented two entirely different models for handling costs in class proceedings: British Columbia preferred a no-costs rule to remove the risk that the representative plaintiff would be responsible for the costs of the defendant should the class be unsuccessful on the common issues, and Ontario preferred a fund to underwrite the costs of litigation and protect a funded plaintiff against an adverse costs award. At the same time (said the Committee), "both models are predicated upon the availability of contingency fees . . . intended to remove any risk to the representative plaintiff for the class lawyers' costs."[53]

Australia. The normal rule as to costs-shifting also applies under the Australian federal class action regime.[54] Australian federal courts have an

[49] *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (SCJ) [30]. In *Ziegler v Sherkston Resorts Inc* (1997), 13 CPC (4th) 177 (Gen Div) [11], Crane J noted, "the endorsement [on the order] as stated was 'Costs of this motion to the defendant/applicant.' There can be no doubt that such an award of costs is on the party and party scale. This has been the clear and unequivocal practice in Ontario, in my experience, for 30 years and in all likelihood for a great deal longer time prior").

[50] *Dabbs v Sun Life Ass Co of Canada* (1998), 38 OR (3d) 781 (Gen Div) (court awarded solicitor and clients costs against class members who sought to remove class counsel and cast unfounded aspersions on the integrity of class counsel); *Smith v Canadian Tire Acceptance Ltd* (1996), 22 OR (3d) 433, aff'd: 26 OR (3d) 94 (CA), leave to appeal denied: (1996), 29 OR (3d) xv (SCC) (court awarded solicitor and client costs against an individual and organisation who improperly promoted class action).

[51] CPA (Ont), ss 32, 33.

[52] Introduced by Law Society Amendment Act (Class Proceedings Funding), 1992, SO 1992 c 7.

[53] *FCCRC Paper*, 102.

[54] See ALRC, *Costs Shifting—Who Pays for Litigation* (Rep No 75, 1995) [16.25]–[16.26]; and Explanatory Memorandum for the Federal Court of Australia Bill 1991, which stated in respect of FCA, s 33ZJ: "The new Part does not affect the application of the ordinary costs rules applicable in the Federal Court for proceedings generally": at [55]. See further: P Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) 31 *Common Law World Rev* 123, 143–45.

unfettered discretion to order that one party pay the costs of another.[55] Despite the width of this discretion, "the common law rule as to costs is usually applied so that, in the absence of any countervailing/mitigating circumstances, the loser pays the winner's costs".[56] The Full Federal Court has rejected the suggestion that the discrepancy between solicitor and client costs incurred, and party and party costs recoverable, in the event of a representative plaintiff's success in the class action is sufficient reason to order full indemnity costs.[57] It was considered that such a view would be inconsistent with authority[58] which establishes that costs are awarded on a party and party basis unless special circumstances exist in a particular case calling for a departure from that practice. Australia's class action statute is notable for the fact that it did not embrace three vital recommendations made by the ALRC with respect to costs and funding: the express permission of contingency fees, the establishment of a special class actions fund, and the abolition of maintenance in the class actions context.[59] This departure from recommendation was a deliberate choice, according to the parliamentary debates of the time, and which has been academically criticised.[60] However, contingency fees, whilst not referred to in the class action statute, are permitted in the class action context, as discussed later.

As a point of departure from its Canadian counterparts, the Australian statute does not contain any stipulated legislative scenarios whereby the court's discretion to depart from the governing costs rule should occur. The Australian statute is also unique in specifying that the normal rules as to security for costs apply to class actions. Surprisingly, and especially given the ALRC's recommendation for the implementation of certain contingency agreements for class proceedings which were to be governed by provisions within the proposed statute,[61] Australia's federal schema in Pt IVA, as enacted, does not deal whatsoever with fee agreements that may be entered into between solicitors and representative parties or class members.

[55] FCA (Aus), ss 43(1), (2).

[56] *ALRC Report*, [254]–[256], quote at [254]. Also: *Re Wilcox: Venture Industries Pty Ltd (No 2)* (1996) 141 ALR 727 (Full FCA) 729 ("in the ordinary case costs will follow the event and the court will order the unsuccessful party to pay the costs of the successful party, on a party and party basis, a basis which will fall short of complete indemnity. Nevertheless the court has an absolute and unfettered jurisdiction in awarding costs, although that discretion must be exercised judicially"). The Full FCA did not endorse the approach earlier adopted in the class actions context in *Marks v GIO Aust Holdings Ltd (No 2)* (1996) 66 FCR 128, 133, where Einfeld J expressed the view that the question of costs should be determined on its merits without any usual rule or preconception as to the costs issue. See also: *ALRC Report*, [254]–[256].

[57] *Graham Barclay Oysters Pty Ltd v Ryan (No 2)* [2000] FCA 1220 (Full FCA) [4]. In this case, the court acknowledged that there was likely to be a substantial discrepancy between the amount of Mr Ryan's costs and the amount that he would be entitled to recover from the defendant on a party and party basis.

[58] *Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2)* (1996) 141 ALR 727 (Full FCA).

[59] *ALRC Report*, [286], [309], [317], and cll 32, 33 of the Draft Bill.

[60] See: Australia, *Parliamentary Debates*, Senate, 12 Sep 1991, 1448, and: V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, 234.

[61] See cl 33 of the Draft Bill.

3. Conclusion

Thus, it is evident that not one of the focus jurisdictions replicates the costs and funding arrangements of any other. In the United States and British Columbia, a very different costs regime operates than in Ontario and Australia, and the former is, prima facie at least, considered to facilitate the commencement of class actions. Certainly, were costs-shifting to operate in an unamended fashion, then would any economically rational person volunteer to be a representative plaintiff? The burdens of his or her own lawyers' fees and the possibility of the opponent's party and party costs would be most offputting.

However, any recommendations as between these different costs regimes is compromised by the fact that, as the Alberta Institute notes, the various approaches *are* working in the jurisdictions in which they have been introduced by very reason of the fact that class actions are being litigated.[62] Despite forebodings that class actions would be rare or practically non-existent if the costs-shifting rules were not amended as to remove the risk of an adverse costs order from the representative plaintiff,[63] the fact is that these reservations appear to have been misplaced. Representative plaintiffs are still willing to "put up their hands" in Australia and Ontario. That said, the utility of class actions in the different focus jurisdictions has been substantially driven by a large number of mechanisms that have been variously introduced to reduce costs exposure and shift the risks of class suits around the various "players". Several of these express statutory costs and funding mechanisms are useful to consider in further detail for the lessons which their enactment by the legislatures offer.

C EXPRESS CLASS ACTION PROVISIONS GOVERNING COSTS AND FEES

Having briefly considered the costs rules and mechanisms that apply in the various focus jurisdictions, attention now turns to the *express* stipulations as to costs and funding which, in post-FRCP regimes, the legislatures of the Canadian provinces and Australia have seen fit to include. From a comparative perspective, the influence of US class action costs jurisprudence has been prominent in respect of some of these express provisions. Whilst by no means uniformly implemented, a collective overview of the provisions among the jurisdictions

[62] *AltaLRI Report*, [394]. See also: M Wilcox (the Hon), *Address at the Indonesian Legal Reform Program: International Seminar on Class Actions* (18–20 Feb 2002) 3, who suggests that others may be "contributing to a fund to finance the case" or that "a large claim, on behalf of many people, is more likely to be taken seriously and settled than a claim by just one person".

[63] See, eg: T Rowe,"Shift Happens: Pressure on Foreign Attorney Fee Paradigms from Class Actions" (2003) 13 *Duke J of Comp and Intl Law* 125, 127; T Rowe, "The Legal Theory of Attorney Fee Shifting: A Critical Overview" (1982) *Duke LJ* 651, 651; DN Dewees *et al*, "An Economic Analysis of Cost and Fee Rules for Class Actions" (1981) 10 *J of Legal Studies* 155, 157; V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, 232; *ALRC Report*, [106]; *OLRC Report*, 703.

serves to highlight the many measures whereby the prima facie costs rules can be ameliorated or softened, in order to find a balance between the distribution of high costs and the purposes of class proceedings. As will be seen, several of the measures have been introduced with a view to shifting the costs burden from the shoulders of representative plaintiffs to those of either the defendant, the class members, an external funding source, or to the class lawyers, as not to deter the representative plaintiff from proceeding with a class action merely because of the threat of a large financial burden.

1. Transferring the Financial Burden to the Defendant

In addition to the already-considered scenario whereby the defendant may be liable for paying or sharing the costs of the class certification notice,[64] there are three other measures by which the defendant may be required to shoulder the financial burden that would, absent the statutory provision, be the representative plaintiff's to bear.

(a) Stipulated scenarios overcoming general costs rules

It has been judicially recognised in obiter in class proceedings under the Australian federal regime that, although there is "no settled rule to this effect",[65] the existence of a public interest element may be one reason for departing from the usual costs-shifting rule that applies in Australian litigation. This public interest element has occasionally been used to deprive a successful defendant of its costs,[66] although, in reality, this option has been little-used in the class action context.[67] Nevertheless, the judicial pronouncement provides some justification for a losing representative to avoid payment of the defendant's party and party costs in an appropriate case, and its potential use in the class action context has been academically mooted.[68] However, an entirely different approach has been adopted by the legislatures of the Canadian focus regimes. These class action regimes have been explicit in seeking to overcome the (different) general costs

[64] See pp 359–62.

[65] *Woodlands and Ballard v Permanent Trustee Co Ltd* (1995) 58 FCR 139, [24] (a class action).

[66] For examples in the non-class context where the public interest rule has been applied, see: *Kent v Cavanagh* (1973) 1 ACTR 43 (SC); *Arnold v Queensland* (1987) 73 ALR 607 (Full FCA); *Oshlack v Richmond River Shire Council & Iron Gates Developments Pty Ltd* (1994) 82 LGERA 236 (NSW LEC).

[67] Also see *Qantas Airways Ltd v Cameron (No 3)* (1996) 148 ALR 378 (Full FCA) 380 (no public interest costs order), aff'd: *Qantas Airways Ltd v Cameron* (1996) 66 FCR 246 (Full FCA).

[68] J Donnan, "Class Actions in Securities Fraud in Australia" (2000) 18 *Company and Securities LJ* 82, 94, citing ALRC, *Beyond the Door Keeper: Standing to Sue for Public Remedies* (Rep No 78, 1996) 22; P Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) *31 Common World Law Rev* 123, 145, and as to why the two-way costs rule should not be applied where there is a public benefit in litigation, see: S Issacharoff, "Too Much Lawyering, Too Little Law" in A Zuckerman and R Cranston (eds), *Reform of Civil Procedure: Essays on Access to Justice* (Oxford, Clarendon Press, 1995) 245, 261, cited Spender, fn 180.

rules which operate in stipulated scenarios, and as a result, the representative plaintiff has scope to shift costs (or be relieved from paying the defendant's costs) and thereby avoid the application of the general costs rule.

In British Columbia, where the no-way costs rule has been expressly legislated for within the class action regime,[69] the representative plaintiff is, in theory, only liable for his or her own solicitor and client costs, and never for the defendant's party and party costs. The danger of an unamended no-costs rule, however, is that defendants may be exposed to unmeritorious suits and be unable to recover the costs of defending the actions. Conversely, the defendant may engage in stultifying litigious behaviour which the representative plaintiff considers to be vexatious, but in the event of a no-costs rule, the representative plaintiff would be unable to recover its costs of responding to the defendant's tactic. With these aims in mind, three exceptions have been expressly built in to the class action costs rule to permit costs-shifting in certain limited circumstances:

> ***Class Proceedings Act* (BC), s 37(2)**
>
> A court . . . may only award costs . . . at any time that the court considers
>
> (a) that there has been vexatious, frivolous or abusive conduct on the part of any party,
> (b) that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
> (c) that there are exceptional circumstances that make it unjust to deprive the successful party of costs

To the extent that defendants are exposed to the risk of costs arising from unmeritorious litigation by class representatives, it has been judicially noted that their protection lies in s 37(2).[70] Equally, it is a provision under which a representative plaintiff may seek to benefit, by shifting costs to an unsuccessful defendant in any one of these stipulated scenarios. However, the court's discretion to shift costs under s 37(2) was obviously meant to be only sparingly applied. According to one British Columbia court, it was manifestly "the intention of the legislature that costs could *not* be awarded in class actions in the normal course of events."[71] Notably, even where an exception appears to apply, the provision is worded in discretionary terms—the court *may* shift costs, it is not an automatic right on the part of any one of the parties. The costs rule under British Columbia's statute, when read as a whole, prohibits orders for costs in class actions except to redress the *specific* situations set out under the abovementioned modifications. This is a legislative direction which has been

[69] CPA (BC), s 37(1), and see further: *AltaLRI Report*, [384]–[387].
[70] *Samos Investments Inc v Pattison* (2002), 216 DLR (4th) 646, 5 BCLR (4th) 21 (CA) [32].
[71] *Secure Networx Corp v KPMG, LLP* [2002] BCSC 1001, [19].

occasionally overlooked (and then rectified) by the judiciary when the representative plaintiff has succeeded at a stage of the class action litigation.[72]

Consistent with this legislative intention, costs-shifting from the representative plaintiff to the defendant on the basis of one of the s 37(2) exceptions which modify application of the no-way costs rule is not a common occurrence in British Columbia. Time and again, it has proven to be practically difficult for representative plaintiffs who have enjoyed some measure of success to convince that costs should be shifted to the defendant.[73] By way of example, the conduct of the defendants in both instituting third party proceedings and applying to amend their pleadings by adding a counter-claim against the representative plaintiff (the first course was stayed upon application of the plaintiff, and the second was adjourned) did not constitute the behaviour or the exceptional circumstances contemplated by s 37(2) to justify a costs order in the representative plaintiff's favour.[74] Therefore, although s 37(2) provides some possible means for a representative plaintiff to invoke the court's discretion, overcome the no-costs rule, and transfer the financial burden to the defendant in limited circumstances, the reality is that it has been less than successfully employed.

In Ontario, where it will be recalled that the usual costs-shifting rule applies, rendering a losing representative plaintiff liable for the party and party costs of the successful defendant, further direction relating to the exercise of the court's discretion, with respect to costs in class proceedings, is found in the following provision:

> ***Class Proceedings Act* (Ont), s 31(1)**
>
> In exercising its discretion with respect to costs under subsection 131(1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

In a case which falls into one or more of these three categories, and absent any circumstances which militate to the contrary, the court may exercise its discretion and decline to award costs to the successful party in a class action suit. The usual course where reliance is placed on s 31(1) is that the losing party will submit that there should be no award of costs. It is evident that, apart from these three categories to which the legislature has directed the court's attention, the court may have regard to any other matters when exercising its discretion as to

[72] *Campbell v Flexwatt Corp* [1998] 105 BCAC 158, where court corrected previous order made 7 Nov 1997 where it allowed the rep plaintiff's appeal, dismissed the defendant's appeal, and ordered: "The plaintiffs are entitled to their costs".

[73] Eg, various applications by the rep plaintiff for orders that the defendant pay aspects of the plaintiff's legal costs or disbursements have either failed, or not been discussed at all, in: *Dalhuisen (Guardian ad litem of) v Maxim's Bakery Ltd* [2002] BCSC 528 (SC [in Chambers]); *Rumley v BC* [2002] BCSC 1100, 22 CPC (5th) 92 (SC [in Chambers]).

[74] *Gerber v Johnston* [2003] BCSC 358, [3].

whether to follow the usual costs rule[75] or make no order as to costs[76] in the case of the unsuccessful representative plaintiff.

Each of the statutorily indicated categories has necessarily entailed some further judicial elicitation in Ontario of what they each mean. Of the first, it has been judicially said:

> My understanding of the meaning of the phrase 'test case' is that given by Walker, *The Oxford Companion to Law* (1980) 'an action brought to ascertain a law, one of a number of similar actions which will all be determined by the same principle.' This action was not brought to ascertain a law, but rather to recover a substantial sum of money which the plaintiff and members of the proposed class claimed to have lost.[77]

Further, it has been clarified that if there are many similar actions involving at least some of the issues in the class action, and the resolution of those issues might have some precedential or persuasive value, but there is no agreement that the result of the class action will dictate the outcome of any other case, then it will not be a test case.[78] Of the second category, "a novel point of law", it has been stated that: "[n]ovelty deals principally with the broad legal issues involved and not the identity of the actors or their particular profession";[79] "[t]he case does raise legal points of some complexity but that is not the same thing as being novel";[80] and novelty will fail where "[e]ven if the facts were novel, as is generally true in any civil action to a considerable extent, *the law* to apply was settled and clear."[81] Finally, a class action in the "public interest" has been explained variously: "[t]here is, of course, a public interest component in respect of any litigation. However, in my view, to be a 'matter of public interest' the class action must have some specific, special significance for, or interest to, the community at large beyond the members of the proposed class";[82] that the case should "raise issues of broad public importance or which is directed towards improving the situation of persons or groups who are historically disadvantaged in our society";[83] and that "public interest" is not the same thing as being of interest to the public.[84]

[75] Eg: *Menegon v Philip Services Corp* (2001), 23 BLR (3d) 151 (SCJ) [59] (court referred to fact that case was "fraught with peril, if it wasn't merely ill-conceived"; plus problematical representative plaintiff chosen; usual cost rule applied), this aspect not discussed on appeal.

[76] Eg: *Moyes v Fortune Financial Corp* (SCJ, 8 Nov 2002) [9] ("public interest" proven; court also mentioned "improper conduct" of certain defendants, and the reasonableness of the plaintiff attempting to see if the mechanism of a class action was an appropriate vehicle to try to redress the harm arising from that conduct).

[77] *Edwards v Law Society of Upper Canada* (1998), 38 CPC (4th) 136 (Gen Div) [11]. Also, similar definition given in: *Williams v Mutual Life Ass Co of Canada* (2001), 6 CPC (5th) 194 (SCJ) [19].

[78] *Cloud v Canada (A-G)* (SCJ, 30 Jan 2002) [8].

[79] *Moyes v Fortune Financial Corp* (SCJ, 8 Nov 2002) [9].

[80] *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 393 (SCJ) [8].

[81] *Williams v Mutual Life Ass Co of Canada* (2001), 6 CPC (5th) 194 (SCJ) [22] (original emphasis).

[82] *Ibid*, [24].

[83] In *Edwards v Law Society of Upper Canada* (1998), 38 CPC (4th) 136, Sharpe J referred at [13] to the reasons of the Class Proceedings Fund Committee where that description of public interest was offered; also cited with approval in *Cloud v Canada (A G)* (SCJ, 30 Jan 2002) [9].

[84] *Pearson v Inco Ltd* (2002), 27 CPC (5th) 171 (SCJ) [9].

The inclusion of these three factors certainly seemed to indicate, as Friedlander suggests, that the legislature was inviting debate and argument on the issue of costs-shifting, and that the courts may have been more willing to abandon the general rule in the face of convincing argument.[85] Thus far, however, attempts by unsuccessful representative plaintiffs to invoke the discretion of the court upon one of the three categories of special case have been rather divided. Although some unsuccessful representative plaintiffs have managed to avoid an adverse costs order,[86] this has by no means been widespread. Several particularly recent decisions[87] have indicated that the judiciary may be turning towards the usual costs-shifting rule approach as being as applicable to class actions as to any other form of litigation. Moreover, the arguments of "novelty" or "test case" are likely to become less available as a greater number of class actions are litigated.[88] Despite the amelioration of the costs-shifting rule upon an unsuccessful representative plaintiff which s 31(1) potentially provides, there has been a tendency in Ontario to treat class actions as a non-special branch of civil litigation. Nowhere is that emphasised better than in the following statement of Nordheimer J:

> I do not accept that class proceedings should be accorded any special treatment in the disposition of costs. There are undoubtedly different considerations that may come into play in determining the proper disposition of costs in a class proceeding but there are many types of cases in which different or special considerations may impact on the proper disposition of costs. To suggest, however, that a special approach should be taken, or that special rules should apply, in determining the disposition of costs in a class proceeding is neither necessary nor appropriate. Costs have always been, and continue to be, an exercise of the court's discretion. In that regard, I view section 31(1) as simply codifying matters which the court has always taken into consideration in determining whether a costs award should be made in any given case. . . . it must be realized that a class proceeding represents a significant risk to a defendant given the enormous potential liability that attaches to such claims if the proceeding is certified. It must be expected, therefore, that a defendant will respond to a certification motion utilizing all of its available effort and resources with the result that the certification battle is likely to be both lengthy and expensive. . . . I am also of the view that the

[85] See: L Friedlander, "Costs and the Public Interest Litigant" (1995) 40 *McGill LJ* 55.

[86] *Moyes v Fortune Financial Corp* (SCJ, 8 Nov 2002) [9] (public interest); *Garland v Consumers' Gas Co* (2001), 208 DLR (4th) 494, 57 OR (3d) 127 (CA) [83] (novel case); *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [146] (novel case), affirming: (1994), 15 OR (3d) 39 (Gen Div); *Smith v Canadian Tire Acceptance Ltd* (1994), 19 OR (3d) 610 (Gen Div) [52]; *Cloud v Canada (A G)* (SCJ, 30 Jan 2002) (public interest); *Elliott v Canadian Broadcasting Corp* (1995), 125 DLR (4th) 534, 25 OR (3d) 302 (CA) [20] (novel case).

[87] Eg: *Chadha v Bayer Inc* (Ont CA, 8 Apr 2003) [2]–[3]; *Hughes v Sunbeam Corp (Canada)* (2002), 61 OR (3d) 433, 219 DLR (4th) 467 (CA) [53]; *Edwards v Law Society of Upper Canada* (2002), 188 DLR (4th) 613, 48 OR (3d) 329 (CA); *Pearson v Inco Ltd* (2002), 27 CPC (5th) 171 (SCJ) (9 Sep 2002); *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 393 (SCJ) (30 Aug 2002); *Williams v Mutual Life Ass Co of Canada* (2001), 6 CPC (5th) 194 (SCJ) (9 Feb 2001); *Ciano v York University* (SCJ, 6 Mar 2000).

[88] See, for similar observation: S Sharpe and J Reid, "Aspects of Class Action Securities Litigation in the United States" (1997) 28 *Canadian Business LJ* 348, 356.

> principle of access to justice is sometimes too readily invoked to justify a result that may superficially appear appropriate but which, in reality, bears little relationship to the principle. It is easy in theory to portray the representative plaintiff as the weak party of modest or little means taking the battle to the powerful and well-funded corporate defendant but the reality is frequently not so simple and straightforward. As the experience in the United States shows, and which the Canadian experience has begun to emulate, plaintiff's counsel is very often as capable, as well-funded and with equal access to resources, both financial and evidentiary, as does defendant's counsel. . . . Put simply, the David against Goliath scenario does not necessarily represent an accurate portrayal of the real conflict.[89]

The Ontario experience serves to emphasise that, in reality, any statutorily introduced directives to the courts by which to soften the potentially harsh effect of the two-way costs rule depends ultimately on judicial discretion, which will not be of much comfort to a representative plaintiff potentially or actually exposed to a formidable costs bill from a successful defendant. It is arguable that even a statutorily modified no-costs rule in the ordinary course (such as operates in British Columbia) still remains more favourable to class action plaintiffs than do the usual costs-shifting rules and uncertainty of the exercise of judicial discretion that applies in Ontario.[90]

In summary, in the Canadian focus regimes, there are two illustrations of statutory enactments, one that allows the representative plaintiff to allege a case to overcome the usual no-way costs rule, and the other to permit no order as to costs in limited scenarios where the losing representative plaintiff would normally otherwise have to bear the successful defendant's party and party costs. These statutory modifications which stipulate scenarios by which the representative plaintiff may adjust the financial burden, whilst of comfort, are of little practical moment if the discretion to do so is infrequently exercised by the judiciary.

(b) Minimal costs scale

A further measure by which to render the class action procedure more attractive to representative plaintiffs, and to ameliorate a two-way costs rule, is to provide statutorily that costs are only to be assessed on a minimal costs scale. This in effect means that a losing representative plaintiff is protected against any significant adverse costs award, and that the costs of a successful defence are very substantially worn by the defendant and not shifted to the plaintiff. Quebec's regime has provided for costs to be limited to the small claims

[89] *Gariepy v Shell Oil Co* (2002), 23 CPC (5th) 393 (SCJ) [4]–[6]. Note the earlier hopes that the section would do much more than "merely codif[y] an existing discretion" in SJ Simpson, "Class Action Reform: A New Accountability" (1991) 10 *Advocates' Society J* 19, 22.

[90] For similar observations in the context of Ontario, see: S Sharpe and J Reid, "Aspects of Class Action Securities Litigation in the United States" (1997) 28 *Canadian Business LJ* 348, 357; I Ramsay, "Class Action: Class Proceedings Act 1992" [1993] *Consumer LJ* CS39, CS40.

scale.[91] As Watson notes, in one of the early Quebec cases involving Canadian Honda Motors Ltd, the defence costs claimed against the losing representative plaintiff were $675,650, which led to these statutory amendments.[92]

The Ontario legislature has also authorised regulations permitting the implementation of a lower scale.

***Law Society Act* (Ont), s 59.5:**

(1) The Lieutenant Governor in Council may make regulations:

. . .

(d) establishing limits and tariffs for payments [of disbursements to a representative plaintiff or costs to a successful defendant]; . . .

(f) providing for the assessment of costs in respect of which a claim is made [by a successful defendant]

However, such a power has not been exercised to date in Ontario, and there are no relevant regulations which implement a lower costs scale for class actions in that province.

One-off costs relief measures under a general statutory provision which allows the court to "specify the maximum costs that may be recovered on a party and party basis"[93] have also been undertaken in Australia under the federal class action regime where considered appropriate to ameliorate the effects of the costs-shifting rule.[94] A ceiling on the maximum costs that could be recovered by the defendant on a party and party basis against the representative plaintiff has been occasionally imposed.[95] In making this lastmentioned order, Wilcox J criticised the lack of other costs provisions in Australia's federal class action regime, particularly where the ALRC's recommendation for a special fund[96] was not implemented:

> The problem that has arisen in this case occasions no surprise to me. It is a problem inherent in representative proceedings. In a nutshell, the problem is that a representa-

[91] CCP (Que), art 1050.1. The scale applicable is that established for claims between $1,000 and $3,000 (Class II-A). Also see: *AltaLRI Report*, [373], and GD Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 274.

[92] GD Watson, "Ontario's New Class Proceedings Legislation—An Analysis" in GD Watson & M McGowan, *Guide to Case Management and Class Proceedings, Ontario Civil Practice 1993* (Scarborough, Carswell, 1993) 6, cited in *Edwards v Law Society of Upper Canada* (1994), 36 CPC (3d) 116 (Ont Class Proceedings Committee) [77]. See also: HP Glenn, "Class Actions in Ontario and Quebec" (1984) 62 *Canadian Bar Rev* 247, 258.

[93] Federal Court Rules, Ord 62A r1 ("The Court may; by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis").

[94] In *Sacks v Permanent Trustee Aust Ltd* (1993) 45 FCR 509, 511, Beazley J quoted a letter from the then Chief Justice of the Court to the then President of the Law Council of Australia which predicted that the rule "would be applied principally to commercial litigation at the lower end of the scale in terms of complexity and the amount in dispute". But he added "it could be applied in other cases as appropriate".

[95] *Woodlands and Ballard v Permanent Trustee Co Ltd* (1995) 58 FCR 139, order 1.

[96] *ALRC Report*, [309].

> tive party is exposed to the risk of an order to pay the costs of a respondent or respondents (the amount of which will usually be increased by the very fact that the proceeding is a representative one), without gaining any personal benefit from the representative role. So there is little or no incentive for a person to act as a representative party. Unless the person's potential costs are covered by someone else, there is a positive disincentive to taking that course.[97]

As evident throughout this chapter, the Ontario legislature elected to provide its judiciary with far more mechanisms by which to adjust the financial burden on the representative plaintiff than did the Australian legislature.

(c) Interim orders regarding payment of party and party costs

Under a costs-shifting regime, early partial success may prompt the successful party to seek an interim costs order in its favour, and this tactic is particularly useful in the context of a successful certification motion in a class proceeding. This course has been sought and obtained in Ontario,[98] and is a significant method by which to lessen the financial burden upon the representative plaintiff, by ordering an early payment of party and party costs after a successful certification motion, rather than have the representative carry those costs throughout the proceedings in the hope that the action will ultimately succeed on the merits.

Unsurprisingly, the interim payment of party and party costs in these circumstances has generated debate.[99] There is certainly sympathy for the representative plaintiff with a small personal stake in the litigation, and who submits that those costs should be paid forthwith because the certification motion is intended to screen claims that are not appropriate for class action treatment, at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation. In that regard, (so the argument goes), a plaintiff in a class proceeding who wins a certification motion has won the right, via the establishment of certain criteria, to proceed further in the view of the court. The defendant's counter-argument that until the action has been tried, there has been no determination of the merits sufficient to warrant an immediate award of costs,[100] is

[97] *Woodlands and Ballard v Permanent Trustee Co Ltd* (1995) 58 FCR 139, [18].

[98] For other cases where a plaintiff who succeeded in having the action certified has been awarded costs payable forthwith, see eg: *Robertson v Thomson Corp* (1999), 43 OR (3d) 389 (Gen Div) [6]; *Nantais v Telectronics Pty (Canada) Ltd* (Gen Div, 18 Jun 1996); *Bunn v Ribcor Holdings Inc* (SCJ, 21 Aug 1998); *Nash v CIBC Trust Corp* (1996), 7 CPC (4th) 260 (Gen Div), aff'd: CA, 13 Mar 1997, leave to appeal refused: SCC, 2 Oct 1997; *Atkinson v Ault Foods Ltd* (Gen Div, 20 Nov 1997) (MacKenzie J fixed the costs and ordered the defendant to pay a portion of the costs forthwith, but on the basis that he disapproved of the defendant communicating with members of the class with a view to soliciting opt-outs).

[99] The various arguments are presented in *Robertson v Thomson Corp* (1999), 43 OR (3d) 389 (Gen Div) [3]–[6]. The court said that, until this case, the issue of the appropriate order for the costs of a successful certification motion had not been the subject of detailed judicial consideration in Ontario.

[100] As in the case of interlocutory injunction cases where a successful plaintiff will ordinarily not be awarded costs forthwith: *Rogers Cable TV Ltd v 373041 Ontario Ltd* (Gen Div, 19 May 1994).

also cogent. Ultimately, the main justification proffered for an interim costs award for certification has been to promote the goal of enhanced access to justice: "some account must be taken . . . of the financial burden of carrying on litigation against wealthy and determined opponents."[101]

2. Transferring the Financial Burden to Third Parties

Apart from the possibility of public funding through a legal aid scheme (which will not be considered in this chapter), there are two other possible external funding scenarios for class proceedings. The first of these, funding via a special public fund for the particular purposes of class actions, has been statutorily implemented in Ontario. The second option of third party funding, has not been statutorily implemented as such within any regime of the focus jurisdictions, but was expressly contemplated by Australia's Draft Bill. Both will be discussed in turn.

(a) Special fund

The creation of a special class actions fund, seeded by public monies and thereafter hopefully self-funding, has been described as "the most attractive method of supporting class proceedings."[102] Recommended in the early report of the South Australian Law Reform Committee[103] and implemented under the Quebec regime,[104] it has since been warmly proposed by those charged with the task of considering an expanded class actions regime[105] (particularly, as noted previously, by the ALRC[106]) as a means of ensuring the regime's viability. Apart from a means of protecting the representative plaintiff against the risk of paying party and party costs if the action fails, its advantages have been declared to include the following: that "public funding would be an acknowledgement that there is a public purpose to be served by enhancing access to remedies";[107]

[101] *Robertson v Thomson Corp* (1999), 43 OR (3d) 389 (Gen Div) [6].

[102] *FCCRC Paper*, 102. Also see *AltaLRI Report*, [391]; V Morabito "Federal Class Actions, Contingency Fees and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, 268–70.

[103] Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 10. The Committee recommended the establishment of a Class Actions Indemnity Fund to ensure that representative plaintiffs were not personally liable for costs, and to extend to providing for the payment of defendants' costs where such costs were otherwise unrecoverable.

[104] An Act Respecting the Class Action 1978, c 8, ss 5, 6. When an action financed by the Class Actions Assistance Fund is successful, the representative plaintiff must reimburse to the Fund any fees, costs or expenses received from the defendant, and the Fund may withhold a percentage of the amount recovered.

[105] See, eg: *VLRAC Report*, [7.33]–[7.34] and recommendation 16; *Final Woolf Report*, ch 17, [68]; *FCCRC Paper*, 103.

[106] *ALRC Report*, [301], [309],]311]–[314] ("Although provision for court approved fee agreements will go some way to alleviating the costs disincentives involved in grouped proceedings, there may still be cases where a public funding solution is needed, in particular, to assist a principal applicant to meet the respondent's costs if the case is unsuccessful").

[107] *Ibid*, [308].

and that a fund means that a plaintiff "has a source to support the expenses . . . particularly important where the class is claiming injunctive or other forms of non-monetary relief so that victory [for the class] will not generate funds from which the class lawyer can recover fees and disbursements."[108]

On the other hand, the establishment of a special fund has been stridently criticised, most notably by the OLRC,[109] but also by other agencies,[110] on the basis that the financial responsibility for the conduct of class litigation should be assumed by private citizens and that public moneys should not be used for that purpose. Concerns about the potential administrative workability of the fund have also been a negative factor.[111] Moreover, the lack of widespread establishment of class action funds can be attributed to two further factors. For one thing, these types of funds have been considered to be politically unrealistic in the modern economic climate,[112] and for another, history has shown that politicians and law reform recommendations can diverge significantly on this policy issue. It is one of the ironies of class action jurisprudence that the OLRC was decidedly against the institution of a special fund, but the Ontario legislature implemented one, whereas the ALRC's strong recommendation to introduce a "self-financing" public fund for the costs of parties involved in class proceedings went unheeded by the Australian lawmakers. The Australian legislature's failure to adopt this recommendation has since been judicially criticised,[113] but the fact remains that the possible establishment of a class actions fund raises policy issues that should be decided by Parliament.[114]

As noted, the Ontario legislature, as part of its class action reform, established a class proceedings fund:

[108] *FCCRC Paper*, 102–3.

[109] *OLRC Report*, 713.

[110] Not recommended in *SLC Report*, [5.48] ("there is not a clear case for such public funding which might be seen as unfairly discriminating against litigants in conventional cases for whom only legal aid is available"), and see the change of heart from support for class actions fund to recommendation against in *SALC Paper*, [5.50]–[5.53]; *SALC Report*, [5.19.13].

[111] *OLRC Report*, 713 ("[o]ur philosophical opposition is strengthened by practical considerations that we believe militate strongly against the establishment of a government fund to finance class actions. Any attempt to implement such a proposal would entail considerable expenditure of time and money in the organization and maintenance of an administrative structure that is capable of managing the fund and regulating access to it").

[112] Note this suggestion in *AltaLRI Report*, [391] ("the Alberta government has been reluctant to come up with funds in related contexts"); *ManLRC Report*, 86.

[113] *Woodlands and Ballard v Permanent Trustee Co Ltd* (1995) 58 FCR 139, [18], [21], [22] (Wilcox J) ("Unless the person's potential costs are covered by someone else, there is a positive disincentive to taking that course. . . . if such a fund had been established, it would have been a means of resolving the present problem. However, the Government did not adopt this recommendation. No fund was established").

[114] The eventual conclusion in *FCCRC Paper*, 103.

***Law Society Act* (Ont), s 59.1**[115]

The board shall,

(a) establish an account of the Foundation to be known as the Class Proceedings Fund;

(b) within sixty days after this Act comes into force, endow the Class Proceedings Fund with $300,000 from the funds of the Foundation;

(c) within one year . . . endow the Class Proceedings Fund with a further $200,000 from the funds of the Foundation

Under this special Fund, representative plaintiffs can apply to the Class Proceedings Committee[116] for assistance in paying the cost of disbursements[117] they incur, but not legal fees.[118] In addition, in any action in which the representative party has been granted such assistance,[119] the Fund will indemnify him or her against any adverse costs award in the event that the class action is unsuccessful. In this way, a successful defendant can seek costs from the Fund where the representative plaintiff has obtained assistance. This is significant—if the representative plaintiff has received any support from the Fund in respect of disbursements, the successful defendant can *only* collect those costs from the Fund and not from the representative plaintiff,[120] a principle which has had a practical application since.[121] As Watson notes, what will be (in form) a request

[115] See, for the totality of the relevant provisions pertaining to the fund: Law Society Act, RSO 1990, c L-8, ss 59.1–59.5, and Law Society Act, O Reg 771/92.

[116] Established under s 59.2.

[117] Section 59.3(1), (2) of the Law Society Act, as amended by the Law Society Amendment Act (Class Proceedings Funding), 1992, SO 1992, c 7, indicates that the funds are to be used for "disbursements related to the proceeding" and "shall not include a claim in respect of solicitor's fees." Disbursements include the usual type common in all litigation for filing fees, transcript costs, expert fees, etc, as well as disbursements for expenses which usually arise only in class proceedings, such as the cost of class notice and perhaps obtaining statistical evidence under CPA (Ont), s 23: *Edwards v Law Society of Upper Canada* (1994), 36 CPC (3d) 116 (Ont Class Proceedings Committee) [45].

[118] The special fund (Le fonds d'aide aux recours collectifs) available in the Quebec province, by virtue of An Act Respecting the Class Action, RSQ 1978, c R-2.1, s 29, is more generous than Ontario's Fund in that it will pay for both lawyers' fees and disbursements, but on the other hand, it is less generous in that it does not relieve an unsuccessful representative plaintiff of liability for the defendant's costs.

[119] In determining whether to grant funding, and in what amount, the Class Proceedings Committee may consider: the merits of the case, whether the plaintiff has made reasonable attempts to obtain funding from other sources, whether the plaintiff has a clear and reasonable proposal for the use of the funds, whether the plaintiff has appropriate financial controls to ensure that funds are spent for the purposes of the award, and any other matter that the Committee considers relevant: Law Society Act, s 59.3(4). The Law Society Act, O Reg 771/92 reg 5, also requires the Committee to consider the extent to which the issues in the proceedings affect the public interest. For criticism of equating public interest with funding historically disadvantaged plaintiff classes, see: BA Leon and J Walker, "Should Businesses Fear Canadian Class Actions?" [1996] *Intl Commercial Litigation* 18, 20.

[120] As provided in s 59.4(1) of the Law Society Act, as amended by the Law Society Amendment Act (Class Proceedings Funding), 1992, and discussed in: *FCCRC Paper*, 100; *Edwards v Law Society of Upper Canada* (1994), 36 CPC (3d) 116 (Ont Class Proceedings Committee) [39].

[121] Eg: *Garland v Consumers' Gas Co* (1998), 165 DLR (4th) 385, 40 OR (3d) 479 (SCC) (motions judge held on appeal to have erred in awarding costs against representative plaintiff in his personal capacity; representative plaintiff successfully applied for financial support from Class Proceedings Fund; very purpose of s 59.4 was to protect class representatives from personal exposure to costs in that situation).

for disbursement funding will be, in reality, a desire to obtain an immunity from liability for the defendant's costs.[122]

In the event that the class action is successful, however, the representative plaintiff is obliged to reimburse the Fund for the amount it paid out, plus a levy of 10 per cent of the court-ordered award or settlement amount,[123] as a "top-up" mechanism for the benefit of future litigants who may require recourse to the Fund. As the Fund will only provide assistance to parties to a class proceeding, individual class members seeking to prove individual issues after the common issues have been determined in their favour will not receive assistance for the purposes of those individual proceedings. There is no prerequisite of certification having already occurred in applying for funding, although one of the matters which the Committee may take into account in making its decision on funding is the likelihood of certification.[124]

The Fund is perceived to provide significant advantages in eliminating or lowering the two most important financial barriers which face representative plaintiffs: assistance with disbursements (which in a class proceeding can be a *very* large figure), and indemnification for costs in the event the representative plaintiff is unsuccessful.[125] However, for all the stated advantages that supposedly accompany a class actions fund, some disquiet about the Ontario solution has been expressed. The lack of utilisation of Ontario's Fund has given rise to academic comment over the years. The surprising level of lack of interest on the part of plaintiffs in even applying for funding at the outset has been variously attributed to suggestions that 10 per cent is too high a levy and could be off-putting to low income class members, that strong cases will not wish to forfeit 10 per cent, that weak cases will be put off by the low capital base of $500,000 available, that some parties are not being advised to apply, and that the Fund ought to cover the plaintiff's fees as well as disbursements.[126] The Fund's

[122] GD Watson, "Ontario's New Class Action Legislation—An Analysis" in GD Watson and M McGowan, *Ontario Civil Procedure* (Toronto, Carswell, 2000) vol 2, 751, 757.

[123] Law Society Act, O Reg 771/92, regs 8(4)(c), 10(1), made pursuant to the Law Society Act, s 59.5(1)(g). A judgment authorising a settlement, discontinuance or abandonment must give directions regarding the payment of any levy in favour of the Fund: Rules of Civil Procedure, RRO 1990, reg 194, rule 12.05(1)(d).

[124] Judicially noted in: *Perron v Canada (A-G)* (2003), 32 CPC (5th) 165 (SCJ) [116]; *Holmes v London Life Ins Co* (2000), 50 OR (3d) 388 (SCJ) [23].

[125] M Cochrane, *Class Actions: A Guide to the Class Proceedings Act 1992* (Aurora, Canada Law Book, 1993) 89, cited in *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 (Gen Div) [35]–[36]. The establishment of a special fund is supported further in: TD Rowe, "Shift Happens: Pressure on Foreign Attorney Fee Paradigms from Class Actions" (2003) 13 *Duke J of Comp and Intl Law* 125, 145–46.

[126] See, for these various contentions: R Smith, "Managing the Down Cycle" [1995] *Legal Action* 6, 7, quoting the views of experienced practitioners; *ManLRC Report*, 85–86, and citing: GD Watson, "Is the Price Still Right? Class Proceedings in Ontario" (Canadian Institute for the Administration of Justice Conference, Toronto, 15 Oct 1997) 32–33; J Campion and V Stewart, "Class Actions: Procedures and Strategies" (1997) 19 *Advocates' Q* 20, n 96; JA Prestage and SG McKee, "Class Actions in the Common Law Provinces of Canada" in C Hodges, *Multi-Party Actions* (Oxford, OUP, 2001) [14.44]; P Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" (1998) 36 *Osgoode Hall LJ* 515, [15]; GD Watson, "Class Actions: The Canadian

under-utilisation is also due to the fact that very few applications for funding have been granted by the Class Proceedings Committee,[127] which illustrates an early prediction that the Fund's administrators could be just as risk-averse as are most potential representative plaintiffs.[128] As Watson observes, the reality is that the Fund, after a modest initial endowment, remains underfunded by virtue of the fact that it is only entitled to a levy from those cases which it has funded, and unfortunately for the Fund's financial welfare, the cases which have settled for multi-million dollar amounts have not applied for funding.[129]

The evident nervousness of the Ontario Law Foundation[130] in its concern that a single costs order against an unsuccessful representative plaintiff could decimate the Fund is exacerbated by the fact that the financial viability of the Fund has not been a matter of judicial concern. Occasionally the court deciding the matter of costs, where a defendant has been successful in defending a class action, has been asked by the Law Foundation to consider the effect of what would be a substantial costs award on the viability of the Fund. However, the courts have consistently refused to become enmeshed in such debate, holding that[131] this was a consideration for the Committee recommending funding, not one for the court in deciding to award costs to an otherwise successful and deserving defendant.

The under-utilisation of the Fund is arguably fostered by the fact that a plaintiff's request for funding may be deferred due to the Committee's policy not to consider such requests until a statement of defence has been delivered in the action. This policy and rationale has been subject to recent judicial criticism[132] on the basis that it is commonplace for defendants to withhold filing statements of defence until after the certification motion is determined, yet the issue of funding, or of available resources, is an important consideration on the certification motion. Hence (said the court), the Committee's policy "hamstrings the ability

Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 275 (and suggesting either scrap the Fund, apply a much lower levy, 1–2%, on all class action recoveries, or change to a no-way costs rule).

[127] Funding is at the discretion of this Committee: Reg 771/92, s 4. Approximately eight applications were granted until 2001. For further information and details, see: Law Foundation of Ontario, *Annual Report 2001* "Report on Class Proceedings" (2001).

[128] K Roach, "Book Review" (1994) 23 *Canadian Business LJ* 156, 159.

[129] See GD Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J of Comp and Intl Law* 269, 276 for an interesting summation of how the Fund could have been embarrassingly well-off if levies had been allowed on the very large payout class actions in Ontario. On the other hand, HT Strosberg, "The Class Struggle Continues: Chapter II" (Practical Strategies for Advocates IX The Advocates Society (Ontario) 4–5 Feb 2000) [16], makes the point: "In *Parsons v The Canadian Red Cross* . . . the plaintiffs did not apply to the CPF. Had an application been made and accepted by the CPF, then about $63,550,000 would have been paid to the CPF. A rather excessive premium, I suggest!").

[130] Funds in the Class Proceedings Fund are funds of the Foundation: r 56.9(3), and on its "extreme caution" from first-hand knowledge, see: Watson, *ibid*, 276.

[131] *Edwards v Law Society of Upper Canada* (2000), 188 DLR (4th) 613, 48 OR (3d) 329 (CA) [52], reflecting the earlier observations in: *Edwards v Law Society of Upper Canada* (1998), 38 CPC (4th) 136 (Ont Class Proceedings Committee) [8]; *Garland v Consumers' Gas Co* (1995), 22 OR (3d) 767 (Gen Div) [46].

[132] *Pearson v Inco Ltd* (2002), 33 CPC (5th) 264 (SCJ) [142].

of every plaintiff who needs funding to meet his or her obligation to satisfy the requirements for certification".

For other jurisdictions, and drawing from the academic, practitioner and judicial commentary canvassed earlier in this section, lessons to be learnt from the Ontario special class actions fund therefore appear to include: lowering the levy applicable to awards or settlements to overcome resentment of losing 10 per cent; applying that levy to *all* awards and settlements, whether funded or not; covering both lawyers' fees and disbursements; seed-funding for a higher amount; and requiring statutorily that a decision be made by fund administrators before the delivery of a defence. The Ontario experience also demonstrates that, under a costs-shifting regime, if a successful defendant can apply to a fund for reimbursement in the event of success in the action, the risk of an adverse costs award may be just as large a deterrent to those administering the fund as to the representative plaintiff.

(b) Funding from third parties

If a third party were able to relieve the representative plaintiff from liability to pay the solicitor and client costs as well as from liability to pay the defendant's party and party costs should the action fail, this would promote access to justice considerably. However, for those jurisdictions, such as Australia, in which the law of maintenance[133] has traditionally prevented external parties from contributing to the financing of litigation, third party financing of class actions can be problematical. The abolition of maintenance in the context of class proceedings has been widely recommended by law reform agencies in recent times[134] (reflecting the tough economic climate where the funding of litigation is concerned), but its implementation has been rather more reserved. As the Manitoba Law Reform Commission noted,[135] members of the class would not be prohibited from contributing to the costs of the action, as they have the requisite "legal interest" in the proceedings; the problem concerns non-parties who wish to provide financial support for the action.

In Australia, it has been judicially indicated[136] that the traditional approach still applies which prohibits a non-party from participating in a share of the

[133] Maintenance may be defined as the giving of assistance or encouragement to one of the parties to the litigation by a person who has neither an interest in litigation nor any other motive recognized by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action: *Halsbury's Laws of Australia* (Sydney, Butterworths, online), D Byrne and B Ernst, 'Building and Construction' [65-1995].

[134] *AltaLRI Report*, [411]–[412]; *ManLRC Report*, 81; *ALRC Report*, [318].

[135] *ManLRC Report*, 80, for observations in text.

[136] *Cook v Pasminco Ltd (No 2)* (2000) 107 FCR 44, [54] (there is an important distinction to be drawn between a solicitor whose interest in the litigation is merely one of an uplift fee if success ensues, and "a non-party whose interest explains the bringing of a proceeding. Unlike such a person, the solicitors were not to be entitled to the fruits of the proceeding or even to a proportion of them").

proceeds in the context of class litigation. The ALRC sought to provide, by means of the following provision, the express ability for private financing of class actions "by, for example, consumer organisations or environmental groups [as] long as the agreement to maintain the action was not made in consideration of a share of the proceeds or subject matter of the action":[137]

> ***Federal Court (Grouped Proceedings) Bill 1988* (Aust), cl 32(1)**
>
> Conduct, not being conduct that constitutes champerty, in relation to a principal proceeding or a group member's proceeding is not unlawful merely because it constitutes maintenance.

The provision was not ultimately enacted.

In Ontario, a fairly liberal attitude has occasionally been evident. Strangers to the litigation, as investors with no legal interest in the class proceeding, were permitted in *Nantais v Telectronics Proprietary (Canada) Ltd* to provide funding for costs and disbursements in the proceeding at a high rate of return and on a purely contingent basis.[138] This decision has been academically supported by Puri[139] on several cogent bases: first, that private investor financing can raise much more capital than available to class action participants under the special fund ($350,000 was raised from a small handful of wealthy investors, more than two-thirds the total capital of the Fund); secondly, that investors may be willing to finance cases that lawyers may not be prepared to accept on a contingency basis (in *Nantais*, Puri notes that the plaintiff's lawyer could have financed the entire litigation through contingency fees, but instead preferred to shift a portion of the risk to private investors); and thirdly, that investor financing may have a useful role to play by plugging the gaps left by established financing arrangements. However, other attempts to invoke outsider funding have also been held to constitute an abuse of process. In *Smith v Canadian Tire Acceptance Ltd*,[140] an action group was founded to promote class actions against corporations alleged to charge excessive credit card interest. As a quid pro quo, cardholders/ investors were offered a stake in the outcome, ie, up to $64,500 for a $100 "investment".[141] This arrangement was not judicially condoned. As a result of these decisions, Canadian academic commentators note that it is evident that "[t]he propriety of financing class actions with funds

[137] *ALRC Report*, [318].

[138] Gen Div, 14 Sep 1995 (with court approval, outside investors invited to loan money to finance litigation, in return for repayment with 20% interest in the event of successful settlement/judgment).

[139] P Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" (1998) 36 *Osgoode Hall LJ* 515, [15]–[17].

[140] (1994), 118 DLR (4th) 238, 19 OR (3d) 610 (Gen Div), aff'd (1995), 26 OR (3d) 95 (CA), leave to appeal to SCC refused: (1996), 29 OR (3d) xv (note).

[141] That newspaper ad, published in April 1994 to recruit investors for the class action, read: "Would you risk $100 on a chance to get back up to $64,500? . . . Sound like a get-rich-quick scam? It's not—it's a class action." As cited and further discussed in: *ManLRC Report*, 24, 81; M Conrod, "Class action suits are no 'get-rich-quick' scheme" (16 Jun 1995) *Lawyers Weekly*, 15.07, and n 142 below.

advanced by non-parties who, in effect, are betting on the outcome of the litigation [is a] debatable subject", the limits of which are yet to be fully defined in the context of class litigation.[142]

3. Transferring the Financial Burden to Class Members

Where the representative plaintiff enjoys a successful outcome in the class action, there are two potential measures by which class members may be required to share the financial burdens which the representative plaintiff undertook to prosecute the action on their behalf. In addition, up-front solicitations have been expressly permitted by some class action statutes in the focus regimes.

(a) Claims for costs reimbursement out of damages awarded

The Australian schema implements a further means of protecting the representative plaintiff in relation to the costs incurred in conducting a class action which closely resembles the US common fund doctrine described previously.[143] As stated, where the representative plaintiff and class have been successful in their action and the court has made an award of damages, the defendant will be liable to pay the representative plaintiff's party and party costs of the action. However, this will usually leave the successful representative plaintiff out-of-pocket, to the extent that the solicitor and client costs incurred by the representative plaintiff exceed the party and party costs which will be recovered from the losing defendant.

Where the court makes an award of damages, Pt IVA specifies that the representative plaintiff can apply for payment of that difference by means of the following provision:

> ***Federal Court Act* (Aust), s 33ZJ(2)**
>
> If . . . the Court is satisfied that the costs reasonably incurred in relation to the [class action] by the person making the application [representative

[142] Respectively: B Bresner, "Recent Developments in Class Action Litigation in Canada" [1998] *Intl J of Ins Law* 187, 193; RB Smith, "Class Actions and Financial Institutions" (1998) 17 *National Banking L Rev* 35, 42. Also: P Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" (1998) 36 *Osgoode Hall LJ* 515, [45]–[51] (recommending (at [54]) that legislation should be implemented permitting investor financed lawsuits, as was done in the area of contingency fees in the Ontario Class Proceedings Act, specifically stating that such agreements are valid).

[143] *Boeing Co v Van Gemert*, 444 US 472, 478, 100 S Ct 745 (1980): "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole . . . The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contribution to court costs are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." Also: JP Dawson, "Lawyers and Involuntary Clients: Attorney Fees from Funds" (1974) 87 *Harvard L Rev* 1597.

> plaintiff] are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person [the representative] out of the damages awarded.

What this effectively means is that, if the court so orders, the class members will be thereby required to contribute to those "excess" (solicitor and client) costs incurred by the representative plaintiff which cannot be recovered from the losing party.[144] The principle to be applied is that contributions towards solicitor and client costs should be permitted to be extracted from class members with whom the solicitor has no contractual arrangement but who have benefited from that legal representation and successful outcome. The most manageable way of doing so is to allow class lawyers to recover an award of reasonable fees out of a fund created by a monetary judgment in the class action. In the interests of fairness to the representative plaintiff who bore the burdens of the litigation and who is contractually obliged to the class lawyer in respect of fees and disbursements, class members should have to contribute to the solicitor and client costs where monetary relief is awarded.[145] A somewhat similar provision, whereby amounts owing to a class lawyer under an enforceable contingency fee agreement between the class lawyer and the representative plaintiff should be a first charge on any monetary award or settlement funds garnered for the class, was recommended by the South Australian Law Reform Committee,[146] and has been enacted by the Ontario[147] and British Columbia[148] legislatures. The effect of these provisions reflects that of the common fund doctrine: it relieves the representative plaintiff from paying the costs incurred in the pursuit of the action by allocating those costs among persons who have benefited from the class suit.

The incorporation of the US common fund doctrine by means of the provision above has received endorsement by the judges who administer Australia's federal class action regime. It has been described as a suitable means for the class lawyers and the representative plaintiff to ensure that "any difference between the costs recovered under the party/party order and the costs reasonably charged by the solicitors in respect of the litigation is met out of recovered damages."[149] It also overcomes the usual stricture that a lawyer retained by the

[144] That is, the provision allows for a successful representative plaintiff to be "fully reimbursed for costs on a solicitor and client basis, with the difference between party and party costs [which the losing defendant pays] and those actually incurred by the representative plaintiff being paid out of the damages recovered on behalf of class members": N Francey, "A Class Act or the Spectre of Class Actions" (1992) 3 *Aust Product Liability Reporter* 52, 54. Also: V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, 237–38.

[145] For this principle in full, see: *ALRC Report*, [289].

[146] See Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 8–9. Also: *VLRAC Report*, [7.9].

[147] CPA (Ont), s 32(3): "Amounts owing under an enforceable agreement [respecting fees and disbursement between a solicitor and a representative party] are a first charge on any settlement funds or monetary award."

[148] CPA (BC), s 38(6).

[149] Noted in *McMullin v ICI Aust Operations Pty Ltd* (FCA, 27 Nov 1997) 4.

representative plaintiff cannot look to members of the class who have not instructed him or her[150] (allowing for the possibility, of course, that the class members will be liable for solicitor and client costs if they have entered an agreement with the representative plaintiff's lawyer[151]). Moreover, as one court explained,[152] the reason for the protective provision arises from the problem of class members who obtain a "free ride".[153] Free riders are those "who obtain the benefit of a lawsuit without contributing to its cost [and] are unjustly enriched at the successful litigant's expense".[154] On point, a provision of this type is clearly supportable on the bases that contribution to the costs only in the event of recovery of damages overcomes the scaring off of class members from participation in the action; and the provisions accord with the "prevailing social notions of user pays";[155] and fully reflects the "notions of fairness that underpin the common fund doctrine".[156]

However, the power of the court to allow a representative party to take reasonably-incurred unrecovered costs out of awarded damages under an express provision like s 33ZJ(2) contains some drawbacks, as has been judicially and academically recognised. First, such an order can only be made in respect of an "award of *damages*" by the court. The provision for costs reimbursement out of a damages award does not address the possibility of absent class members contributing to the costs of the representative party when the class members have recovered damages or compensation from a defendant in a *settlement*.[157] This latter scenario would have to be dealt with via another power, if possible.[158] Secondly, provisions compelling class members to contribute towards the costs of the litigation in successful class actions for damages in no way overcome the disincentives that face a representative plaintiff at the outset of the litigation, or meet the problem of people being deterred from acting as a representative party. The possibility of the proceeding failing and an adverse costs order then being made against the representative plaintiff can never be discounted, in which case,

[150] This problem was articulated in Law Reform Committee of South Australia, *Report Relating to Class Actions* (Rep No 36, 1977) 8.

[151] As noted by *ALRC Report*, [287], but note the OLRC's observation that it would be imprudent to base costs rules on the supposition that enforceable agreements would be entered into by absent class members voluntarily so as to lessen or relieve the representative plaintiff of the costs burden that he or she bears: *OLRC Report*, 710.

[152] *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, [38].

[153] *ALRC Report*, [289], and see *Boeing Co v Van Gemert*, 444 US 472, 478, 100 S Ct 745 (1980).

[154] For excellent discussion of the free rider problem, see: V Morabito, "Federal Class Actions, Contingency Fees and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, 235–39; C Silver, "A Restitutionary Theory of Attorneys' Fees in Class Actions" (1991) 76 *Cornell L Rev* 656; both cited in *Courtney*, *ibid*.

[155] JS Emerson, "Class Actions" (1989) 19 *Victoria U of Wellington L Rev* 183, 207.

[156] V Morabito, "Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States" (2003) 38 *Texas Intl LJ* 663, 712.

[157] *King v AG Aust Holdings Ltd (formerly GIO Aust Holdings Ltd)* (2002) 121 FCR 480, [53].

[158] As Morabito suggests, n 156 above, 711, possibly via FCA (Aus), s 33V(2) (the court can make "such orders as are just with respect to the distribution of any money").

s 33ZJ does not apply.[159] Thirdly, whilst the OLRC considered a common fund provision to be both fair and worthwhile,[160] it was described as a "partial solution" to the question of solicitor and client costs because if the representative plaintiff sought exclusively non-monetary (eg, injunctive or declaratory) relief, there would be no monetary recovery from which the fees and disbursements could be offset, in which case the provision would then be of no assistance.[161] Lastly, adequacy of notice of the potential costs burden upon class members has been considered significant by some Australian cases. In the interests of fairness to class members, class action notices to the class typically contain reference to this potential costs liability on the part of class members.[162]

Thus, while this derivation from the US common fund doctrine which has been expressly enacted within focus class action regimes such as Australia has significant benefits for a representative plaintiff in the event of success in the action, the provision does not, of itself, counter the disincentive of acting as representative under a costs-shifting regime. The risk of an adverse costs order in the event of failure remains as large as ever, regardless of the provision.

(b) Solicitations from class members

The common fund provisions just discussed apply in the event of the class's success. However, if the class loses, a specific and unilateral costs immunity for class members is a feature of all class action regimes of the focus jurisdictions. That immunity is statutorily provided in Australia,[163] Ontario,[164] and British Columbia,[165] and it is judicially stated that, in respect of class suits under FRCP 23, absent class members are not liable for costs of litigation or attorneys' fees in the event of an adverse judgment against the class.[166] This is a recognition of

[159] *Woodlands and Ballard v Permanent Trustee Co Ltd* (1995) 58 FCR 139, [22]. Also: J Donnan, "Class Actions in Securities Fraud in Australia" (2000) 18 *Company and Securities LJ* 82, 90.

[160] See cl 45(1) of the Draft Bill.

[161] *OLRC Report*, 714; V Morabito, "Taxpayers and Class Actions" (1997) 20 *U of New South Wales LJ* 372, 387.

[162] *Courtney v Medtel Pty Ltd* [2001] FCA 1037, notice reproduced in Annexure B: "You will not be liable for [defendant's] legal fees merely by remaining a Group Member. The only qualification is if the Applicant is successful, and the Court awards compensation to Group Members, the Court may make an order that some of that compensation be used to help pay a share of any remainder of the Applicant's legal costs which is not recovered from [the defendants]".

[163] FCA (Aus), ss 33Q, 33R, and s 43(1A) which was introduced by Law and Justice Legislation Amendment Act (No 4) 1992 (Aus), s 3, some 6 months after the enactment of Pt IVA, and of which the following was said in the second reading speech: "[Section 43(1A)] make(s) it clear that a person represented in a representative proceeding . . . cannot be ordered to pay costs except in special circumstances. This amendment reaffirms a long line of judicial authority which was said to be wrong in a recent judgment of the Supreme Court of Victoria [*Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 (CA)] in respect of statutory provisions in that State dealing with the power of that court to award costs. The amendment will remove any doubts that may have been created by that decision for proceedings of this kind": Australia, *Parliamentary Debates*, House of Representatives, 14 Oct 1992, 2157.

[164] CPA (Ont), s 31(2).

[165] CPA (BC), s 37(4).

[166] Articulated clearly, and in the face of a court-approved notice which said the opposite, in *Lamb v United Security Life Co*, 59 FRD 44, 48 (SD Iowa 1973).

the fact that "the effectiveness of class proceedings legislation might be impaired if class members chose to opt out of a proceeding rather than face a potential costs liability."[167]

Of particular importance under the costs-shifting regimes of Ontario and Australia, there are no statutory provisions for members of an unsuccessful class to be ordered by the court to contribute to costs, even where the representative plaintiff is a "person of straw", with insufficient finances to satisfy any costs order made in favour of the successful defendant. As the Ontario Divisional Court has noted, the reality is that class members have little practical opportunity to influence the course adopted by the representative party's lawyers in the conduct of the action, and of course, some may not even be aware that proceedings have been brought on their behalf. For these reasons, "class members face little, if any, exposure to legal costs."[168]

However, in a rather curious provision, the Canadian provincial statutes seek to impose an expectation rather than a liability, by stating as follows:[169]

> ***Class Proceedings Act* (BC), s 19(7)**
>
> With leave of the court, notice [of certification] may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements

Whilst the provision has been judicially recognised in Ontario[170] and solicitations for contributions to costs have been made in at least one proceeding in British Columbia to date,[171] no significant issues have yet arisen in relation to it. It is unlikely to be much utilised because of the disincentive to class member participation which up-front funding would entail. In any event, Morabito observes that the practicalities are that any potential benefit is surely a bit remote at the time that this request for contributions is normally made, at such an early stage of the proceedings.[172] The OLRC did not recommend such a provision, and no similar clause was contained within its Draft Bill. Interestingly, it has very occasionally been permitted in the US that named plaintiffs have sent notices to class members seeking their contributions to the costs of the proceedings,[173]

[167] *ManLRC Report*, 76.

[168] *Abdool v Anaheim Management Ltd* (1995), 121 DLR (4th) 496, 21 OR (3d) 453 (Div Ct) [47].

[169] Also: CPA (Ont), s 17(7).

[170] *Smith v Canadian Tire Acceptance Ltd* (1995), 22 OR (3d) 433 (Gen Div) [37].

[171] See reference in *ManLRC Report*, 80, although the case is not nominated by the Commission.

[172] V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, 236, with reference to contributions from class members generally.

[173] See, eg, *Norris v Colonial Commercial Corp*, 77 FRD 672, 673 (SD Ohio 1977) ("the Court is aware of the dearth of authority on the question of post-certification contribution solicitation, but if a balance is to be struck, it would seem better policy to permit rather than deny fund solicitation from members of the class").

but even in that jurisdiction, the practice has been judicially disavowed[174] and academically criticised.[175] In the absence of any sanction on class members for non-compliance with the call for solicitations, the utility of such a provision as a means of costs-spreading is extremely doubtful.

(c) Compensation to the representative plaintiff

Whether the representative plaintiff should be entitled to compensation for the time and effort expended in relation to the action is, as with so many costs issues, the subject of competing arguments. Under FRCP, Newberg notes that "the propriety of 'incentive' awards to representative plaintiffs has also been rigorously debated."[176] These contrary arguments have been repeated in other focus jurisdictions, both academically[177] and judicially,[178] and are reproduced and/or summarised below:

On the one hand, class proceedings may involve a very considerable expenditure of time and effort by the representative plaintiff on behalf of a wider group which latter will benefit from the former's efforts if the action is successful. Moreover, the very purpose of a class actions procedure could be frustrated if representative plaintiffs are, in effect, left out of pocket at the end of the day.

If such compensation were permitted, however, absent class members would have to accept less than full restitution in return for their "free ride", as a defendant, if liable, cannot ordinarily be ordered to pay more than full damages (plus costs, under a costs-shifting regime). Where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is undoubtedly an appearance of a conflict of interest between the representative plaintiff and the class members. This view holds that a class action should not be viewed as a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. Additionally, no class action statute of the focus jurisdictions makes any reference to compensation for the representative plaintiff (when it would have been easy enough to provide for it), perhaps indicating that the legislatures did not support additional compensation for the representative plaintiff.

[174] Eg: *Fauteck v Montgomery Ward & Co Inc*, 91 FRD 393, 396 (ND Ill 1980) ("The court finds that it is necessary to prohibit the proposed solicitation of funds at this time in order to properly discharge this responsibility [of properly conducting the proceeding before it]").

[175] NT Bowen, "Restrictions on Communication by Class Action Parties and Attorneys" [1980] *Duke LJ* 360, 361.

[176] *Newberg* (4th) § 11.38 p 81.

[177] Eg: FG Hawke, "Class Actions: The Negative View" (1998) 6 *Torts LJ* 68, 69; *Newberg*, *ibid*.

[178] They are well stated, eg, in *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) [24]–[29]; *Tesluk v Boots Pharmaceutical plc* (2002), 21 CPC (5th) 196 (SCJ) [18]–[22].

The practice among the focus jurisdictions is varied. No additional compensation to a representative plaintiff appears to have been judicially authorised to date under the Australian federal regime, and such award has been academically noted to lack appeal.[179] In contrast, in the United States, some courts have been prepared to make "incentive awards" to the class representative which have the dual function of encouraging class actions and compensating representative plaintiffs for their effort and for having assumed risks during the course of the litigation.[180] Commentary has suggested, however, that such awards, whilst justifiable, should be the exception rather than the rule, and should only be made when the court supervising the action finds "unusual factors", for example, that the representative plaintiff "made an unusual contribution to the case (eg, particular expertise or extraordinary time commitments), or that it was unlikely that other plaintiffs would have brought or continued the class action, or undergone unusual personal risk."[181] Some US courts, nonetheless, have not been prepared to make compensatory awards where requested. This has ostensibly been based on the potentially undesirable effect of a representative plaintiff expecting a "bounty" in order to create a class action, or in the words of one District Court, "[i]f class representatives expect routinely to receive special awards in addition to their share of the recovery, the representative may be tempted to accept sub-optimal settlements at the expense of the class members whose interests they are appointed to guard."[182] One statute has put the matter beyond doubt: payments to class representatives are now not permitted for US securities class actions:

> ***Private Securities Litigation Reform Act of 1995*, 15 USCA § 87u-4(a)(2)(A)(vi)**
>
> The class representative cannot accept any payment for serving as a representative party beyond his or her pro rata share of the settlement or final judgment.

Modest compensatory awards to representative plaintiffs have been made in Ontario, although also with the caveat that they must be awarded sparingly,

[179] FG Hawke, "Class Actions: The Negative View" (1998) 6 *Torts LJ* 68, 69. Also: K Fowlie, "Identifying Class Actions" in P Cashman *et al*, *Class Actions* (Sydney, Legal and Accounting Management Seminars Pty Ltd, 1998) 15 ("there is no additional compensation for an Applicant for agreeing to be a representative").

[180] *Petrovic v Amoco Oil Co*, 200 F 3d 1140, 1152 (8th Cir 1999) (approval of incentive payment to class representative); *In re Catfish Antitrust Litigat*, 939 F Supp 493, 503–4 (ND Miss 1996) (not unusual to make incentive awards to class representatives); *Smith v Tower Loan of Mississippi Inc*, 216 FRD 338, 368 (SD Miss 2003) (payments to class representative would have no significant effect on individual amounts distributable to other class members); *In re SmithKline Beckham Corp Securities Litig*, 751 F Supp 525, 535 (Ed Pa 1990).

[181] Association of the Bar of the City of New York, "Financial Arrangements in Class Actions, and the Code of Professional Responsibility" (1993) 20 *Fordham Urban LJ* 831, 842–44. See also: JS Solovy, "The Head of The Class" (1990) 12 (51) *National LJ* 13; *Newberg* (4th) §11.38.

[182] Respectively: *In re Gould Securities Litig*, 727 F Supp 1201, 1209 (ND Ill 1989); *Weseley v Spear, Leeds & Kellogg*, 711 F Supp 713, 720 (ED NY 1989).

and only where the representative "can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class".[183] This statement has been construed strictly. Whilst recovery for out-of-pocket expenses has since been permitted,[184] it is plain that if the work of the representative plaintiff was unnecessary to the preparation or presentation of the case (eg, only commenced after a settlement had been structured) and did not result in any monetary success for the class (eg, an entire settlement being in the form of a cy-pres distribution), then any request for compensation will be denied.[185]

In summary, the class members may be liable to share in the representative plaintiff's costs by recovery of those costs out of the damages awarded to the class, or where the class members answer a call for solicitation of funds in the certification notice, or where the representative plaintiff is awarded a compensatory fee for work undertaken on behalf of the class. All three mechanisms have been variously implemented across the focus jurisdictions as possible means of shifting the representative's financial burden to the class members, although otherwise, the class members enjoy costs immunity.

4. Transferring the Financial Burden to the Class Lawyers

Two measures have been variously employed by which to shift the financial burden to the class lawyers engaged in the litigation. The first is by means of contingency fees, and in this section, the specific statutory enactments on that topic in the class action regimes of Canada will be particularly discussed. The second, and far rarer, scenario is where the court considers that, in all the circumstances, the conduct of the class lawyers has been contumelious, and that an award against those lawyers personally is appropriate.

(a) Contingency fee agreements

In the context of class suits, contingency agreements are a mechanism for shifting the financial risks inherent in the failure of the action from the class representative to the class lawyer. The phrase "contingency fee" can cover a range of possible fee-paying structures, and may adopt a variety of forms, "but the one

[183] *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) [28] (representative plaintiff awarded $4,000; devoted "an unusual amount of time and effort to communicating with other class members, acting as a liaison with the solicitors, and assisting the solicitors at all stages of the proceeding").

[184] *Fraser v Falconbridge Ltd* (2002), 24 CPC (5th) 396 (SCJ) [17].

[185] *Tesluk v Boots Pharmaceutical plc* (2002), 21 CPC (5th) 196 (SCJ) [22] (representative plaintiffs established lay advisory panel to provide input for, and themselves contributed to the soliciting and evaluating of, worthwhile research areas for cy-pres distribution; "to compensate them for their work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of a Cy-pres distribution in particular and to a class proceeding generally").

element common to all of them is that the client only becomes liable to pay the lawyer's fees in the event of success in the litigation."[186] The more common types are described in Table 12.2.

Table 12.2 ***Types of contingency fees***

Type	Nutshell description
Speculative fee	the lawyer is paid a standard fee if the class wins, and is paid no fees if the class loses
Base/multiplier (or lodestar) fee[187]	the lawyer is paid an uplift fee (calculated by means of: the number of hours reasonably spent on the basis of time sheets recorded by the lawyers, multiplied by a reasonable hourly rate of compensation, multiplied by a factor that identifies the risk that the case involved, say, between 1 and 5) if the class wins, and is paid no fees if the class loses
Uplift fee	the lawyer is paid, in addition to his usual fee, an agreed flat amount or percentage uplift of the usual fee or of the party and party costs recovered, if successful, and is paid no fees if the class loses
Percentage of recovery fee	the lawyer is paid a set % of the quantum of damages recovered by the class if the class wins, and is paid no fees if the class loses
Sliding percentage of recovery fee	the lawyer is paid a % of the quantum of damages recovered by the class, but on a scale varying according to when the proceedings are resolved (eg, 20% of recovery if settlement reached within certain period, 25% if settled prior to trial, 30% if matter proceeds to hearing)

Contingency fees are permitted throughout the focus jurisdictions, but their form and application to class proceedings differ widely.

United States. In the United States, the contingent fee agreement has been long established, both judicially[188] and by professional association endorsement, and its use is widespread in individual monetary actions. However, the

[186] Canada: *McIntyre Estate v Ontario (A-G)* (2002), 218 DLR (4th) 193, 61 OR (3d) 257 (CA) [1], (quote). Australia: Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation—Contingency Fees* (1991) [2.3] ("defining characteristic . . . is that the client pays the lawyer only if the lawyer obtains the result sought"). US: HM Kritzer, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", (1998) 47 *DePaul L Rev* 267, 267 and fn ("the contingency fee is one of the defining characteristics of civil litigation in the United States. . . . While a number of countries have some form of contingency fee . . . [w]hat sets the American contingency fee apart from contingency arrangements in most other countries is that it is based on a percentage of recovery"); T Rowe, "Shift Happens: Pressure on Foreign Attorney Fee Paradigms from Class Actions" (2003) 13 *Duke J of Comp and Intl Law* 125, fn 17 ("Because of the prominence of the American contingent fee based on a percentage of the recovery, it may often be assumed that the term 'contingent fee' refers to such a contingent percentage fee. But the element of contingency comes from the no-win, no-pay feature and is independent of the means by which the amount of the fee is determined"). The table is derived from the various fee descriptions contained in this literature.

[187] This type of contingency fee is variously called the "base-fee/multiplier" and the "lodestar/multiplier".

[188] *Wylie v Coxe*, 56 US 415 (1853); *American Bar Association Code of Ethics* (1908), cited in *OLRC Report*, 722 n 343.

OLRC commented[189] that contingent fees are not common in US class actions; rather, the equitable common fund exception to the American Rule is singularly important. As Newberg notes,[190] the "economic reality of class litigation [in that jurisdiction] depends on the contingent prospect that counsel will create a substantial common fund recovery for the benefit of the class, from which counsel is entitled to receive reasonable fee compensation" as determined by the court. The two methods alternatively used to calculate attorney's fees from the common fund are the percentage of recovery method and the lodestar/multiplier method.[191] Of these alternatives, the Sixth Circuit has noted:

> The lodestar method better accounts for the amount of work done, while the percentage of the fund method more accurately reflects the results achieved. For these reasons, it is necessary that district courts be permitted to select the more appropriate method for calculating attorney's fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them.[192]

Although there is a huge amount of jurisprudence on both methods of fee calculation, a few points are pertinent for present purposes. Although it has been judicially stated that "no general rule could be articulated as to what is a reasonable percentage of a common fund",[193] according to Sherman and others, common fee awards fall typically within the range of 20 to 33 per cent, with 50 per cent generally representing the upper limit on a reasonable fee award from a common fund.[194] It has also been noted[195] that, while the percentage-of-recovery method of calculating fees was the most common approach in the United States until 1973, the Third Circuit introduced the "lodestar/multiplier" approach[196] in reaction to a perception that percentage fees sometimes resulted in large fee awards. The court envisaged that the lodestar could be increased or decreased in accordance with a number of factors, and these were subsequently

[189] *OLRC Report*, 666.

[190] *Newberg* (4th) § 14.6 p 570. See also: *Rand Institute Report*, 77–79.

[191] The "lodestar" is intended to reflect "the contingent nature or risk in the particular case involved and the quality of the attorney's work": Third Circuit Task Force, "Court Awarded Attorney Fees" (1985) 108 FRD 237, 243.

[192] *Rawlings v Prudential-Bache Properties Inc*, 9 F 3d 513, 516 (6th Cir 1993).

[193] *In re Combustion Inc*, 968 F Supp 1116, 1132 (WD La 1997), noting also that the Ninth Circuit has adopted a benchmark of 25% in percentage of fund cases and adjusts this figure upward where the particular circumstances are extraordinary, or downward where, for example, recovery is a certainty: *Paul, Johnson, Alston and Hunt v Graulty*, 886 F 2d 268, 273 (9th Cir 1989).

[194] Federal Judicial Center, *Manual for Complex Litigation* (3rd edn, St Paul, Minn, West Publishing, 1995) § 24.121, 187–91 (1995); *In re Activision Sec Litig*, 723 F Supp 1373, 1378 (ND Cal 1989) (stating that "absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%"); *Newberg* (4th) §14.6 p 550; EF Sherman, "Export/Import: American Civil Justice in a Global Context" (2002) 52 *DePaul L Rev* 401, fn 36.

[195] *Swedish Hosp Corp v Shalala*, 1 F 3d 1261, 1265–66 (DC Cir 1993).

[196] *Lindy Bros Builders Inc of Philadelphia v American Radiator & Standard Sanitary Corp*, 487 F 2d 161 (3rd Cir Pa 1973).[197] 488 F 2d 714, 717–19 (5th Cir 1974), cited and summarised in *Swedish Hosp Corp v Shalala*, 1 F 3d 1261, 1266–67 (DC Cir 1993). Other factors, such as the class counsel's continuing obligation to the class, have subsequently also been cited as relevant: *Wing v Asarco Inc*, 114 F 3d 986, 989 (9th Cir 1997).

articulated as 12 factors by the Fifth Circuit in *Johnson v Georgia Highway Exp Inc*:[197]

> The 12 factors were: 1. Time and labour involved; 2. Novelty and difficulty of the questions involved; 3. Skill requisite to perform the legal services properly; 4. Preclusion of other employment by the attorney due to acceptance of the case; 5. Customary fee charged; 6. Whether fee is fixed or contingent; 7. Time limitations imposed by client or other circumstance; 8. Amount involved and results obtained; 9. Experience, reputation and ability of the attorneys; 10. Undesirability of the case; 11. Nature and length of professional relationship with the client; 12. Awards in similar cases.

Multipliers in the range of one to four are commonly awarded in common fund cases when the lodestar approach is used.[198] Nevertheless, the lodestar method has not been entirely endorsed, with significant support for the "percentage of the fund" method.[199]

As a further interesting observation upon the US fee recovery calculations, it has been judicially urged that multiple methods of fee calculation should be employed to double check one another, and that fee award to class counsel should be in line with that in comparable class actions.[200] Newberg explains that both empirical studies[201] and judicial observations[202] confirm that, regardless of which method is used, fee awards in class actions in the US average about 30 per cent of the amount of common fund recovery. There is no doubt that large fee awards have occurred in the US,[203] but as shall be seen shortly, that is by no means a characteristic of that jurisdiction alone.

British Columbia. This US jurisprudence has had some impact in British Columbia (both positive and negative) regarding remuneration for class action lawyers. Percentage contingency fees were permitted in the province[204] before class proceedings legislation was enacted. Hence, the class action legislation

[198] According to *Newberg* (4th) § 14.6 p 578.

[199] See, eg: *In re Thirteen Appeals Arising out of the San Juan Du Pont Plaza Hotel Fire Litig*, 56 F 3d 295, 304–8 (lst Cir 1995). The lodestar method has been described as a "cumbersome, enervating and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar": *Court Awarded Attorney Fees, Report of the Third Circuit Task Force* (1986) 108 FRD 237, 255, and further: that the method consumed enormous judicial resources by requiring courts to review lawyers' billing information, gave no little incentive to settle early, and "rewarded plodding mediocrity and penalized expedient success".

[200] *In re Cendant Corp Prides Litig*, 243 F 3d 722, 742 (3d Cir 2001); *Gunter v Ridgewood Energy Corp*, 223 F 3d 190, 195 fn 1 (3d Cir 2000); *In re Prudential*, 148 F 3d 283, 333 (3d Cir 1998).

[201] *Newberg* (4th) § 14.6 p 551, who cites (at 557) FC Dunbar *et al*, *National Economic Research Associates, Recent Trends III: What Explains Settlements in Shareholder Class Actions* (June 1995); and FE Goodrich and RW Silber, "Common Funds and Common Fund Problems: Fee Objections and Class Counsel's Response" (1998) 17 *The Review of Litigation* 525.

[202] Eg: *In re Activision Securities Litig*, 723 F Supp 1373, 1375 (ND Cal 1989) ("What is curious is that whatever method is used and no matter what billing records are submitted to the regime, the result is an award that almost always hovers around 30% of the fund created by the settlement").

[203] *In re Combustion Inc*, 968 F Supp 1116 (WD La 1997) (36% of $127 million); *In re Lease Oil Antitrust Litig (No II)*, 186 FRD 403 (SD Tex 1999) (25% of $190 million), and see further: *Newberg*, *ibid*, p 551, fn 13.

[204] Barristers and Solicitors Act, RSBC 1979, c 26, s 99.

makes no specific provision for contingency fees. However, use of the base-fee/multiplier approach as a method of assessing the contingency fees of plaintiffs' class counsel was judicially rejected in that jurisdiction in *Endean v Canadian Red Cross Society*.[205] The British Columbia Supreme Court called the method "undesirable and unnecessary" on two bases: first, it was mindful of the problems encountered with the lodestar approach in the United States[206] which dictated against its use in British Columbia; and secondly, there was no statutory basis in British Columbia for a multiplier approach.[207] Consequently, the Supreme Court declared that its role should be restricted to serving in appropriate circumstances as a tool for testing the court's initial assessment, and no more. For any percentage contingent fee agreement with the representative plaintiff, a fairly wide range of percentages has been judicially permitted.

Again, British Columbia courts[208] have referred to class counsel fees in the United States as a yardstick. In that jurisdiction, the reasonable rate of 30 per cent is presumed, being adjusted according to special circumstances. Similarly, they have approved a range of class lawyers' recoveries from 10 per cent to 33 per cent.[209] Although the factors to which a court must have regard when exercising its discretion in relation to the approval of a fee agreement are not stipulated, both statutory[210] and common law of general application in respect of

[205] (2000), 78 BCLR (3d) 28 (SC) [19].

[206] The Court particularly cited (at [16]) the *Report of the Third Circuit Task Force* (1986) 108 FRD 237, 255, and the several criticisms of the lodestar approach articulated therein: (1) increases the workload of an already overtaxed judicial system; (2) insufficiently objective and results are far from homogeneous; (3) process creates a sense of mathematical precision that is unwarranted; (4) process subject to manipulation by judges who prefer to calibrate fees in terms of percentages; (5) although designed to curb abuses, has led to other abuses, such as encouraging lawyers to expend excessive hours and inflate their normal billing rates; (6) creates a disincentive for the early settlement of cases; (7) does not provide court with enough flexibility to reward or deter lawyers so as to foster desirable objectives, such as early settlement; (8) process disadvantages the public interest bar because the lodestar is set lower in civil rights cases than in securities and antitrust cases; and (9) considerable confusion and lack of predictability remain in its administration.

[207] At the time, the Barristers and Solicitors Act, s 99(5), provided in part that while "champertous contracts are prohibited . . . the taking of a fee based on a proportion of the amount recovered is not, in itself, champertous within the meaning of this subsection." See now: Legal Profession Act, RSBC 1998, c 9, ss 65–67.

[208] Eg: *Knudsen (Guardian ad Litem of) v Consolidated Food Brands Inc* [2001] BCSC 1837, [39].

[209] See the summary provided in *Knudsen*, *ibid*, [39], in which 20% was approved. Also, see judicial approval of each of the following: *Campbell v Flexwatt Corp* (BC SC, 22 Feb 1996) (graduated contingency fee agreement stipulated a fee ranging from 10% to 33% of recovery, depending on time of settlement or judgment); *Harrington v Dow Corning Corp* (1999), 64 BCLR (3d) 332 (SC) (15% approved on a $40M settlement); *Sawatzky v Société Chirurgicale Instrumentarium Inc* (BC SC [in Chambers], 8 Sep 1999) (20% approved); *Fischer v Delgratia Mining Corp* (BC SC [in Chambers], 7 Dec 1999) (30% approved).

[210] Eg: Legal Profession Act, RSBC 1998, c 9, s 71(4) (a)–(h), which requires a consideration of: (a) the complexity, difficulty or novelty of the issues involved, (b) the skill, specialised knowledge and responsibility required of the lawyer, (c) the lawyer's character and standing in the profession, (d) the amount involved, (e) the time reasonably spent, (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable, (g) the importance of the matter to the client whose bill is being reviewed, and (h) the result obtained.

lawyers' fees must apply.[211] In the context of class proceedings, the relevant matters which the court will consider in order to determine whether a fee agreement is fair and reasonable have been judicially articulated[212] to closely resemble the *Johnson* list of factors. Large fee awards in British Columbia class actions have occurred, and ostensibly, one of the most significant relevant factors in these awards is the risk of no or little recovery for counsel.[213]

Ontario. The position in Ontario was complicated by the fact that contingency fees in that province were, unless otherwise provided, prohibited.[214] The Ontario class actions statute therefore expressly provides that a lawyer and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success of a class action.[215] The statute is unique amongst the focus jurisdictions in expressly providing, in the context of class actions, that the contingency fee may be increased by a multiplier, in a manner that is consistent with the US lodestar approach.

***Class Proceedings Act* (Ont), s 33**

33(3) "base fee" means the result of multiplying the total number of hours worked by an hourly rate; . . . "multiplier" means a multiple to be applied to a base fee. . . .

33(4) . . . the solicitor [may apply] to the court to have his or her fees increased by a multiplier. . . .

33(7) . . . the court (a) shall determine the amount of the solicitor's base fee; (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success;

[211] Noted in *Endean v Canadian Red Cross Soc* (2000), 78 BCLR (3d) 28 (BC SC) [8].

[212] See, for discussion and application to the facts: *Harrington v Dow Corning Corp* (1999), 64 BCLR (3d) 332 (SC) [18]; *Sawatzky v Société Chirurgicale Instrumentarium Inc* (BC SC [in Chambers], 8 Sep 1999) [8]; *Fischer v Delgratia Mining Corp* (BC SC [in Chambers], 7 Dec 1999) [22]; *Endean*, *ibid*, [39]; *Knudsen (Guardian ad Litem of) v Consolidated Food Brands Inc* [2001] BCSC 1837, [38].

[213] *Audet (Guardian ad litem of) v Bates* (1998), 18 CPC (4th) 357 (BC SC). In *Endean*, *ibid*, a class action on behalf of Canadians infected with the Hepatitis C virus by the Canadian blood supply, Smith J described the risk of no recovery at all as substantial: at [58]. Also: *Sun-Rype Products Ltd v Archer Daniels Midland Co* (2002), 17 CPC (5th) 178 (BC SC [in Chambers]) [17]–[19]; *Parsons v Canadian Red Cross Soc* (2000), 49 OR (3d) 281 (SCJ) (victims of Canada's Hep C contaminated blood case struggled for almost 3 years without legal representation because no law firm would take their case; one reason for multi-million award of fees to successful class counsel, $15M for the former transfusion action and $5M in the latter haemophiliac action), aff'd: (2001), 11 CPC (5th) 16 (CA) (23 Jan 2001), leave to appeal refused: 153 OAC 199 (note) (SCC) (30 Aug 2001).

[214] Solicitors Act, RSO 1990, c S 15, s 28 and An Act Respecting Champerty, SO 1897, c 327, ss 1, 2.

[215] CPA (Ont), s 33(1).

33(8) In making a determination under (7)(a), the court shall allow only a reasonable fee.

33(9) In making a determination under (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

Despite the reservations about multiplier contingent fees in the province of British Columbia, this fee structure has been endorsed by Ontario courts. It has been variously said that the lodestar approach "gives the lawyer the necessary economic incentive to take the case in the first place and to do it well";[216] that the statute "makes a clear break with the past in authorizing contingency arrangements";[217] and that "the policy goal [of access to justice] is facilitated by applying an appropriate multiplier where class counsel is prepared to proceed subject to a contingency agreement".[218] Under the Ontario base/multiplier fee, there are two stages prescribed by the class action legislation. First, the court must determine the amount of the solicitor's base fee, which involves the usual factors in determining the reasonableness of solicitors' fees.[219] Secondly, the court may apply the multiplier, which requires (in addition to the statutory matters articulated above) that the court consider, amongst other things, the percentage of the gross recovery that would be represented by the multiplied base fee—if the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high.[220] In figures reflective of US lodestar analysis, Ontario decisions indicate that a multiplier of between 1.5 and 3.5 is customarily appropriate.[221] It has been suggested that a multiplier of three to four would be the highest end of the range, awarded "in the most deserving

[216] *Gagne v Silcorp Ltd* (1998), 167 DLR (4th) 325, 41 OR (3d) 417 (CA) [14].

[217] *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) [20].

[218] *Smith v Krones Machinery Co* (2000), 42 CPC (4th) 292 (SCJ) [14].

[219] See factors listed and applied in general civil litigation in: *Cohen v Kealey & Blaney* (1985), 26 CPC (2d) 211 (CA), and in the context of class actions, see: *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) [8] where Sharpe J outlined the usual factors to be considered: (a) the time expended by the solicitor; (b) the legal complexity of the matters to be dealt with; (c) the degree of responsibility assumed by the solicitor; (d) the monetary value of the matters in issue; (e) the importance of the matter to the client; (f) the degree of skill and competence demonstrated by the solicitor; (g) the results achieved; (h) the ability of the client to pay; (i) the client's expectation as to the amount of the fee. Cited with approval in *Smith*, *ibid*, [7]; *Bisignano v Corporation Instrumentarium Inc* (1999), 47 CPC (4th) 63 (SCJ) [7].

[220] *Gagne v Silcorp Ltd* (1998), 167 DLR (4th) 325, 41 OR (3d) 417(CA) [26]. Also see: *Serwaczek v Medical Engineering Corp* (1996), 3 CPC (4th) 386 (Gen Div) [36]; *Smith v Krones Machinery Co* (2000), 42 CPC (4th) 292 (SCJ) [13].

[221] *Gagne*, *ibid* (multiplier of 2); *Windisman v Toronto College Park Ltd* (1996), 3 CPC (4th) 369 (Gen Div) (multiplier of 2.5; risk of continuing action increased significantly at each step by virtue of strenuous defence mounted by defendant); *Burleton v Royal Trust Corp of Canada* (2003), 34 CPC (5th) 182 (SCJ) (multiplier of 2.4, "having due regard to the substantial risk undertaken by counsel, the exemplary and extensive efforts made to keep potential class members informed and the favourable results achieved": [73]); *Fraser v Falconbridge Ltd* (2002), 24 CPC (5th) 396 (SCJ) (multiplier of 1.5); *Tesluk v Boots Pharmaceutical plc* (2002), 21 CPC (5th) 196 (SCJ) (multiplier of 1.97; "at the low end of the range that has received judicial sanction": [17]); *Directright Cartage Ltd v London Life Ins Co* (2001), 17 CPC (5th) 185 (SCJ) (multiplier of approx 3.4); *Smith v Krones Machinery Co* (2000), 42 CPC (4th) 292 (SCJ) (multiplier of 2.9); *Bisignano v Corporation Instrumentarium Inc* (1999), 47 CPC (4th) 63 (SCJ) (multiplier of 2.86).

case",[222] and that the rate would be lower where the risk involved in accepting the retainer was lower and class lawyers faced little risk that the action would fail.[223] The fact that there has, to date, been no keenly battled and drawn-out class action in common law Canada—that is, "one fought bitterly through all stages (certification, discovery, common issues trial, individual assessments and ultimate appeals)"—has prompted one commentator[224] to wonder what an appropriate multiplier would be, when some cases have already been awarded at the upper end of the multiplier scale.

Due to the fact that the Ontario statute makes no reference to permitting contingency fees based on a percentage-of-recovery but specifically refers to another form of contingency agreement, it had been understandably and generally assumed by academic commentary[225] earlier in the life of the statute (and in line with the OLRC's recommendations[226]) that such contingency fees were not permitted in class actions in Ontario. However, that proved to be incorrect. Percentage contingent fee agreements were permitted in 1996,[227] and have since been judicially endorsed on the basis that they promote efficiency in the litigation and discourage unnecessary work that might otherwise be done by the lawyer simply in order to increase the base fee.[228] Also in line with US case law, recoveries of up to 30 per cent have been approved in Ontario.[229]

Australia. As noted previously, although the ALRC recommended the introduction of an uplift contingency fee for class proceedings conducted under Australia's federal regime,[230] which was to be governed by provisions within the proposed

[222] *Gagne*, *ibid*, [26].

[223] *Maxwell v MLG Ventures Ltd* (1996), 30 OR (3d) 304 (Gen Div) [20] (multiplier of 1.5; although class solicitors achieved successful result for clients, court considered result largely attributable to result in another action which had settled first).

[224] L Barnes, "Litigation—Class Actions: Recent Developments of Importance"(2001) *Canadian Legal Lexpert Directory*, LEX/2001-36.

[225] Eg: M Boodman, "The Malaise of Mass Torts" (1994) 20 *Queen's LJ* 213, 232; A Borrell and W Branch, "Power in Numbers: BC's Proposed Class Proceedings Act" (1995) 53 *Advocate* 515, 521; HP Glenn, "Class Proceedings Act, 1992, SO 1992, c 6—Law Society Amendment Act (Class Proceedings Funding), 1992" (1993) 72 *Canadian Bar Rev* 568, 571; M Evans, "Products Liability in Ontario" (1998) 8 *Windsor Rev of Legal and Social Issues* 113, 135; P Iacono, "Class Actions and Products Liability in Ontario: What Will Happen?" (1992) 3 *Canadian Insurance L Rev* 99, 103; L Friedlander, "Costs and the Public Interest Litigant" (1995) 40 *McGill LJ* 55.

[226] *OLRC Report*, 715.

[227] *Nantais v Telectronics Pty (Canada) Ltd* (1996), 134 DLR (4th) 470, 28 OR (3d) 523 (Gen Div) [10]–[12], leave to appeal denied: (1996), 28 OR (3d) 523n (CA) (the multiplier method referred to in s 33(4) is simply one method authorised by the use of the word "otherwise" in s 32(1)(c)).

[228] *Crown Bay Hotel Ltd Partnership v Zurich Indemnity Co of Canada* (1998), 160 DLR (4th) 186, 40 OR (3d) 83 (Gen Div) [11].

[229] *Nantais* (1996), 134 DLR (4th) 470, 28 OR (3d) 523 (Gen Div) (30% yielded a fee of approx $6M); *Pelletier v Baxter Health Care Co* (SCJ, 9 Jul 1999) (16.9% yielding $3,648,000 in fees); *Crown Bay*, *ibid* (20% of the amount of settlement).

[230] The ALRC proposed that the court be authorised to approve fee agreements, which could include an uplift fee (but not a percentage contingent fee), in advance of the conclusion of the proceeding: *ALRC Report*, [296]–[297].

statute,[231] this proposal was not enacted. The legislative decision was driven, ironically, partly because of concerns about American class lawsuits,[232] which concerns continue to be voiced in the context of class actions in Australia.[233] Nevertheless, contingency fees in some form are still widely employed. Lawyers in all Australian jurisdictions are judicially permitted to charge clients on a speculative fee basis.[234] In addition, some Australian states[235] have authorized the use of "uplift" fees, which may also be used in the context of Pt IVA proceedings. In the class actions context, it has been held[236] that any argument that the class lawyers had a "financial interest" in the litigation amounting to some improper purpose such as maintenance will not succeed. Of course, where an uplift fee is agreed, the class lawyers *will* have "an interest in the outcome. But the fact that they are not to be paid at all if the proceeding fails is a quid pro quo of their right to receive the . . . uplift factor if they succeed." It has been judicially accepted that, in the context of Pt IVA proceedings, this kind of arrangement is permitted "in order to facilitate the bringing of claims that might otherwise not be brought at all."[237] All the while, the ALRC has continued to push for the acceptance of contingency fees in the financing of class action suits.[238]

[231] See cl 33 of the Draft Bill.

[232] Australia, *Parliamentary Debates*, Senate, 13 Nov 1991, 3025 (Senator Tate): "we have set our face firmly against some features of the American legal system, such as contingency fees, which appear, from my observations over there recently, to drive the American legal system rather than the merits of the issues themselves". Ironically, it is the common fund doctrine rather than the operation of contingency fee agreements which substantially governs class lawyers' remuneration under US class action suits.

[233] Eg, in *Williams v FAI Home Security Pty Ltd (No 3)* [2000] FCA 1438, [15], the court ordered that the defendants issue a correction notice about its incorrect statement that the class lawyers "utilise the American system of engaging clients on a contingency fee basis; that is, they share a percentage of the judgment" because, as the applicants submitted, that statement was "calculated to evoke the repugnancy to American contingency fee litigation which is widespread in Australia". As Spender notes, this "apparent opprobrium which surrounds contingency fees in Australia" is of greater interest in many respects than the fact that some Australian states simply will not allow them at all: P Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) 31 *Common Law World Rev* 123, 143.

[234] *Clyne v Bar Assn of NSW* (1960) 104 CLR 186 (HCA) 203 (two provisos apply: that the lawyer believes client has reasonable cause of action/defence, and does not bargain with client for interest in subject matter of litigation). Also: *Re Sheehan* (1990) 97 FLR 190, 205; Spender, *ibid*, 142–43; V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash U L Rev* 231, Pt III.

[235] Eg: Legal Profession Act 1987 (NSW), ss 186, 187(2), (3), (4); Legal Practice Act 1996 (Vic), s 98; Legal Practitioners Act 1981 (SA), s 42 and Rules of Professional Conduct and Practice 2003(SA), r 42; and Barristers' Rules (Qld), r 102A(d). Contingency fee arrangements are, however, prohibited in family and criminal law cases. Tasmania prohibits the charging of uplift fees by barristers: Rules of Practice 1994 (Tas), r 92(1). In the Northern Territory and Western Australia, uplift fee agreements may amount to champerty at common law. In respect of the latter, see, for recent discussion: *Clairs Keeley (a firm) v Treacy* [2003] WASCA 299, [172]–[174].

[236] *Cook v Pasminco Ltd (No 2)* (2000) 107 FCR 44, [53].

[237] *Ibid*, [54]. The use of an uplift fee was also discussed with approval by Goldberg J in *Williams v FAI Home Security Pty Ltd (No 3)* [2000] FCA 1438, [13].

[238] ALRC, *Managing Justice* (Rep No 89, 1999) [7.119] ff.

Judicial approval. A further point of significance within the statutes of the class proceedings regimes of British Columbia and Ontario is that *any* fee agreement (hence, whether a contingency fee agreement or not) between the class lawyer and representative plaintiff must be in writing,[239] and further, must be approved by the court:[240]

> ***Class Proceedings Act*** **(BC), s 38(2):**
>
> An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the [application] of the solicitor.

This provision is of particular comparative interest. The stipulated requirement of judicial approval of fees payable to class lawyers in the Canadian regimes mirrors the practice in US class action litigation, under which reasonable fees and expenses from a common fund are determined by the court in the particular case. In that jurisdiction, class lawyers "are not authorised to bill the class directly for their services, but must petition the court for an award of fees reasonable under the circumstances and in light of the monetary benefit created for the class."[241] In addition to the provision reproduced above, a further expressly included safeguard in both Canadian provinces is that the (court-approved) certification notice to be distributed to the class members must summarise any agreements respecting fees and disbursements payable under an agreement between the representative plaintiff and the class lawyers.[242] The two justifications which have been cited for judicial scrutiny of fee agreements in the class action context are, first, "to protect other class members who may be bound by the terms of a retainer agreement that they did not negotiate", and secondly, "to ensure that legal fees are not disproportionate to the services provided."[243]

This judicial involvement in the approval of fees stands in stark contrast to the Australian procedure. Despite the ALRC's recommendation that any agreement concerning the remuneration to be paid to a legal practitioner be approved by the court,[244] and that any application for approval of a fee agreement be preceded by notice to class members,[245] Australia's federal schema in Pt IVA, as enacted, does not deal with fee agreements that may be entered into between

[239] CPA (BC), s 38(1); CPA (Ont), s 32(1).

[240] Also: CPA (Ont), s 32(2).

[241] *Newberg* (4th) §14.2. p 512, and also: *Mills v Electric Auto-Lite Co*, 396 US 375, 392, 90 S Ct 616 (1970), cited, and practice evident, in, eg: *Boeing Co v Van Gemert*, 444 US 472, 478, 100 S Ct 745 (1980).

[242] CPA (BC), s 19(6)(e); CPA (Ont), s 17(6)(d).

[243] Eg: *Mura v Archer Daniels Midland Co* (2003), 18 BCLR (4th) 194 (SC) [3]. The court reiterated that, while it may be difficult to estimate the prospective fee as required by CPA (BC), s 38(1)(b), nevertheless an estimate must be given in the unique circumstances of class proceedings.

[244] See *ALRC Report*, [293], and cl 33(1) of the Draft Bill.

[245] See cl 18(2) of the Draft Bill.

solicitors and representative parties or class members. Judicially, it has been noted in Australia that the issue of fee agreements can not be said to be directly, or indirectly, regulated by Pt IVA.[246] Therefore, the court approval and involvement in fee agreements which is manifest within the other focus jurisdictions, and which provides a conspicuous safeguard to class members, and which was explicitly recommended by the ALRC, are absent under Pt IVA.

This leads to a rather unsatisfactory state of affairs for three reasons. First, it is ironic that, in one of the highest profile class actions cases to date under Australia's federal regime,[247] it was the *defendant* rather than the detrimentally-affected absent class members who sought the court's review of fee arrangements and procedures between the class lawyers and their clients. As one commentator has wryly observed,[248] it seems a rather odd scenario when the class members have to rely upon the defendant for protection in fee matters. Automatic court scrutiny of fee agreements seems by far the preferable alternative. Secondly, Pt IVA contains the equivalent US common fund doctrine, whereby, in the event of success, the class members are required to contribute to the representative's solicitor and client costs by virtue of s 33ZJ(2) previously discussed. Surely it follows that one purpose of judicial approval of a fee agreement would be to regulate the liability of the class members to contribute to those solicitor and client costs in the event that the class eventually wins. This reasoning motivated the ALRC's recommendation that notice of approval of the fee agreement be given to class members to enable any members to object before it was approved.[249] However, in the absence of that requisite judicial involvement, the degree of regulation with respect to an order under s 33ZJ anticipated by the ALRC is missing. Lastly, it is plain that the ALRC continues to be uncomfortable about the lack of requisite judicial scrutiny of fee agreements under Pt IVA. Whilst again recommending that express provisions should be enacted enabling the court to approve fee agreements between the representative party and/or class members with the representative party's lawyer, it foreshadowed

[246] Noted in *Johnson Tiles Pty Ltd v Esso Aust Ltd* (1999) 94 FCR 167, [15].

[247] *Ibid* (defendant claimed representative plaintiff's solicitors entering into uplift fee agreements with class members, and that class members should be so informed in class notice; court sought and obtained assurance that class members would not incur such costs liability; court approved opt-out notice, which did not contain statement concerning any potential costs liability class members may incur; notwithstanding assurance, retainer provided class members liable for uplift fee of 25%, without prior court approval). Cf: *King v GIO Aust Holdings Ltd* [2001] FCA 270 (Full FCA) [11] (court satisfied that it would be unduly complicated if the opt out notice were to address such issues as the class lawyers' charge-out rates and a 25% uplift in the fee agreement). As Dunn notes, *Johnson Tiles* does not appear to mean that an agreement for uplift fees is improper in class actions, but that notification to clients of any additional fee obligations is crucial: I Dunn, "Ethical Issues in Class Actions" [Dec 2001] *Plaintiff* 14, 18.

[248] See: V Morabito, "Contingency Fees in Federal Class Actions" (2000) 74 *Law Institute J* 86, 89, and that author's comment that "any regulatory scheme which relies on class members to ensure, without judicial intervention, that the fee agreements drafted by the lawyers acting on behalf of the class do not prejudice the interests of some or all of the class members is fundamentally flawed": at 89.

[249] *ALRC Report*, [293].

that the issue should be addressed in a review of Pt IVA.[250] The problem is that no such review has been instituted by the Federal Government, and the issue languishes unresolved on the face of the statute.

In summary, the Australian position stands in marked contrast to the caution that was exhibited by the Canadian legislatures and which is judicially invoked under FRCP 23 class actions. Judicial approval of the fee agreements between class lawyers and class representatives, with notification to the class members of the content of the proposed fee agreement, should be mandatory under any class action regime. The Australian legislature's failure to provide for this, in addition to the omission of contingency fees and a class actions fund, represents one of the numerous ways in which the legislature failed to adopt important recommendations of its law reform commission in respect of costs and fees.

(b) Costs orders against the class lawyers

If a class proceeding is struck out as incompetent, or if there is other conduct by the representative plaintiff's lawyers which attracts the disapproval of the court, it is conceivable for the court to order that the defendant's costs be paid by those class lawyers personally, and not by the representative plaintiff.[251] Although rarely ordered,[252] the threat of lawyers being personally liable for costs is a significant disincentive in the context of costly class actions. Indeed, the role of the lawyer in class litigation can be polarised to the same extent as many of the more substantive arguments troubling class action jurisprudence. For example, some Australian judges have expressed their view of lawyers' conduct under Pt IVA with negative connotations, describing their embarking upon "increasingly competitive entrepreneurial activities . . . in which, in a practical sense, the lawyers are often as much the litigants as the plaintiffs themselves, and with the same or even a greater stake in the outcome as any member of the group".[253] Others, however, have reiterated that lawyers "remain free to undertake risky litigation, whether of a class action kind or otherwise".[254] The latter sentiment does provide some reassurance to those charged with the conduct of these difficult and complex actions.

[250] ALRC, *Managing Justice* (Rep No 89, 1999) [7.126], and recommendation 80.

[251] Noted in obiter in *Giuliano v Allstate Insurance Co* (2003), 66 OR (3d) 238 (SCJ) [22] (no evidence of any conduct to warrant such an order in this case).

[252] See, in Australia, eg: *Cook v Pasminco Ltd (No 2)* (2000) 107 FCR 44, [65] (representative plaintiff's lawyers ordered to pay defendant's costs on an indemnity basis; court held that lawyers did not give proper consideration to the question whether the federal claim had any prospect of success). Also noted to be possible in Ontario but "in only the most unusual and extreme of cases" in: G McKee, "Class Actions in Canada" (1997) 8 *Aust Product Liability Reporter* 84, 89.

[253] *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1 (HCA) [183] (Callinan J).

[254] *Cook v Pasminco Ltd (No 2)* (2000) 107 FCR 44, summary prepared by Lindgren J, last paragraph.

Appendix
Relevant Legislation

AUSTRALIA

Federal Court of Australia Act 1976, Pt IVA

Division 1—Preliminary

33A Interpretation

In this Part, unless the contrary intention appears:

group member means a member of a group of persons on whose behalf a representative proceeding has been commenced.
representative party means a person who commences a representative proceeding.
representative proceeding means a proceeding commenced under section 33C.
respondent means a person against whom relief is sought in a representative proceeding.
sub-group member means a person included in a sub-group established under section 33Q.
sub-group representative party means a person appointed to be a sub-group representative party under section 33Q.

33B Application

A proceeding may only be brought under this Part in respect of a cause of action arising after the commencement of the *Federal Court of Australia Amendment Act 1991*.

Division 2—Commencement of representative proceeding

33C Commencement of proceeding

(1) Subject to this Part, where:
  (a) 7 or more persons have claims against the same person; and
  (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
  (c) the claims of all those persons give rise to a substantial common issue of law or fact;

  a proceeding may be commenced by one or more of those persons as representing some or all of them.

(2) A representative proceeding may be commenced:
  (a) whether or not the relief sought:
    (i) is, or includes, equitable relief; or
    (ii) consists of, or includes, damages; or
    (iii) includes claims for damages that would require individual assessment; or
    (iv) is the same for each person represented; and

(b) whether or not the proceeding:
  (i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or
  (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

33D Standing

(1) A person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph.
(2) Where a person has commenced a representative proceeding, the person retains a sufficient interest:
  (a) to continue that proceeding; and
  (b) to bring an appeal from a judgment in that proceeding;
  even though the person ceases to have a claim against the respondent.

33E Is consent required to be a group member?

(1) The consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person.
(2) None of the following persons is a group member in a representative proceeding unless the person gives written consent to being so:
  (a) the Commonwealth, a State or a Territory;
  (b) a Minister or a Minister of a State or Territory;
  (c) a body corporate established for a public purpose by a law of the Commonwealth, of a State or of a Territory, other than an incorporated company or association; or
  (d) an officer of the Commonwealth, of a State or of a Territory, in his or her capacity as such an officer.

33F Persons under disability

(1) It is not necessary for a person under disability to have a next friend or committee merely in order to be a group member.
(2) A group member who is under disability may only take a step in the representative proceeding, or conduct part of the proceeding, by his or her next friend or committee, as the case requires.

33G Representative proceeding not to be commenced in certain circumstances

A representative proceeding may not be commenced if the proceeding would be concerned only with claims in respect of which the Court has jurisdiction solely by virtue of the *Jurisdiction of Courts (Cross-vesting) Act 1987* or a corresponding law of a State or Territory.

33H Originating process

(1) An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required to be included:

(a) describe or otherwise identify the group members to whom the proceeding relates; and

(b) specify the nature of the claims made on behalf of the group members and the relief claimed; and

(c) specify the questions of law or fact common to the claims of the group members.

(2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

33J Right of group member to opt out

(1) The Court must fix a date before which a group member may opt out of a representative proceeding.

(2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.

(3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.

(4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

33K Causes of action accruing after commencement of representative proceeding

(1) The Court may at any stage of a representative proceeding, on application made by the representative party, give leave to amend the application commencing the representative proceeding so as to alter the description of the group.

(2) The description of the group may be altered so as to include a person:

(a) whose cause of action accrued after the commencement of the representative proceeding but before such date as the Court fixes when giving leave; and

(b) who would have been included in the group, or, with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceeding.

(3) The date mentioned in paragraph (2)(a) may be the date on which leave is given or another date before or after that date.

(4) Where the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceeding.

33L Situation where fewer than 7 group members

If, at any stage of a representative proceeding, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) as it thinks fit:

(a) order that the proceeding continue under this Part; or

(b) order that the proceeding no longer continue under this Part.

33M Cost of distributing money etc. excessive

Where:

(a) the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs); and

(b) on application by the respondent, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts;

the Court may, by order:

(c) direct that the proceeding no longer continue under this Part; or

(d) stay the proceeding so far as it relates to relief of the kind mentioned in paragraph (a).

33N Order that proceeding not continue as representative proceeding where costs excessive etc.

(1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:

(a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or

(b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or

(c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

(2) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the respondent except with the leave of the Court.

(3) Leave for the purposes of subsection (2) may be granted subject to such conditions as to costs as the Court considers just.

33P Consequences of order that proceeding not continue under this Part

Where the Court makes an order under section 33L, 33M or 33N that a proceeding no longer continue under this Part:

(a) the proceeding may be continued as a proceeding by the representative party on his or her own behalf against the respondent; and

(b) on the application of a person who was a group member for the purposes of the proceeding, the Court may order that the person be joined as an applicant in the proceeding.

33Q Determination of issues where not all issues are common

(1) If it appears to the Court that determination of the issue or issues common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining issues.

(2) In the case of issues common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.

(3) Where the Court appoints a person other than the representative party to be a sub-group representative party, that person, and not the representative party, is liable for costs associated with the determination of the issue or issues common to the sub-group members.

33R Individual issues

(1) In giving directions under section 33Q, the Court may permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member.
(2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the issue.

33S Directions relating to commencement of further proceedings

Where an issue cannot properly or conveniently be dealt with under section 33Q or 33R, the Court may:

(a) if the issue concerns only the claim of a particular member—give directions relating to the commencement and conduct of a separate proceeding by that member; or
(b) if the issue is common to the claims of all members of a sub-group—give directions relating to the commencement and conduct of a representative proceeding in relation to the claims of those members.

33T Adequacy of representation

(1) If, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such other orders as it thinks fit.
(2) If, on an application by a sub-group member, it appears to the Court that a sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

33U Stay of execution in certain circumstances

Where a respondent in a representative proceeding commences a proceeding in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceeding until the other proceeding is determined.

33V Settlement and discontinuance—representative proceeding

(1) A representative proceeding may not be settled or discontinued without the approval of the Court.
(2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

33W Settlement of individual claim of representative party

(1) A representative party may, with leave of the Court, settle his or her individual claim in whole or in part at any stage of the representative proceeding.

(2) A representative party who is seeking leave to settle, or who has settled, his or her individual claim may, with leave of the Court, withdraw as representative party.
(3) Where a person has sought leave to withdraw as representative party under subsection (2), the Court may, on the application of a group member, make an order for the substitution of another group member as representative party and may make such other orders as it thinks fit.
(4) Before granting a person leave to withdraw as a representative party:
  (a) the Court must be satisfied that notice of the application has been given to group members in accordance with subsection 33X(1) and in sufficient time for them to apply to have another person substituted as the representative party; and
  (b) any application for the substitution of another group member as a representative party has been determined.
(5) The Court may grant leave to a person to withdraw as representative party subject to such conditions as to costs as the Court considers just.

Division 3—Notices

33X Notice to be given of certain matters

(1) Notice must be given to group members of the following matters in relation to a representative proceeding:
  (a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under subsection 33J(1);
  (b) an application by the respondent in the proceeding for the dismissal of the proceeding on the ground of want of prosecution;
  (c) an application by a representative party seeking leave to withdraw under section 33W as representative party.
(2) The Court may dispense with compliance with any or all of the requirements of subsection (1) where the relief sought in a proceeding does not include any claim for damages.
(3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceeding is founded.
(4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 33V must not be determined unless notice has been given to group members.
(5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.
(6) Notice under this section must be given as soon as practicable after the happening of the event to which the notice relates.

33Y Notices—ancillary provisions

(1) This section is concerned with notices under section 33X.
(2) The form and content of a notice must be as approved by the Court.
(3) The Court must, by order, specify:
  (a) who is to give the notice; and
  (b) the way in which the notice is to be given;
  and the order may include provision:

(c) directing a party to provide information relevant to the giving of the notice; and
(d) relating to the costs of notice.

(4) An order under subsection (3) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.

(5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.

(6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.

(7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.

(8) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in a proceeding.

Division 4—Judgment etc.

33Z Judgment—powers of the Court

(1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:
(a) determine an issue of law;
(b) determine an issue of fact;
(c) make a declaration of liability;
(d) grant any equitable relief;
(e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
(f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
(g) make such other order as the Court thinks just.

(2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

(3) Subject to section 33V, the Court is not to make an award of damages under paragraph (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.

(4) Where the Court has made an order for the award of damages, the Court may give such directions (if any) as it thinks just in relation to:
(a) the manner in which a group member is to establish his or her entitlement to share in the damages; and
(b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

33ZA Constitution etc. of fund

(1) Without limiting the operation of subsection 33Z(2), in making provision for the distribution of money to group members, the Court may provide for:
(a) the constitution and administration of a fund consisting of the money to be distributed; and
(b) either:

(i) the payment by the respondent of a fixed sum of money into the fund; or
(ii) the payment by the respondent into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members; and

(c) entitlements to interest earned on the money in the fund.

(2) The costs of administering a fund are to be borne by the fund, or by the respondent in the representative proceeding, as the Court directs.

(3) Where the Court orders the constitution of a fund mentioned in subsection (1), the order must:
(a) require notice to be given to group members in such manner as is specified in the order; and
(b) specify the manner in which a group member is to make a claim for payment out of the fund and establish his or her entitlement to the payment; and
(c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund; and
(d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

(4) The Court may allow a group member to make a claim after the day fixed under paragraph (3)(c) if:
(a) the fund has not already been fully distributed; and
(b) it is just to do so.

(5) On application by the respondent in the representative proceeding after the day fixed under paragraph (3)(d), the Court may make such orders as are just for the payment from the fund to the respondent of the money remaining in the fund.

33ZB Effect of judgment

A judgment given in a representative proceeding:
(a) must describe or otherwise identify the group members who will be affected by it; and
(b) binds all such persons other than any person who has opted out of the proceeding under section 33J.

Division 5—Appeals

33ZC Appeals to the Court

(1) The following appeals under Division 2 of Part III from a judgment of the Court in a representative proceeding may themselves be brought as representative proceedings:
(a) an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to issues common to the claims of group members;
(b) an appeal by a sub-group representative party on behalf of sub-group members in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members.

(2) The parties to an appeal referred to in paragraph (1)(a) are the representative party, as the representative of the group members, and the respondent.

(3) The parties to an appeal referred to in paragraph (1)(b) are the sub-group representative party, as the representative of the sub-group members, and the respondent.

(4) On an appeal by the respondent in a representative proceeding, other than an appeal referred to in subsection (5), the parties to the appeal are:
   (a) in the case of an appeal in respect of the judgment generally—the respondent and the representative party as the representative of the group members; and
   (b) in the case of an appeal in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members—the respondent and the sub-group representative party as the representative of the sub-group members.

(5) The parties to an appeal in respect of the determination of an issue that relates only to a claim of an individual group member are that group member and the respondent.

(6) If the representative party or the sub-group representative party does not bring an appeal within the time provided for instituting appeals, another member of the group or sub-group may, within a further 21 days, bring an appeal as representing the group members or sub-group members, as the case may be.

(7) Where an appeal is brought from a judgment of the Court in a representative proceeding, the Court may direct that notice of the appeal be given to such person or persons, and in such manner, as the Court thinks appropriate.

(8) Section 33J does not apply to an appeal proceeding.

(9) The notice instituting an appeal in relation to issues that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

33ZD Appeals to the High Court—extended operation of sections 33ZC and 33ZF

(1) Sections 33ZC and 33ZF apply in relation to appeals to the High Court from judgments of the Court in representative proceedings in the same way as they apply to appeals to the Court from such judgments.

(2) Nothing in subsection (1) limits the operation of section 33 whether in relation to appeals from judgments of the Court in representative proceedings or otherwise.

Division 6—Miscellaneous

33ZE Suspension of limitation periods

(1) Upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.

(2) The limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.

33ZF General power of Court to make orders

(1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

(2) Subsection (1) does not limit the operation of section 22.

33ZG Saving of rights, powers etc.

Except as otherwise provided by this Part, nothing in this Part affects:

(a) the commencement or continuance of any action of a representative character commenced otherwise than under this Part; or

(b) the Court's powers under provisions other than this Part, for example, its powers in relation to a proceeding in which no reasonable cause of action is disclosed or that is oppressive, vexatious, frivolous or an abuse of the process of the Court; or

(c) the operation of any law relating to:

(i) vexatious litigants (however described); or

(ii) proceedings of a representative character; or

(iii) joinder of parties; or

(iv) consolidation of proceedings; or

(v) security for costs.

33ZH Special provision relating to claims under Part VI of the *Trade Practices Act 1974*

(1) For the purposes of subsection 87(1) of the *Trade Practices Act 1974*, a group member in a representative proceeding is to be taken to be a party to the proceeding.

(2) An application under subsection 87(1A) of the *Trade Practices Act 1974* by a representative party in a representative proceeding is to be taken to be an application by the representative party and all the group members.

33ZJ Reimbursement of representative party's costs

(1) Where the Court has made an award of damages in a representative proceeding, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.

(3) On an application under this section, the Court may also make any other order it thinks just.

ONTARIO

Class Proceedings Act, 1992, SO 1992, c 6

Definitions

1. In this Act,

"common issues" means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ("questions communes")

"court" means the Ontario Court (General Division) but does not include the Small Claims Court; ("tribunal")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur")

Plaintiff's class proceeding

2.(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.

(3) A motion under subsection (2) shall be made,

(a) within ninety days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court.

Defendant's class proceeding

3. 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.

Classing defendants

4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

Certification

5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(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,

(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.

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

Certain matters not bar to 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.

Refusal to certify: proceeding may continue in altered form

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate. 1992, c. 6, s. 7.

Contents of certification order

8.(1) An order certifying a proceeding as a class proceeding shall,

(a) describe the class;

(b) state the names of the representative parties;

(c) state the nature of the claims or defences asserted on behalf of the class;

(d) state the relief sought by or from the class;

(e) set out the common issues for the class; and

(f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass.

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding.

Opting out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order. 1992, c. 6, s. 9.

Where it appears conditions for certification not satisfied

10.(1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c).

Stages of class proceedings

11.(1) Subject to section 12, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Court may determine conduct of proceeding

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.

Court may stay any other proceeding

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

Participation of class members

14.(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

Discovery

15.(1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding.

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members.

(3) In deciding whether to grant leave to discover other class members, the court shall consider,
  (a) the stage 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.
(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery.

Examination of class members before a motion or application

16.(1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court.
(2) Subsection 15(3) applies with necessary modifications to a decision whether to grant leave under subsection (1).

Notice of certification

17.(1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.
(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.
(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,
  (a) the cost of giving notice;
  (b) the nature of the relief sought;
  (c) the size of the individual claims of the class members;
  (d) the number of class members;
  (e) the places of residence of class members; and
  (f) any other relevant matter.
(4) The court may order that notice be given,
  (a) personally or by mail;
  (b) by posting, advertising, publishing or leafleting;
  (c) by individual notice to a sample group within the class; or
  (d) by any means or combination of means that the court considers appropriate.
(5) The court may order that notice be given to different class members by different means.
(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 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.

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

Notice where individual participation is required

18.(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

(3) Notice under this section shall,
(a) state that common issues have been determined in favour of the class;
(b) state that class members may be entitled to individual relief;
(c) describe the steps to be taken to establish an individual claim;
(d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
(e) give an address to which class members may direct inquiries about the proceeding; and
(f) give any other information that the court considers appropriate.

Notice to protect interests of affected persons

19.(1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

Approval of notice by the court

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given.

Delivery of notice

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.

Costs of notice

22.(1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

Statistical evidence

23.(1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

(a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;

(b) complied with subsections (4) and (5); and

(c) complied with any requirement to produce documents under subsection (7).

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

(a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

(a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

Aggregate assessment of monetary relief

24.(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis.

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given.

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

Individual issues

25.(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner.

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,
  (a) dispense with any procedural step that it considers unnecessary; and
  (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.
(4) The court shall set a reasonable time within which individual class members may make claims under this section.
(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.
(6) Subsection 24(9) applies with necessary modifications to a decision whether to give leave under subsection (5).
(7) A determination under clause (1) (c) is deemed to be an order of the court.

Judgment distribution

26.(1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.
(2) In giving directions under subsection (1), the court may order that,
  (a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;
  (b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and
  (c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.
(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.
(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.
(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.
(6) The court may make an order under subsection (4) even if the order would benefit,
  (a) persons who are not class members; or
  (b) persons who may otherwise receive monetary relief as a result of the class proceeding.
(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

(8) The court may order that an award made under section 24 or 25 be paid,
  (a) in a lump sum, forthwith or within a time set by the court; or
  (b) in instalments, on such terms as the court considers appropriate.
(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.
(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

Judgment on common issues

27.(1) A judgment on common issues of a class or subclass shall,
  (a) set out the common issues;
  (b) name or describe the class or subclass members;
  (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
  (d) specify the relief granted.
(2) A judgment on common issues of a class or subclass does not bind,
  (a) a person who has opted out of the class proceeding; or
  (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).
(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,
  (a) are set out in the certification order;
  (b) relate to claims or defences described in the certification order; and
  (c) relate to relief sought by or from the class or subclass as stated in the certification order.

Limitations

28.(1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,
  (a) the member opts out of the class proceeding;
  (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
  (c) a decertification order is made under section 10;
  (d) the class proceeding is dismissed without an adjudication on the merits;
  (e) the class proceeding is abandoned or discontinued with the approval of the court; or
  (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

Discontinuance, abandonment and settlement

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

(2) A settlement of a class proceeding is not binding unless approved by the court.

(3) A settlement of a class proceeding that is approved by the court binds all class members.

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds.

Appeals

30.(1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Ontario Court (General Division) as provided in the rules of court.

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

(4) a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection.

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding more than $3,000 to the member.

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than $3,000 to the member.

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than $3,000 to the member.

(9) With leave of the Ontario Court (General Division) as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding $3,000 or less to the member; or

(b) dismissing an individual claim made by the member for monetary relief.

(10) With leave of the Ontario Court (General Division) as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,
   (a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or
   (b) dismissing an individual claim made by a class member for monetary relief.

(11) With leave of the Ontario Court (General Division) as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,
   (a) determining an individual claim made by a class member and awarding $3,000 or less to the member; or
   (b) dismissing an individual claim made by a class member for monetary relief.

Costs

31.(1) In exercising its discretion with respect to costs under subsection 131 (1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

Fees and disbursements

32.(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
   (a) state the terms under which fees and disbursements shall be paid;
   (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
   (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(4) If an agreement is not approved by the court, the court may,
   (a) determine the amount owing to the solicitor in respect of fees and disbursements;
   (b) direct a reference under the rules of court to determine the amount owing; or
   (c) direct that the amount owing be determined in any other manner.

Agreements for payment only in the event of success

33.(1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, 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.

(2) For the purpose of subsection (1), success in a class proceeding includes,
  (a) a judgment on common issues in favour of some or all class members; and
  (b) a settlement that benefits one or more class members.
(3) For the purposes of subsections (4) to (7),
  "base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")
  "multiplier" means a multiple to be applied to a base fee. ("multiplicateur")
(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.
(5) A motion under subsection (4) shall be heard by a judge who has,
  (a) given judgment on common issues in favour of some or all class members; or
  (b) approved a settlement that benefits any class member.
(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.
(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,
  (a) shall determine the amount of the solicitor's base fee;
  (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
  (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.
(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.
(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

Motions

34.(1) The same judge shall hear all motions before the trial of the common issues.
(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.
(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues.

Rules of court

35. The rules of court apply to class proceedings.

Crown bound

36. This Act binds the Crown.

Application of Act

37. This Act does not apply to,
  (a) a proceeding that may be brought in a representative capacity under another Act;
  (b) a proceeding required by law to be brought in a representative capacity; and
  (c) a proceeding commenced before this Act comes into force.

38. Omitted (provides for coming into force of provisions of this Act).
39. Omitted (enacts short title of this Act).

UNITED STATES

Federal Rules of Civil Procedure, Rule 23

(a) Prerequisites to a Class Action

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

• the nature of the action,

• the definition of the class certified,

• the class claims, issues, or defenses,

• that a class member may enter an appearance through counsel if the member so desires,

• that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the [representative] parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise

(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel

(1) *Appointing Class Counsel.*

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider: • the work counsel has done in identifying or investigating potential claims in the action, • counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, • counsel's knowledge of the applicable law, and • the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and (iv) may make further orders in connection with the appointment.

(2) *Appointment Procedure.*

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award

In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) *Motion for Award of Attorney Fees*. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) *Objections to Motion*. A class member, or a party from whom payment is sought, may object to the motion.

(3) *Hearings and Findings*. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) *Reference to Special Master or Magistrate Judge*. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

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