Consumer Class Actions in Canada: Some Proposals for Reform

Neil J. Williams
Osgoode Hall Law School of York University

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj

Citation Information

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
CONSUMER CLASS ACTIONS IN CANADA
—SOME PROPOSALS FOR REFORM

NEIL J. WILLIAMS*

This article examines the procedural device known as the class action and assesses the prospects of utilizing the action to secure redress for Canadian consumers injured by business misconduct.¹ It reaches the conclusion that though the procedure can achieve this result in a few cases, the action is burdened by restrictions that have prevented the development of its full potential. The courts are largely responsible for this situation as they have tended to strictly interpret the language of the Practice Rule that governs the class action and hence have confined the operation of the procedure within rather narrow limits. Moreover, it is felt that the courts will not take a more liberal view of the Rule in the foreseeable future. The article argues that easier access to class relief would give Canadian consumers better protection against market misconduct than is provided by existing court procedures and concludes by setting out proposals for change to the class action remedy that are designed to broaden its scope.

* Professor of Law, Osgoode Hall Law School, York University.

¹ The article is based on a report prepared by the writer for the Consumers' Association of Canada in 1974, and funded partly by the Laidlaw Foundation. The draft legislation and annotations at the end of the article are identical to what appeared in the report, except that the proposed legislation now includes a provision for the fluid recovery assessment and distribution of a damages award, and minor changes have been made to some incidental features of the class action procedure proposed in the draft. In revising the draft legislation, the writer is indebted to Professor Richard F. Dole, Jr., of the University of Iowa, College of Law, for his valuable comments and suggestions. The text which precedes the legislation has been re-written, though with the exception of fluid recovery the views expressed and conclusions reached are essentially the same.
A class action² brings together for a single determination the claims of a number of persons against the same defendant that arise from a common nucleus of fact. Without the class action, the claims would have to be adjudicated on individually, probably in separate proceedings.³ The class action procedure can thus achieve significant economies in expense and in time and effort for the courts and the parties, and also avoid the embarrassment that inconsistent findings in separate proceedings could cause.⁴ For consumer groups, the appeal of the class action lies in the mass determination of numerous claims that otherwise would not be adjudicated on at all. In many situations involving consumers, separate actions will in fact not be brought for the reason that proof is too difficult or the amount involved not large enough to justify the expense and effort of suing. Consumers who have sustained loss and damage from wrongdoing in the supply of goods and services will therefore be left without compensation while the manufacturer or distributor responsible retains the improperly acquired profits. A class action can prevent this result because one consumer is able to recover for all the damages that each consumer would receive if he sued independently.

Consumer interest in the class action has grown considerably in this country in recent years, and attention has focused on the United States where a new class action provision was introduced for Federal courts in 1966.⁵

²The terms class action and representative action are used interchangeably in the article.

³The alternatives to a class action are separate actions by individual claimants, a single action brought by all claimants as co-plaintiffs, and a test action which, by agreement, will be accepted by the parties as determining the outcome of all other actions against the defendant. See further, infra, text at Cl.

⁴Duke of Bedford v. Ellis, [1901] A.C. 1 at 14, per Lord Shand. "The object of requiring all persons interested to be joined in the action is to prevent another action where the same issues will be raised: the intention is, that all having identically the same interest shall be bound in one action and one judgment" (May v. Wheaton (1917), 41 O.L.R. 369 at 371, per Riddell, J.)

⁵Canadian writing on class actions is not extensive. The leading articles on the procedure generally are D. Sherbaniuk, Actions By and Against Trade Unions in Contract and Tort (1958), 12 U. of T. L.J. 151; J. Kazanjian, Class Actions in Canada (1973), 11 Osgoode Hall L.J. 397. The following articles deal with consumer class actions: M. Treblecock, Private Law Remedies for Misleading Advertising (1972), 22 U. of T. L.J. 1; G. McFadyen, Consumer Class Actions (1973), 4 Queen's L.J. 50.

This produced class action litigation notable for both its variety and volume. The new procedure improved the effectiveness of the class action in enforcing securities, anti-trust and civil rights legislation and brought class relief for the first time into areas affecting consumers generally. Class actions have now been successfully launched to obtain relief for consumers in situations as diverse as the violation of truth-in-lending legislation, rate overcharging by public utility and telephone companies, fraudulent sales to consumers, and sales following misleading advertising and other deceptive trade practices. These developments, however, have not been matched in Canada, though the types of business conduct at which the United States procedure has been directed are no less prevalent in this country. Canadian consumer groups, faced with court rulings that have kept the class action within fairly narrow bounds, have been encouraged by the United States' achievement to press for the introduction of similar procedures. But the enthusiasm of consumers is by no means universal, and the opposition to an expanded class action procedure by the Canadian business community is equally as spirited.6

The class action has won the attention of citizen groups who in the face of government and business power are searching for a countervailing instrument to secure a better response to their needs. What attracts them in the procedure is the bringing together of a multitude of separate claims for a single determination. A class action can demonstrate the truth of the adage that unity is strength. No matter how just the claim, it is the exceptional person who will embark on litigation against an intransigent business corporation or government agency, particularly if the individual stake is only small. However, a vindication of rights becomes a realizable prospect when the citizen sues not just for himself but also for hundreds and possibly thousands of others in an identical position.7 The aggregation of numerous separate claims effected by a class action will give the plaintiff a psychological lift that the party to ordinary litigation will rarely experience. Though the plaintiff cannot ordinarily expect any financial backing from the class, he

---

6 The objections of business were set out in an article by Mr. Anthony C. Abbott, President of the Retail Council of Canada, in the Toronto Globe and Mail, September 11, 1972. They can be summarized as follows: United States experience shows that consumer class actions are slow and cumbersome due largely to the problem of giving adequate notice to the class; the action would place a heavy burden on Canadian courts and add unduly to their present congestion; the procedure is unnecessary as most consumer frauds are committed, not by legitimate business, but by fly-by-night or marginal operators who would not fear the consequences of a class action since they are generally judgment-proof; class actions would normally be brought against legitimate enterprises which could be forced to defend against exorbitant claims often involving insignificant or isolated violations; class actions often prevent the settlement of consumer claims because the lawyer for the class has more to gain if the action is tried on the merits. Some, though certainly not all, class action suits in the United States have bordered on the frivolous, yet nonetheless they have become a source of considerable expense and harassment to the defendant", Toronto Globe & Mail, January 15, 1975, quoting the Canadian Advertising Advisory Board.

7 "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" (Eisen v. Carlisle & Jacquelin (1974), 94 S. Ct. 2140, per Douglas J.).
will certainly have their moral support and encouragement, something that will perhaps help sustain him for the struggle ahead. The combination of separate claims is not without significance for defendants also. But for a class action there might be no litigation at all since no individual would risk suing himself. More important, however, the class action presents a far greater threat to a defendant — in terms of both the adverse publicity the action will generate and the magnitude of the potential liability — than any separate action could pose. The action can hardly be ignored, and if the claim has merit the defendant will need to seriously consider making an effort to reach a compromise.

The changed conception of the role of the class action that has followed its emergence from the relative obscurity of the eighteenth and nineteenth century courts of equity has been clouded at times by misunderstandings as to the objectives the device can be expected to achieve and the threat the danger allegedly poses to those against whom it might be employed. The contemporary class action has proved to be a highly controversial phenomenon in the consumer context. However, the opposing viewpoints are often overstated, the expectations of protagonists for the procedure being matched in extravagance by the disasters prophesied by its critics. This situation results largely from ignorance as to the nature of the class action and of the larger litigation process in which the action operates.

The mistake of many enthusiasts for the class action concept is to expect too much of the remedy. The belief is that given a sufficiently large number of aggrieved individuals, the mere invocation of the procedure will secure relief for all. This perception of the class action function stems from a failure to appreciate that the action is essentially a procedural device which brings together a number of individual claims that otherwise would be triable separately. A class action cannot succeed if the separate claims are not soundly based in fact or in law. If an individual has no remedy under the substantive law it does not help to draw on a class action mantle and sue also on behalf of others in the same situation; the multiplication by a hundred or even a thousandfold does not fortify an individual claim that lacks foundation. The substantive law, whether in legislation or common law, is thus the point from which consumers must launch the struggle to improve their situation. First subject business to legally enforceable standards for consumer protection; then the class action becomes an instrument for securing mass relief for all who are injured when a business enterprise fails to conform to those standards.

Both supporters and opponents of the class action share another misconception concerning the procedure. In relating United States experience to Canadian conditions they overlook several differences in the procedural systems of the two countries that have important consequences for class actions, and hence they do not appreciate that Canadian developments will never exactly follow United States practice. For example, there is no counterpart in Canadian jurisdictions of the United States' constitutional guarantee of due process. This affects notice to members of the class. Canadian courts are not obliged to ensure that the class members who can be identified be sent notice of the proceedings. By contrast, in the United States, the need
to give extensive notice in order to comply with due process requirements has at times been a stumbling block to effective class litigation.

Again, Canadian courts apply procedural rules, particularly as to the costs of litigation, that are not found in the United States. The distinctive Canadian costs rules can deter class actions, especially when the sums claimed are small, while costs do not appear to be so great an obstacle in the United States. In most United States jurisdictions the plaintiff will not have to pay the defendant's costs if the action is defeated. Also, the plaintiff's lawyer will usually be remunerated on a contingency basis, receiving nothing if his client loses and an agreed percentage of the award if he wins. Thus, in the United States it is the plaintiff's lawyer rather than the plaintiff himself who is at risk as regards the litigation costs. The total potential recovery in the typical United States class action is usually quite large, and critics of the procedure cite the contingent fee arrangement to support the charge that class action litigation is often lawyer-instigated, the purpose being to earn substantial fees for the lawyer rather than to get compensation for class members. Whatever the truth of the allegation in the United States, there is far less danger of the procedure being abused in this fashion in Canadian jurisdictions because in most provinces lawyers are prohibited from acting for a contingent fee of the United States variety.

The existing class action procedure in Canada has been demonstrated to be wide enough to enable members of the public in certain circumstances to check the abuse of power by government agencies which purport to act under lawful authority. However, the courts have denied the procedure any further reach. This restriction would largely disappear if the draft statute which concludes this article were enacted. A broader procedure would encompass, for example, the claims of groups of consumers that arise from the

---

8 As to the costs immunity, see Fleischmann Distilling Corp. v. Maier Brewing Co. (1967), 386 U.S. 714 at 714-19; A. Homburger, State Class Actions and the Federal Rule (1971), 71 Colum. L. Rev. 609 at 647.

Ethical Consideration 5-7 of the Code of Professional Responsibility of the American Bar Association provides as follows: "The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. ... A lawyer...should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client." Ethical Consideration 2-20 provides that contingent fee arrangements "in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of a claim produces a res out of which the fee can be paid." See further, A. Homburger, Private Suits in the Public Interest in the United States of America (1974), 23 Buf. L. Rev. 343 at 373-5.


purchase from a single supplier of goods that fail to conform to the conditions and warranties implied by *The Sale of Goods Act*¹¹ or to a promise concerning their condition or quality made in substantially identical terms to each purchaser. It would also extend to claims by consumers induced to purchase defective goods by manufacturer's or distributor's representations or warranties, whether made fraudulently or not. Tenants in an apartment block could utilize the class action to secure redress for their landlord's failure to observe a common covenant in the tenancy agreements of the class members for example, an obligation to keep the common stairway in safe order and condition or to maintain heat in the apartments in winter, or for the landlord's breach of statutory obligations imposed for the benefit of tenants under such legislation as Part IV of *The Landlord and Tenant Act* in Ontario.¹²

The Ontario *Consumer Protection Act* is another example of legislation enacted specifically to safeguard consumer interests.¹³ However, the rights of consumers under this statute would have much greater vitality if they could be enforced on a class basis. For example, the Act requires a lender of money to give to the borrower a statement in writing showing a number of details of the credit transaction, including the sum for the cost of the borrowing and the method of calculation of the cost. The statute states that the borrower is not required to pay more as the cost of borrowing than the sum shown in the statement.¹⁴ If a lender subsequently adopts a method of calculating the actual sum for the borrowing that the lender has to pay which does not conform to the statement, the borrower will be the loser. If a lender applies the same formula to all his loan transactions, the additional profit could be substantial when aggregated. Yet the extra burden for any borrower, assuming the incorrect calculation is detected at all, will probably be so small that no individual would take the trouble to sue. A class action would effectively strike down the prohibited practice for subsequent borrowers and at the same time secure a refund or credit allowance for those overcharged in the past.

Legislative proposals presently under review in Ontario hold the promise of strengthening the substantive rights of consumers. The Ontario Ministry of Consumer and Commercial Relations has recommended that the warranties incorporated by *The Sale of Goods Act* into a contract for the sale of goods be extended to the relationship between the manufacturer of goods and the buyer where the manufacturer is not the seller.¹⁵ This measure would give consumers the same remedies against the manufacturer of a product as exist now against the seller, thus increasing the number of persons who can be held responsible for the marketing of defective goods.

Also, legislation prohibiting certain defined deceptive and unfair prac-

---

¹⁴ *Id.*, Part III.
practices in sales to consumers has recently been enacted in British Columbia\(^{16}\) and a Bill containing similar proposals is currently before the Ontario Legislature.\(^{17}\) Under both schemes consumers can recover any money or property that has been acquired by reason of a prohibited practice. In addition, if the Ontario legislation is enacted, the consumer will be able to recover any damages incurred as a result of the practice.\(^{18}\) The British Columbia enactment specifically allows a recovery action to be brought on behalf of all consumers in the Province or a class thereof.\(^{19}\) The Ontario proposals, however, lack any similar provision. This is a serious omission, given the limitations on the existing class action remedy. Class relief would not presently be available under the legislation for consumers who succumb to an identical deceptive practice perpetrated by the same supplier of goods. The enactment of the draft statute would help overcome this deficiency. The draft statute would also serve the wider purpose of allowing a class action to be brought not only for the unfair and deceptive practices the new legislation will proscribe, but also to enforce any other legislation that creates consumer rights.

A. **CLASS ACTION DEFINED & A HISTORY OF THE PROCEDURE**

This section commences with a definition of a class action and a brief history of the procedure. Then follows an account of two class actions from the law reports, one decided many years ago, and the other quite recently. The cases are useful for three reasons. First, they give flesh to the class action definition and provide examples of situations in which the procedure is appropriate. Second, they show the conditions that have to be satisfied before a class action can be brought. Finally, the cases suggest a number of procedural problems inherent in the class action device which need to be overcome if the action is to become a more effective remedy for securing the redress of wide scale consumer grievances.

1. **Class Action Defined**

A class action is a court proceeding in which the plaintiff claims for himself and also on behalf of other persons who are in the same situation as regards the defendant. The persons for whom the plaintiff sues constitute the class. What justifies the proceeding is the existence of questions of fact or law that are common to the claim of the plaintiff and the claims of those whom he represents, the class members. Judgment for the plaintiff on the common questions is also judgment for the class members on their individual

---


\(^{17}\) Bill 55, 4th Session, 29th Legislature, 23 Elizabeth II, 1974. Also, the Federal Parliament will soon be considering proposals for amending the Combines Investigation Act, which will prohibit false advertising and other unethical trade practices. The Minister for Consumer and Corporate Affairs has announced that the legislation will allow consumers to bring class actions to enforce the provisions (Toronto, *Globe and Mail*, January 28, 1975; *Time (Canada)*, p. 13, February 10, 1975).

\(^{18}\) The court can also award exemplary or punitive damages (*id.*).

\(^{19}\) *Trade Practices Act*, S.B.C. 1974, c. 96, s. 16(2).
The utility of the class action lies in the binding effect of the judgment on the common questions. The action allows the claims of a large number of people who have essentially the same complaint against the defendant to be decided in a single adjudication where otherwise a multitude of separate determinations would be necessary.

2. History of the Class Action

Contemporary class action procedure in the common law provinces of Canada is regulated by a Rule of Court which is substantially identical in each jurisdiction. The Rule first appeared in England as part of the procedural reforms that accompanied the introduction of the *Judicature Act* system in that country one hundred years ago. The new system and the substance of the procedural reforms, including a similar class action rule, were adopted soon after in Canada. The rule, however, did not establish the class action. The procedure had long existed in England, and its origin can be traced to the Court of Chancery towards the end of the seventeenth century. The class action developed as an offshoot of the rule in equity as to the necessary parties to proceedings before the Chancellor. The general rule was that all persons materially interested in the subject of the suit, either as prospective plaintiffs or prospective defendants, ought to be made parties, however numerous they might be, in order that a final end might be made of the controversy and a multiplicity of suits avoided. Convenience was the consideration on which the rule was founded. The same consideration of convenience led to the rule being relaxed when to insist that all persons interested be made parties would be impracticable or would produce hardship.

---


The judgment will not bind the class if it was obtained by fraud or collusion or if the court was cheated into believing that the case was fairly fought or fairly represented when in fact it was not (Commissioner of Sewers v. Gellaily, supra, 616; Brenner v. Title Guarantee & Trust Co., supra, 891.) Nor will the judgment preclude subsequent actions by those whose rights to recover are based on different facts than those determined by the judgment (Daar v. Yellow Cab Co. (1967), 63 Cal. Rptr. 724, 433 P. 2d 732 at 739). However, the court that pronounces the judgment cannot predetermine its *res judicata* effect. This can only be tested in a subsequent action (Restatement, Judgments, §86, comment (b), §116 (1942); Advisory Committee Note (1966), 39 F.R.D. 69 at 106; C. Wright, *Class Actions* (1970), 47 F.R.D. 169 at 181; Spencer-Bower and Turner, *Res Judicata* (1969), 373 (2d); Notes, *Collateral Attack on the Binding Effect of Class Action Judgments* (1974), 87 Harv. L. Rev. 588.


It was recognized that joinder might be difficult or impossible if the interested persons were very numerous or were out of the jurisdiction or otherwise could not be located. To prevent the suit being defeated by the failure of the plaintiff to join all interested persons as parties, equity would sometimes dispense with complete joinder if the actual parties had a common interest with the absent individuals in the outcome of the suit and fairly represented them in the conduct of the proceedings.

The rationale of the class suit as developed in the Court of Chancery was that it avoided the harsh consequences of the practice the Court itself had developed of refusing to entertain a controversy unless every person who had a material interest in its outcome were made a party. The compulsory joinder requirement reflected the concern of the Court that there not be a multitude of suits raising the same question. The essential characteristic of the class suit was that the decree in the suit bound the representative party and all those persons who, though not parties themselves, had the same interest in the outcome as the representative. The class suit therefore ensured that the Court would not decline jurisdiction for want of joinder of all interested persons, but would proceed to adjudicate on the controversy. At the same time the device implemented the policy that there should be but a single adjudication that put an entire end to the dispute and bound all those who had an interest in the result.

The need to avoid the injustice caused by a strict application of the compulsory joinder rule ceased to be a justification for the class suit with the procedural changes that took place in England and in this country upon the introduction of the Judicature Act system and the accompanying Rules of Practice. The most significant change as regards the class suit was the virtual abolition of the compulsory joinder rule itself. The new Rules gave the plaintiff a much greater discretion in selecting the persons to be joined as plaintiffs or defendants than existed previously. The Rules also provided that an action would not be defeated by reason of the misjoinder or non-joinder of parties and that the court could in every case deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. There are now just a few situations in which the court will compel


24 W. Holdsworth, History of English Law (1965), Vol. 15 at 107, 133; R. Millar, Civil Procedure of the Trial Court in Historical Perspective (1952), 105-07.

the plaintiff to add all interested persons as parties.\textsuperscript{26} Moreover, the court will no longer act on its own initiative. The defendant must object if the plaintiff has not joined a necessary party, and if he does not so object, the court will decide the controversy between the parties actually before it.\textsuperscript{27}

Now that the rule requiring the joinder of all interested persons has been abolished in all but a few cases, the plaintiff is no longer under any compulsion to sue in a representative capacity in situations where, under the previous Chancery practice, a class suit would have been necessary before the court would accept jurisdiction. If a number of other persons share a common interest in the plaintiff's claim against the defendant such as would justify the maintenance of a class action, the plaintiff has a choice either to sue simply on his own behalf or to bring the action as a class representative. In the event the plaintiff elects to take the former course, the court will not compel him to change the capacity in which he sues so as to claim also on behalf of the individuals who are in the same situation as himself.

3. \textit{Two Illustrative Cases}

\textit{Duke of Bedford v. Ellis,}\textsuperscript{28} a decision of the House of Lords, and \textit{Chastain v. British Columbia Hydro and Power Authority,}\textsuperscript{29} a decision of McIntyre, J. of the Supreme Court of British Columbia, were class actions.

The decision of Lord MacNaghten in \textit{Duke of Bedford} sets out the conditions necessary for a class action in language that has been accorded the kind of weight and authority usually reserved for a statute. The explanation lies in the Rule of Court that now regulates the class action procedure.\textsuperscript{30} It is sparsely worded and gives only minimal guidance as to when it applies. Canadian jurisdictions adopted the English Rule in substantially identical terms and the courts have accepted Lord MacNaghten's pronouncement as an authoritative definition of the scope of the class action remedy. The subsequent history of the class action in this country demonstrates that though Lord MacNaghten's words were spoken over 70 years ago, time has not diminished their influence.\textsuperscript{31}

The class action provision in Ontario is Rule 75 of the Rules of Practice.\textsuperscript{32} The Rule reads:

\begin{quote}
Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.
\end{quote}

Of the corresponding English provision, Lord MacNaghten in \textit{Duke of Bedford} said as follows:

\begin{quote}
In considering whether a representative action is maintainable you have to consider what is common to the class, not what differentiates the cases of individual members. . . . Given 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.\textsuperscript{33}
\end{quote}

The words "common interest" in this passage are critical to the main-


The Rule also allows an action to be brought against the members of a class through the defendant as a representative. As this article is concerned only with the class action as a means of remedying consumer grievances, proceedings against a defendant class will not be dealt with except where relevant.

The procedure for suing a defendant class is employed most frequently for the enforcement of claims in contract and tort against the members of a voluntary association such as a club or unincorporated society or trade union. For an examination of the special problems that arise in proceedings against a voluntary association in contract or tort, see H. Ford, Unincorporated Non-Profit Associations (Oxford: Claredon Press, 1959) at 92-112; S. Stoljar, The Representative Action: an Equitable Post-Mortem (1956), 3 U. of W. Aust. Ann. L. Rev. 479; D. Lloyd, Actions By or Against Unincorporated Bodies (1949) 12 Mod. L. Rev. 409; D. Sherbaniuk, Actions By and Against Trade Unions in Contract and Tort (1958), 12 U. of T. L. J. 151; A. Sheppard, Some Aspects of the Law of Unincorporated Associations (1967), 3 U.B.C. L.J. 137; J. Keeler, Contractual Actions for Damages Against Unincorporated Bodies (1971), 34 Mod. L. Rev. 615; R. Baxt, The Dilemma of the Unincorporated Association (1973), 47 Aust. L. J. 305. Membership of an unincorporated association creates rights and obligations among the members themselves and between members and third parties that have no counterpart among the consumers who constitute a class when a representative action is brought to enforce their separate claims against the same defendant. Membership of a voluntary association implies a continuing commitment to the aims and objects that the members hold in common whereas in litigation on behalf of a consumer class the class has no existence independently of the action. The class is created when the action is commenced and dissolves once the proceedings come to an end.

30 The class action provisions in the other common law provinces are: Alberta: Alberta Rules of Court, 1969, r. 42; British Columbia: Supreme Court Rules, 1961, O. 16, r.9 (M.R. 131); Manitoba: The Queen's Bench Rules, r. 58; New Brunswick: Rules of Court, 1969. O. 16, r.9: Newfoundland: Rules of the Supreme Court of Newfoundland, O. 16, r. 9; Nova Scotia: Rules of the Supreme Court of Nova Scotia, 1971, r. 5:09; Prince Edward Island: Supreme Court Rules of Prince Edward Island 1954, O. 15, r. 9; Saskatchewan: Rules of Court of the Province of Saskatchewan, 1961, r. 45.

Quebec is the only province that does not have a similar class action provision. Article 59 of the Code of Civil Procedure requires any person suing on behalf of others to file with the court a power of attorney from those whom he represents. This effectively precludes a class action.

As to the Federal Court of Canada, see Federal Court Rules, r. 1711. The class action rule in England was replaced in 1965 with a more detailed provision (O. 15, r. 12). However, as regards the circumstances for bringing a class action the new rule retained without any elaboration the "same interest" formula contained in the original.


32 The class action provisions in the other common law provinces are: Alberta: Alberta Rules of Court, 1969, r. 42; British Columbia: Supreme Court Rules, 1961, O. 16, r.9 (M.R. 131); Manitoba: The Queen's Bench Rules, r. 58; New Brunswick: Rules of Court, 1969. O. 16, r.9: Newfoundland: Rules of the Supreme Court of Newfoundland, O. 16, r. 9; Nova Scotia: Rules of the Supreme Court of Nova Scotia, 1971, r. 5:09; Prince Edward Island: Supreme Court Rules of Prince Edward Island 1954, O. 15, r. 9; Saskatchewan: Rules of Court of the Province of Saskatchewan, 1961, r. 45.

Quebec is the only province that does not have a similar class action provision. Article 59 of the Code of Civil Procedure requires any person suing on behalf of others to file with the court a power of attorney from those whom he represents. This effectively precludes a class action.

As to the Federal Court of Canada, see Federal Court Rules, r. 1711. The class action rule in England was replaced in 1965 with a more detailed provision (O. 15, r. 12). However, as regards the circumstances for bringing a class action the new rule retained without any elaboration the "same interest" formula contained in the original.

33 [1901] A.C. 1 at 7-8.
tenance of a class action and the courts in Canada have interpreted them rather narrowly. Unless the courts are prepared to take a wider view of the common interest requirement it is not likely that the class action will ever become a broad and flexible procedural tool for remedying abuses to consumers which occur on a large scale. Failing a change in the attitude of the courts a new provision will be needed — either an amended Rule of Court or legislation — if the class action is to be made to serve this purpose.

The Duke of Bedford owned Covent Garden Market. An Act of Parliament fixed the fee which the Duke could charge a particular class of growers of fruit and vegetables to sell their produce in the market. The Act also gave the growers certain preferential rights over sellers in the market who did not grow the produce themselves. A few members of the class of growers brought an action against the Duke on their own behalf and also for the other growers. The plaintiffs alleged that in breach of the statute, the Duke had charged growers excessive tolls and had infringed their preferential rights. They claimed a declaration that they held the preferential rights, and an injunction restraining the Duke from doing any act contrary to the rights so declared and from charging tolls in excess of the statutory amounts. The Duke objected that the claim ought not to be allowed as a class but, on appeal, the House of Lords dismissed the objection and directed the action to proceed to trial. The law reports do not disclose the subsequent history of the action, but the effect of the House of Lords decision was to ensure that any declaration or injunction which the plaintiffs succeeded in obtaining at trial would stand also for the benefit of the class members on whose behalf they sued.

Chastain raised the question of the validity of a billing procedure adopted by the British Columbia Hydro and Power Authority. For some years, the Authority had followed the practice of requiring persons who wanted gas or electric power to pay a security deposit. The practice, however, was discriminatory for the Authority only demanded the deposit from individuals who were considered poor credit risks. The defendant claimed that its practice was authorized under regulations purportedly made pursuant to the British Columbia Hydro and Power Authority Act, 1964. The regulations allowed the Authority to obtain a security deposit and fixed the amount. The Authority would return the deposit to the customer or credit his account on the termination of the supply of power to his premises.

Three customers of the Authority brought the action. The plaintiffs had either paid or been called on by the defendant to pay security deposits of $75, $60, and $50, respectively. At the commencement of the action the defendant held some 23,624 deposits totalling $1,041,443.00. The figures covered commercial, industrial and residential accounts, and though the evidence before the court did not disclose the number and value of the residential

34 Id. The plaintiffs also claimed an accounting of the tolls which individually they had been overcharged, but the class was not included in this claim. This appears from the speeches of Lord Shand (p. 17) and Lord Brampton (p. 22).
36 Hydro and Power Authority Act, 1964 S.B.C., c. 7.
deposits, it seems that they were substantial. The writ in the action described the plaintiffs as suing "on behalf of themselves and all others in residential premises being required to pay security deposits or who have already paid such deposits to the defendant for the supply of gas and electric power." The relief claimed by the plaintiffs included a declaration that the defendant had no valid authority to require security deposits, an order, in effect, for the return of the moneys deposited, and an injunction against demanding security deposits in the future.

The defendant objected that the action did not come within the British Columbia class action Rule of Practice. McIntyre, J. upheld the validity of the proceedings, concluding that the plaintiffs and those whom they represented "form a group having the same interest in the cause." His Lordship then proceeded to determine the question of substance and held that the regulation under which the Authority purported to act in requiring security deposits was not authorized by the statute. The court then made orders in terms of the relief claimed by the plaintiffs in their statement of claim.

Chastain, apart from its value in illustrating the class action definition, has a rather special significance in the consumer context. It is one of the few class actions in Canada to reach the law reports where the class comprised persons who can fairly be described as consumers. The reported class actions in the past invariably concerned individuals who sought to recover money from a common fund or to vindicate some other proprietary right.

B. CHARACTERISTICS OF THE CONTEMPORARY CLASS ACTION

1. Merits of the Class Action

The merit of the class action procedure lies in the res judicata effect of the judgment that will be pronounced at its conclusion. Judgment in a class action binds not only the plaintiff and the defendant but also those whom the plaintiff represents, the class members. It is this characteristic that makes the class action such a convenient method of determining the claims of a large number of individuals who are essentially in the same legal situation as regards the defendant.

The procedure is convenient both for the court system and the parties interested in the controversy (the class members and the defendant) as it enables common questions between each class member and the defendant to be determined in a single proceeding. The alternative to a single proceeding
is a multitude of separate proceedings brought against the defendant by individual members of the potential class with each proceeding raising the same issue.\textsuperscript{41}

The possibility of numerous proceedings follows from the rule that judgment in an action other than a class action binds no one but the immediate parties.\textsuperscript{42} Thus, success for the defendant in one action will not prevent another claimant in the same situation as the original plaintiff from bringing another action that puts in issue the very question determined in the first, provided the common question is one of fact. With a question of law, unless the decision of the court is reversed on appeal, the doctrine of judicial precedent will ensure that courts in subsequent proceedings will reach the same conclusion. However, even with questions of fact, the prospect of further

\textsuperscript{41} In theory, two other alternatives are a single action brought by all claimants as co-plaintiffs, and a test action. Neither alternative is really practicable when the number of claimants is large. See text at Cl, infra.

\textsuperscript{42} A pair of patent law cases demonstrates how in two sets of litigation involving a common party, different courts can make opposite findings on the same question of fact. The common party was the plaintiff, the reverse of the potential class action situation, but this does not weaken the value of the example. In Monsanto Co. v. Rohm & Haas Co. (1970), 312 F. Supp. 778, a suit for patent infringement, the defendant denied the infringement and pleaded (inter alia) anticipation of prior art. The question was whether the patented invention was "described in printed publications" within the meaning of 35 U.S.C. §§102(a) and (b) before a certain date and was therefore anticipated. The District Court for the Eastern District of Pennsylvania found that the invention was so published and held that the patent was invalid. In an action heard subsequently, the Monsanto Co. alleged a breach of the same patent by another defendant, which pleaded the same defense of anticipation of prior art. The District Court for the Southern District of Texas found for the plaintiff on the issue (Monsanto Co. v. Dawson Chemical Co. (1970), 312 F. Supp. 452). Singleton, J. at 464-5, referred to the Rohm & Haas Co. Case as follows:--

Before this opinion is concluded, it should be added that the possible effect of the decision in [the case] upon the result here reached has been carefully considered. Even though there is an identity of subject matter between that case and this one, the fact nevertheless remains that there is no identity between the parties defendant, nor for that matter is there any privity between the parties defendant in each respective action. Moreover, the defendants here have placed greater emphasis on certain prior art items, namely, [describing them] than did the defendants in [the Rohm & Haas Case], though it is not clear whether the court in that case had exactly the same evidence before it as was offered here. The result on the issues resolved in [the Rohm & Haas Case] does not therefore relieve this Court of its judicial travail of reaching its own independent decision on the merits of the case between these parties and on this record, even though this brings about diametrically opposed decisions on the validity of the same patent against the same attack. There is no \textit{res judicata} or estoppel by judgment flowing from the earlier decision precluding plaintiff from its day in court against these defendants."

On appeal in Dawson, the Fifth Circuit held that when the district court considered the matter, it was obligated by Triplett v. Lowell (1936), 297 U.S. 638, to make its own independent conclusion concerning the validity of the Monsanto patent. Subsequently, however, the Supreme Court reversed its holding in Triplett, and ruled that a patent owner is bound by the judgment of patent invalidity in a prior suit against a different defendant unless the patent owner can show that for some reason the prior judgment should not be given this estoppel effect. The circuit court therefore remanded the case to the district court to allow the defendant to amend its pleading to assert a plea of estoppel (Monsanto Co. v. Dawson Chemical Co. (1971), 443 F.2d 1035.)
litigation following the failure of the first action is sometimes more theoretical than real as the defeat could well deter others from suing.

The defendant is equally free to contest again a question of fact decided against him in earlier proceedings brought by another claimant. An unfavourable finding of fact in one action will not bind the defendant in any other, though in practice the finding might persuade him to compromise the claims still to be tried. However, while the satisfaction of all claims by compromise would achieve the same result as a class action, there can be no assurance that a defendant to a judgment that technically only binds him as regards the plaintiffs will nevertheless deal with other claimants on the footing that the judgment is also for their benefit.

A class action eliminates the possibility that different tribunals will reach opposite conclusions on the same question of fact. If the defendant succeeds on the common question, no class member can raise it again in another action; if the plaintiff class succeeds on the question, no class member need bring his own action.\(^4\)

For members of the class, the class action procedure gives an advantage that neither the representative plaintiff nor the defendant enjoys. Class members are strictly not parties and so they are saved the burdens and anxieties that usually trouble the actual participants in litigation; yet the \textit{res judicata} effect of a judgment gives them the benefit of the proceedings should they succeed. In the event of victory, class members can emerge from the shelter afforded by the representative plaintiff and share in the outcome just as if they were named as parties.

The class members also have an advantage if the action brought on their behalf is defeated. Since class members are not parties, they cannot be ordered to pay the costs of the defendant.\(^4\) As a general rule the costs of litigation follow the event.\(^5\) This means that the court will order the losing party to pay the costs of his successful opponent. Only the class representative, the plaintiff, can be ordered to pay the defendant's costs and the class members are under no obligation to indemnify him for the costs unless they had previously agreed to do so.\(^6\)

As non-parties, the individuals represented in a class action clearly enjoy several benefits. However, judgment in the action will bind them whether it is favourable or not. If the action is defeated on a question common to the class, the class member cannot relitigate the question in a separate

\(^{43}\)Note 20, supra.


\(^{46}\)In McAllister v. O'Meara (1896), 17 P.R. 176, Boyd, C. suggested that class members who contribute to the expenses of the action may be found liable to the defendant for costs, upon a proper application.
action brought against the same defendant. The status of class members as non-parties bound nevertheless by the judgment is therefore not altogether advantageous. There is a danger that the action will have prejudiced class members who might have successfully sued the defendant themselves. In order to fully appreciate the risk of prejudice to class members inherent in the class action two further characteristics of the procedure need to be mentioned. These concern the appointment of the class representative and notice to the class.

2. Appointment of Class Representative

Under present practice in Canada any member of a prospective class can appoint himself plaintiff and, without giving notice to the class, bring an action on their behalf. In practice, the representative plaintiff is sometimes chosen from among a group of members, but this is not essential, and class members have no right to be consulted in the selection. Furthermore, since the members of the class are not parties, they have no standing in the action which will entitle them to appear at the trial and be separately represented by counsel. The court can add them as plaintiffs provided the original plaintiff consents but, once added, it is doubtful whether they will be allowed separate representation as co-plaintiffs. However, it seems that the court has power to join a class member as defendant if he wishes to oppose the claim of the plaintiff, though this hardly seems an advantage in the context of consumer litigation. The court also has some power to intervene to ensure that the representative will protect the interests of the class. The limits of the power have not been clearly defined, but the court will at least allow another member of the class to take over the conduct of the action if the original plaintiff elects to discontinue, and it seems that it would also
Consumer Class Actions

substitute a class member if the original plaintiff does not truly represent the class interests.\textsuperscript{51}

There is a further limitation on the court's jurisdiction in the matter of class representation; the power to remove the plaintiff will not be exercised except on the initiative of a class member. Under present practice the plaintiff is under no obligation to satisfy the court either at the commencement or at any subsequent stage of the action that his interests are not in conflict with those of the class members or that he is competent to properly present their claims. Nor will the court inquire into these matters. The defendant will hardly object if the plaintiff's ability to adequately represent the class is questionable; the \textit{res judicata} rule is not qualified by any requirement that the judgment pleaded in answer to a subsequent action should have followed a trial in which the defeated claim was expertly presented and argued. Both class members and defendant have a real, yet contradictory, concern in the trial competence of the representative plaintiff and his lawyer. If there is any possibility that the trial presentation of the class claim will be so inept the action will be defeated, the defendant will be just as anxious to secure a judgment that binds the class as the class members are to avoid one. The defendant will therefore have no incentive to take any steps that might lead the court to substitute a more effective class representative.

Objection to the representative character of the plaintiff needs to be distinguished from a challenge to his competence. It is to the advantage of the defendant to show that the plaintiff and the class members do not share a common interest as required by Rule 75. Where there is a danger of losing the action on the merits, the defendant will be concerned to confine the binding effect of the judgment to the plaintiff and so exclude class members from participating in the result. A class action defendant, therefore, has a sound reason for objecting to the propriety of the proceedings if the argument is reasonably open. If the court sustains the objection, it will strike out the representative claim, leaving the plaintiff at liberty, if he so decides, to carry on the action for his claim alone.\textsuperscript{52} The members of the former class will technically be free to commence separate proceedings against the defendant but for various reasons they may not do so. For instance, the expiration of time under a relevant Statute of Limitations when the order excluding the representative claim is made will bar further actions.\textsuperscript{53} Again, though a limitation period has not intervened, litigation may not have been practicable except on a class basis, the amounts involved being so small or the issues of fact or law so complex that no individual would sue merely for himself. Thus, though the defendant is ultimately found liable on the plaintiff's in-

\textsuperscript{51} Watson v. Cave (No. 1) (1881), 17 Ch. D. 19 at 21.


\textsuperscript{53} Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021 at 1042, 1043. In the United States class members can apply for leave to intervene as parties if the court determines at a time outside the limitation period that an action which has been timely commenced as a class action is not suitable for class action treatment (\textit{American Pipe & Construction Co. v. Utah} (1974), 94 S. Ct. 756.)
dividual claim, he might avoid a considerably heavier liability by his successful challenge to the assertion of a representative capacity.

According to present practice, a class action plaintiff is not required to satisfy the court that his claim is typical of the claims of the class members whom he represents unless the question is raised by the defendant. This contrasts with the procedure followed when the representative party is not the plaintiff but the defendant. Rule 75 applies to proceedings both by and against “numerous persons having the same interest.” In an action against the members of a class the plaintiff must first select the member or members to be made defendants and then attribute a representative capacity to them. Rule 75 provides that one or more of the numerous persons who have the same interests may “be sued or may be authorized by the court to defend” on behalf of all of them. For an action by numerous persons the Rule simply states that one or more of them may sue, and there is no provision that they be authorized by the court to represent the others. The passage in the Rule dealing with actions against numerous persons suggests that the plaintiff can elect whether or not to obtain an order authorizing the selected class members to defend on behalf of all. The language, however, has been held to be mandatory, with the result that judgment does not bind class members other than the defendant unless the plaintiff has obtained an order, called a representative order, authorizing the defendant to represent the class. In practice, the plaintiff usually applies for the order shortly after the commencement of the action, usually once the defendant has filed an appearance. The plaintiff has to show that the defendant is the proper person to be sued on behalf of all persons interested, and the order can be made though the defendant objects to being sued as a representative.

The reasons for this divergence in the procedure to be followed according to whether the plaintiff or the defendant is the representative party do not appear to have been considered in any reported case. At first sight, the way the courts have interpreted Rule 75 suggests that the rights of a defendant class are better safeguarded than those of a plaintiff class as regards an adverse judgment. However, it is submitted that this is not so. On a judgment against a defendant class, execution will issue for the plaintiff against a class member simply upon proof of membership, provided the

---

54 Rules of Practice (Ont.), r. 75.
55 Commissioner of Sewers v. Gellatly (1876), 3 Ch.D. 610 at 615.
57 The defendant does not have to wait until the plaintiff applies for a representative order to contest the claim of the plaintiff that he is liable as a representative. He can move after appearance to have the claim against him as a representative struck out (A.-G. for Victoria v. City of Brighton, [1964] V.R. 59 at 63).
plaintiff has first obtained a representative order.\footnote{In the Federal Court of Canada, the plaintiff cannot issue execution against a class member without leave (Federal Court Rules, r. 1711(4)). There is a similar provision in England (Rules of the Supreme Court 1965, O. 15, r. 12(3)), and South Australia (Rules of the Supreme Court 1947, O.48(A), r. 23).} In resisting the execution claim, the individual is thus confined to denying that he belonged to the class. On the other hand, judgment against the plaintiff in a class action does not necessarily preclude a class member from separately suing the defendant. The binding effect of a judgment on non-parties is not a question which the court pronouncing the judgment will decide, but one for the court before which the judgment is subsequently pleaded as a defence.\footnote{Note 20, supra. See also, Hansberry v. Lee (1940), 311 U.S. 32; Hunter v. Southern Indemnity Underwriters Inc. (1942), 47 F. Supp. 242; Newberry Library v. Chicago Board of Education (1944) 387 Ill. 85, 55 N.E. 2d 147; Meyer v. Wichita County Water Imp. Distts. Nos. 1 and 2 (1954), 263 S.W. 2d 660.} A class action does not bind the class members except on questions that are common to the class claims and the claims of the representative plaintiff. Thus, it is open to a former class member to establish in a separate action that the matters of fact on which he relies were not determined in the class action because they were not common to the claim of the representative plaintiff, but were different.\footnote{Note 20, supra.}

The procedure for obtaining a representative order when the defendant is sued on behalf of a class is significant for it emphasizes the deficiencies of the existing plaintiff class action procedure. It provides a persuasive precedent for instituting judicial scrutiny of an action for a plaintiff class, the appropriate time being at the commencement of the action when the court can determine whether the conditions of Rule 75 are satisfied and whether the plaintiff can adequately represent the interests of class members.

3. **Notice to the Class**

A second characteristic of the class action that needs to be noted in considering the possible prejudicial impact of judgment in the action on the individual claims of class members concerns notice to the class. At present there is no requirement that class members be notified that an action has been brought on their behalf. This can render futile what limited control class members now have over the person who represents them.

Under the class action procedure of most, if not all, common law jurisdictions outside the United States, the court itself will not notify the class that a class action has been commenced nor will it direct the plaintiff to give notice. There is thus a real likelihood that few members of the class, perhaps none at all, will know of the action, even after judgment. If the class is large, class members who learn of the action will only do so by accident, for instance, from newspaper publicity. Judgment, however, will bind each and every class member whatever the result and whether members have had notice of the proceedings or not.

The absence of notice will hardly prejudice anyone if the action succeeds for then all class members will benefit. Members who had not planned...
to sue themselves will enjoy a windfall, and the victory will spare any mem-
bers who did intend to sue the trouble and expense of an action. A judgment
adverse to the class, however, presents different considerations. The judgment
will preclude individual class members from bringing actions that raise the
claim defeated in the class action. There is thus a distinct possibility that a
class member will be barred from bringing an action to enforce his claim by
an adjudication in proceedings that determined the existence of his right to
sue, but of which he had no notice.

A class action judgment constitutes an exception to the general rule
that a person is not bound by a judgment that determines his rights or
liabilities unless he had notice of the proceedings and an opportunity to be
heard. Joinder as a party will usually be sufficient for this purpose as
joinder imports notice and the right to be heard, but joinder is not essential
provided the individual is afforded these privileges. The justification for the
departure from the general rule in the case of a class action rests in the
representative capacity in which the plaintiff sues. As the representative
plaintiff has the same interest as class members in the outcome of the action
it can be assumed that he will present the claims of the class as effectively
as the members would themselves. Hence, they need not be notified of the
action. In the words of the United States Supreme Court in Smith v. Sworm-
stedt, "The legal and equitable rights and liabilities of all being before the
court by representation, and especially where the subject-matter of the suit is
common to all, there can be very little danger but that the interests of all
will be properly protected and maintained."

Nevertheless, the risk remains that class members who did not receive no-
tice of the action will be prejudiced by an adverse result, although the following
analysis will show that there are probably only a few situations in which
there has been actual prejudice. In assessing the danger of prejudice to class
members who get no notice of the proceedings, the members who never inten-
tended to sue for themselves can be disregarded. It is safe to conclude that
notice advising these members of the commencement of the action would not
have evoked any response. The question of prejudice needs to be tested by
examining the position of a class member who had seriously considered bring-
ing an action himself. Of course, it must be assumed that a short limitation
period does not apply and that time has yet to expire when the class action
terminates. Timely notice of the class action to an individual in this position
would give him the opportunity to follow either of two alternative courses.
First, if he thought the plaintiff did not adequately represent the interests of
the class, he could apply to the court to have another class member (pos-
sibly himself) substituted. Alternatively, the class member could apply to

---

63 May v. Newton (1887), 34 Ch.D. 347; Templeton v. Leviathan Pty. Ltd.
(1921), 30 C.L.R. 34; Pennoyer v. Neff (1877), 95 U.S. 714; Hansberry v. Lee
(1940), 311 U.S. 32.
64 Smith v. Swormstedt (1853), 16 How. (57 U.S.), 288.
65 Id., at 303.
66 See Watson v. Cave (No. 1) (1881), 17 Ch.D. 19 at 21.
Consumer Class Actions

have himself excluded from the class.\textsuperscript{67} It is not certain whether under existing procedure the court would allow such an application, but the object would be to avoid being bound by whatever judgment was given in the action. Once he was removed from the class, the class member could bring a separate action against the defendant.\textsuperscript{68}

However, to establish prejudice it is really not sufficient for a class member to point to the courses he might have followed if he had received notice. He must show that he would probably have achieved a successful outcome if he had brought an action of his own, and two conditions have to be satisfied before the probability of success is demonstrated.

First, the class action must have failed in consequence of the incompetence of the representative plaintiff or his lawyer in the presentation of the claim, and for no other reason. No prejudice would be shown if the action were defeated for reasons unrelated to the quality of the presentation of the case because there would then be no basis for concluding that the class member would probably have succeeded himself. Second, assuming the action did fail by reason of the incompetence of the representative plaintiff or his counsel, it must be reasonable to suppose that upon receiving timely notice, the class member would have either replaced the class representatives with others possessing the skill and ability necessary to win the action or alternatively secured his exclusion from the class and then commenced his own action. This second condition will not be satisfied if the class member would not have procured an effective substitute as plaintiff because, for instance, he was content to retain the original party believing, albeit mistakenly, that he was sufficiently skilled to win the action, or he could not afford the legal costs of proceedings to secure alternative representation, or the representative he proposed himself was actually no better qualified than the first plaintiff.

Under present class action practice, notice to class members will only be given in one situation. If a fund of money is recovered for a class to be distributed among the members, notice will have to be given to members who are not identifiable.\textsuperscript{69} The notice will allow persons who might wish to claim that they belong to the class an opportunity to step forward and establish their right to participate in the judgment. In a case such as Chastain, notice will not usually be necessary because the defendant can identify the class members from its own records. However, if the class action procedure

\textsuperscript{67}A dissentient class member can apply to be made a defendant. See note 49, supra. Whether he has to be made a defendant as a condition of exclusion from the class does not appear to have been decided. In the United States under the Federal Rules of Civil Procedure a class member can elect to be excluded from the class and on such election he will not be bound by the judgment, whether for or against the class (F.R.C.P. 23(c) (2)).

\textsuperscript{68}For the dissentient class member to simply bring a separate action would probably not achieve an exclusion from the class. It would almost certainly invite a motion from the defendant either to stay the action or to have it consolidated with the class action (Driffl\textsuperscript{i} v. Ough (1906), 13 O.L.R. 8 at 9). In the latter case it is doubtful whether the plaintiff would be allowed separate representation by counsel. See note 48, supra.

\textsuperscript{69}See, for instance, Shablinsky v. Horwitz (1973), 32 D.L.R. (3d) 318.
is ever utilized as a consumer remedy more extensively than it is at present, there will be situations when neither the representative plaintiff nor the defendant will have a complete record of class members. The court will then have to deal with the problems of notifying the class of the judgment and of informing members of their right to share in the result. If the United States' experience provides any guide, the court will need to direct notices in newspapers and on radio and television in order to reach the maximum number of class members.

In all common law jurisdictions, including the United States, judgment in a class action will conclusively determine the rights of the members of the class on whose behalf the action was brought whether the members had notice of the proceedings or not. The possibility that class members who did not receive notice might be prejudiced if the action is defeated does not seem to have been considered by Canadian courts or by the courts of other common law jurisdictions outside the United States. In the United States the question of the binding effect of a class action judgment on class members is affected by the constitutional requirement of due process. The courts in that country originally looked to the adequacy of the representation for the class in determining whether due process had been observed, but since the decision of the Supreme Court in *Mullane v. Central Hanover Bank and Trust Co.* in 1950, the emphasis has shifted towards the opportunity to be heard as a "fundamental requisite of due process." However, the right to be heard has little value unless preceded by notice and so the giving of notice has assumed considerable importance in the class action procedure in the United States. This is evident in the new procedural rule for class actions introduced for Federal courts in 1966, Federal Rule of Civil Procedure 23. Though the Rule gives quite specific directions for notice, experience with the Rule in practice has disclosed considerable uncertainty in such matters as the terms of the notice, the distribution of notice among class members,

---

70 Note 20, supra.
73 Rule 23 provides as follows:-

(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 representatives 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
Consumer Class Actions

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) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) 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 notice 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 favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(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) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
the time at which notice is to be given, and whether the plaintiff or defendant should pay the costs of notice. The cost of notice has proved to be a major factor in much of the class action litigation in the United States. The court's directions as to notice can determine the fate of an action for if extensive notice is ordered and the class is large, the expense may deter the plaintiff from continuing.

The United States constitutional guarantee of due process has no equivalent in this country and Canadian courts have not been troubled by the absence of any notice direction of the kind made by Federal Rule of Civil Procedure 23. Nevertheless, the present class action practice is anomalous in this respect. In other areas of the law, notably in proceedings for the administration of the estate of a deceased person or for the interpretation of a will or trust instrument, the courts have extended the binding effect of the judgment beyond an immediate party to other persons whom the party represents. In most cases, however, the representative party will be an executor or administrator or a trustee, an individual chosen by the person whose will or trust instrument is in question, and if there is no such representative, the court will appoint one. There is thus some assurance that the representative party will be both competent and sufficiently motivated to do whatever is necessary to protect the interests of non-parties, and accordingly less need for concern that non-parties have not received notice. The same assurance should exist in every case where a judgment will bind non-parties who have had no notice except through a representative. It is submitted that under any new procedure that is devised for the class action the court should be required to be satisfied that the representative plaintiff will properly protect the interests of class members before the action is allowed to proceed.

The competence of the representative plaintiff and notice to the class are closely connected matters and one cannot realistically be considered without the other. Notice to the class would help the court in determining the competence question. Notice at the commencement of the action would enable class members to scrutinize the plaintiff's claim of competence to represent the class and, where appropriate, challenge the claim before the court. Also, the court's decision on the question is likely to be better informed if reached after any opposing points of view have been presented. Notice would also give class members the opportunity to exclude themselves from the class, assuming this right were to be given to them.

---

74 The recent decision of the Supreme Court in *Eisen v. Carlisle & Jacquelin* (1974), 94 S. Ct. 2140 has probably removed the cost uncertainty. The Court upheld an order of the Court of Appeals which directed the plaintiff at his own expense, at least in the first instance, to give individual notice to all members of the class who could be identified through reasonable effort. Class members in this category numbered approximately two million.

75 This may be the fate of the *Eisen* claim (*Time*, June 10, 1974, 57). The costs of giving individual notice to the class of two million, originally $225,000, would now be $315,000 following a four-cent increase in postage (1974), 94 S. Ct. 2140. For a more sanguine outlook, see Analysis, *Eisen IV: Don't Believe The Headlines*, 271 SRLR B-1 (1974).

76 *May v. Newton* (1887), 34 Ch.D. 347; *Templeton v. Leviathan Pty. Ltd.* (1921), 30 C.L.R. 34. See also, Rules of Practice (Ont.), rr. 76, 77.
The extent of the risk of prejudice to class members who do not receive notice will vary according to the value of the individual claims and to the likelihood of class members bringing separate actions.\textsuperscript{77} Since the rationale of the class action in the consumer context is that few, if any, class members would sue individually, notice to the class would often be superfluous; the action might fail, but this will not frustrate the plans of any class member as the class action plaintiff is the only person prepared to sue. However, where class members have substantial claims against the defendant, it cannot be so readily assumed that an adverse judgment will cause no prejudice.\textsuperscript{78}

C. CLASS ACTION CRITERIA

1. Ingredients of a Class Action

In assessing the potential of a class action in securing consumer redress against widespread business misconduct it is necessary to understand that the action is essentially a procedural mechanism. It does no more than bring together for a single determination the claims of many people who seek the same kind of relief from the defendant. By suing as a representative, the plaintiff does not invoke any new kind of substantive legal right, one that could not be enforced if a class member were to sue individually. The legal rights of the class members which the plaintiff seeks to enforce are not created by the procedure but exist independently. The plaintiff is asserting the same rights of the class members that would be in question if each were to bring his own action. Conceptually, therefore, the various claims are not united or fused into one but remain separate and distinct, though from the perspective of the defendant they will have this unified appearance since he will aggregate them in assessing his total potential liability.

A class action plaintiff sues in a dual capacity — both personally and on behalf of a class. However, the representative capacity asserted by the plaintiff is not really material when the court at trial considers the substantive liability of the defendant. The court will find the facts and apply the law just as it would if the plaintiff sued simply for himself in the ordinary way. Failure of the plaintiff on either the facts or the law means the defeat

\textsuperscript{77} The prejudicial effect of a class action judgment might extend beyond the immediate claim for relief made in the class action. For instance, if a person suffers both personal injury and property damage as a result of a tort he cannot “split his cause of action” so as to claim damages for personal injury in one action and damages for the loss to his property in a second. He has but a single cause of action for both kinds of damage, and judgment in an action in which he has sought compensation for only one kind of damage will extinguish his right to recover for the other (Cahoon v. Franks, [1967] S.C.R. 455; Cox v. Robert Simpson Co. (1974), 1 O.R. (2d) 333). Applied to the class action, this principle could lead to prejudice for class members even though the action was successful. For instance, it could be argued that a class judgment for damages for breach of a warranty or contractual promise on the sale of a product would preclude a claim for damages for personal injury on the footing that the product was dangerous.

\textsuperscript{78} A class action against General Motors that is currently proceeding in Ontario is an example. The action has been brought on behalf of some 5,000 purchasers in Ontario of Firenza motor cars manufactured by General Motors and the amount claimed for each owner is $1,000.
The claims of class members will also fail because they are necessarily identical with the plaintiff's claim, if not entirely, then at least on the questions of fact or law decided against the plaintiff common to all the claims. Thus, for example, if the court in Chastain had held that the defendant Authority was authorized to require security deposits, it would have dismissed the claim both for the plaintiff and the class, and a judgment for the defendant would preclude any class member from raising the question again in another action.  

The class action allows questions that are common to the claims of a number of individuals to be determined in a single action. However, the procedure is not the only means of achieving this result, though it is probably the most convenient where the claimants are very numerous. One alternative is a single action in which all claimants join as plaintiffs. But no one can be made a plaintiff without his consent, and where the prospective plaintiffs are sufficiently numerous to constitute a class it will normally be quite impracticable to join them all as parties, even assuming they could all be readily identified. Moreover, any class member who can be identified is not likely to agree to become a plaintiff when he learns of his liability to contribute to the defendant's costs should the action fail. The other alternative to the class action for determining a number of disputes at one stroke is a test action brought by a single member of a potential class. However, the class action was one of law, an adverse decision would also have bound a class member as a precedent in any action subsequently brought. For an examination of the practical consequences of the stare decisis — estoppel distinction in Eisen v. Carlisle & Jacquelin (1974), 94 S. Ct. 2140, see Analysis, Eisen IV: Don't Believe The Headlines, 271 SRLR B-1 at B-8 (1974).  

Rule 75 requires that the persons constituting the class be "numerous"; it is not sufficient that their claims raise a common question. The Rule does not define "numerous", and the few reported decisions on the meaning of the term do not give much guidance. See J. Kazanjian, Class Actions in Canada (1973), 11 Osgoode Hall L.J. 396 at 409; Eighth Union Building Society v. Carnegie (1893), 19 V.L.R. 388; Trustees Executors and Agency Co. v. Sparling (1894), 16 A.L.T. 34. For decisions in the United States, see C. Donelan, Prerequisites to a Class Action Under New Rule 23 (1969), 10 Boston College Ind. & Comm. L. Rev. 527 at 530. The condition presents no problem in the consumer context as the action will be brought for market misconduct causing loss to many people. Nevertheless, the qualification has some significance for it suggests that the makers of the Rule recognized that the class action was somewhat anomalous by reason of the binding effect of the judgment on non-parties, and therefore excluded disputes which affected only a few persons from the procedure, it being reasonable to assume that these persons would become actual parties to litigation either as co-plaintiffs in the one writ or as plaintiffs in actions separately brought. Only when the persons interested were numerous could their direct participation as parties not be expected. See In Re Braybrook, [1916] W.N. 74. This situation justified the class action as an exception to the ordinary rule that judgment in an action binds only the immediate parties. Thus, under the Rule as originally conceived, the class action was proper if the number of persons represented was so large there was no practical likelihood all of them would become parties in other litigation. By contrast, the major rationale of the contemporary class action in the consumer context is that without a class action there would be no recovery by any class member since no one would become a party plaintiff in litigation separately brought.  

Rules of Practice (Ont.), r. 66; Holmested and Gale, Ontario Practice Yearbook 1968 at 642-644.  

Rules of Practice (Ont.), r. 136(1).
efficacy of this procedure depends upon all of the claimants and the defendant agreeing to abide by the result of the test action,\(^3\) and agreement will be difficult to obtain if the number of claimants is large.

2. **Common Interest**

The various procedures for securing a single determination of numerous claims, namely, the class action, the multiple joinder of plaintiffs in a single action, and the test action, all share the same requirement. The action must raise a question or questions of fact or law common to each claim against the defendant. With the class action, the question must be common to the claim of the plaintiff and to the claim of each person whom the plaintiff represents. The plaintiff's claim must represent or typify the claims of class members in the sense that the different claims raise the same question. A finding for the plaintiff on the question will thus be a finding for the class also.

What constitutes a sufficient common interest to justify a class action will vary from jurisdiction to jurisdiction. It depends on the language and court interpretation of the procedural rule which governs the class action in the particular system. The *Duke of Bedford*\(^4\) and *Chastain*\(^5\) cases demonstrate the common interest element of the Rule that applies in Canadian courts. In *Duke of Bedford*, the plaintiffs and the other growers whom they represented were all in the same relationship with the defendant Duke as lord of the market. All relied on "one and the same Act of Parliament as their common charter,"\(^6\) and the conduct alleged against the Duke — his denial of the preferential rights of the class and charging of excessive tolls — affected them all in the same way. By disputing the existence of the preferential rights the Duke raised an issue common to the entire class. The *Chastain* case was rather similar. The domestic consumers of power from whom the defendant Authority had required security deposits were all in the same relationship as regards the defendant and the question of the validity of the regulation under which the defendant purported to act was common to every claim.

Both in *Duke of Bedford* and *Chastain* the plaintiff sought for the class a declaration that the defendant had acted in breach of the rights of class members and an injunction to restrain the commission of further breaches. The class in *Chastain* sought additional relief in the form of an accounting by the defendant of the security deposits it had exacted without authority. A similar claim was made in *Duke of Bedford*, but by the named plaintiff only and not on behalf of the class.\(^7\)

There is a distinction between a declaratory judgment or injunction on the one hand, and an order for an account on the other that has important

---

\(^3\) *Bennett v. Lord Bury* (1880), 5 C.P.D. 339; *The Supreme Court Practice 1970*, 27.

\(^4\) [1901] A.C. 1.

\(^5\) (1973), 32 D.L.R. (3d) 443.

\(^6\) [1901] A.C. 1 at 9, *per* Lord MacNaghten.

\(^7\) See note 34, *supra.*
procedural consequences for class actions. A declaratory judgment conclusively determines the rights of a litigant. The rights determined will usually be the pre-existing rights of the party, but this is not necessarily the case and the court does have jurisdiction to declare rights upon a state of facts which has not yet arisen. Also, the court may make a binding declaration of right whether any consequential relief is or could be claimed or not. It is usual, however, for the court to grant an injunction at the same time it makes a declaration. The injunction is then given in aid of the rights that have been declared. Thus, for example, in Chastain the court judgment first declared that the defendant had no valid authority to require security deposits and next ordered that the defendant be restrained from "demanding, or collecting, or keeping security deposits as a condition precedent to the supply of gas or electrical power to residential consumers, or as a condition of the supply of gas and electrical power to any of the plaintiffs or any member of the class represented" in the action.

The making of a declaration or the granting of an injunction in a class action will afford identical relief to the plaintiff and to each class member. Chastain demonstrates this as the declaration of invalidity and the injunction against requiring the payment of security deposits in the future extended to each and every class member. A declaration, however, may also be the foundation for the grant of individual relief for class members, the extent of the relief varying from person to person. For example, in Chastain, the defendant was in effect ordered to return the security deposits to class members. As the customers had paid different amounts to the defendant Authority, questions which affected only individual class members were introduced into the proceedings for the first time. It was therefore possible that on the question of amount there would be as many separate issues to be determined as there were members of the class. However, this did not prevent the Chastain claim proceeding as a class action, though the court did not have to decide the point as the defendant made no objection on this ground. But the matter was raised by the defendant in another recent case in British Columbia, Shaw v. Real Estate Board of Greater Vancouver.

Shaw was also an action to recover charges imposed by a statutory authority, questions which affected only individual class members were introduced into the proceedings for the first time. It was therefore possible that on the question of amount there would be as many separate issues to be determined as there were members of the class. However, this did not prevent the Chastain claim proceeding as a class action, though the court did not have to decide the point as the defendant made no objection on this ground. But the matter was raised by the defendant in another recent case in British Columbia, Shaw v. Real Estate Board of Greater Vancouver.

---

80 (1973), 32 D.L.R. (3d) 443 at 459.
81 If the defendant has caused class members financial loss, a declaration and an injunction restraining his conduct in future will not provide adequate relief in most cases. See A. Travers and J. Landers, The Consumer Class Action (1970), 18 U. of Ka. L. Rev. 811 at 815.
authority. The plaintiff class consisted of real estate salesmen who claimed that the defendant Real Estate Board had illegally exacted part of the commissions due to them on property sales. The plaintiff sought a declaration and an order that the Board return the sums collected to the class members. The defendant argued that as each member claimed a different amount the class did not have the same or a common interest as required by the relevant practice Rule. The trial judge dismissed the objection and his decision was upheld by a majority of the British Columbia Court of Appeal. The appeal court concluded that once an infringement of the rights of the class held in common was established, it was no objection to the maintenance of a class action for pecuniary relief that the extent of the relief might vary among individuals. The court reached this conclusion despite what it acknowledged would be "long, detailed and difficult accountings" in calculating the entitlement of each class member.

The Chastain and Shaw decisions and other cases show that in Canada a class action can be brought to secure monetary relief for members of a plaintiff class provided the issue of the defendant's liability raises a common question, and notwithstanding that the members claim amounts that vary between individuals and possibly require separate assessments. In the words of Orde, J.A. in A. E. Osler & Co. v. Solman, by "the same interest", Rule 75 "does not mean a like or similar interest. There must be a common interest in the sense that the plaintiff and all those whom he claims to represent will gain some relief by his success, though possibly in different proportions and perhaps in different degrees." However, in all the Canadian cases allowing a class action for pecuniary relief the class members sought the return of money they had previously paid the defendant; damages were never claimed for individual class members. Canadian courts have consistently held that the common interest requirement is not satisfied if separate damages are claimed.

The reasons the courts have given for not allowing class actions for damages will be examined in the next section. It is sufficient at this point to note that the utility of the procedure in the consumer field will be severely restricted if damages claims are forever to be excluded. In both Chastain and Shaw the defendant had purported to require payment under statutory authority. However, the cases were hardly typical of consumer transactions. Most consumer claims arise in the private sector based on a contract between consumer and supplier. A damages award is the remedy the courts will normally give to a consumer when a supplier of goods or services has not performed his part of the bargain or not complied with conditions implied into the contract by law, as, for example, under The Sale of Goods Act, or when the consumer in making the contract relied to his detriment on false representations by the suppliers as to the quality of the product.

---

93 Supreme Court Rules, 1961, O.16, r.9 (M.R. 131).
94 (1973), 36 D.L.R. (3d) 250 at 255.
96 [1926] 4 D.L.R. 345 at 349.
3. Damages and Separate Contracts

The review of the reported decisions which follow will show that Canadian courts have so far refused to allow a class action to be brought for damages, at least where damages have to be individually assessed for each class member. The courts have not been entirely unanimous in their reasons for excluding damages claims, nor have their reasons always been clearly articulated. Thus, in a few cases the damages objection was founded more on the court's concern at the absence of procedural safeguards for the defendant than on any view that damages claims were inherently unsuited for class action presentation. The procedural concern arose from lack of any provisions in the practice rules of the court giving the defendant the right to discovery against class members or making individual class members liable for the defendant's costs if their separate claims were defeated. The immunity of class members in this respect reflected their status as non-parties, and it was considered unfair that the defendant should not have the procedural advantages normally available against an adversary. In the other class action cases, the objection to damages claims was based on the substance of the claim, and the procedural situation of the defendant was not a reason for the decision. But it was not always made clear in these cases whether it was the existence of separate contracts or transactions with the defendant or the individualization of damages among class members, assuming a breach of the common contractual term, which was the bar to a class action. However, the distinction had no practical significance, for the presence of one characteristic rather than the other was never considered decisive. Whether the court stressed the separate contracts or the individual damages, the same conclusion was reached, applying the test for the class action rule enunciated by Lord MacNaghten in *Duke of Bedford*. The plaintiff and the class members did not have the necessary common interest.

The 1910 decision of the English Court of Appeal in *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, is a convenient starting point from which to examine the prospects of bringing a class action for damages in Canada today as a number of Canadian courts have accepted the decision as authority for the proposition that the action cannot be maintained. In fact, however, only one of the three members of the Court of Appeal in *Markt*, Fletcher Moulton, L.J., dismissed the plaintiff's representative claim on the ground that the relief sought was damages. The action was brought on behalf of owners of cargo which was on board a ship owned by the defendant and was lost when the ship sank during the Russo-Japanese War. A Russian cruiser sank the ship on the ground that she was carrying contraband of war. The plaintiff alleged that the contract of shipment between each owner and the defendant contained an identical implied term to the effect that the defendant
Consumer Class Actions

would not carry contraband. Vaughan Williams, L.J. held that the representative claim should be dismissed on the ground that since the claims of the plaintiff and the cargo owners arose out of separate contracts with the defendant there was no common interest. He contrasted the situation of the class members in Duke of Bedford, quoting Lord MacNaghten, “All growers have the same rights. They rely on one and the same Act of Parliament as a common charter.” In Markt, however, “there is no common origin of the claims of those who shipped goods upon the Knight Commander — the contracts were constituted by the bills of lading which manifestly might differ much in their form, and as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped.”

Fletcher Moulton, L.J. also considered that there was no common interest when the class claimed under separate contracts. He said “... each of these parties made a separate contract of shipment in respect of different goods entitling him to its performance by the defendants and to damages in case of non-performance. ... Defences may exist against some of the shippers which do not exist against the others, such as estoppel, set-off, etc., so that no representative action can settle the rights of the individual members of the class.”

Fletcher Moulton, L.J., thus dismissed the representative proceedings on two grounds — the members of the class sought to recover damages which required separate calculation and the claims arose under different contracts.

The question whether damages could be recovered in a class action appears to have been considered by a Canadian court for the first time in 1920. In an Ontario case, Preston v. Hilton, the plaintiff owned a dwelling house and she claimed damages for nuisance for herself and all other owners of property in the vicinity that was similarly situated. But in the judgment of Orde, J. “... an action either for damages for a nuisance or for an injunction to restrain a nuisance cannot be brought in a representative capacity ... it is clear that the injury or threatened injury must be peculiar to each person alone or to his property. ... There is no ... community of interest here. In this case each person whom the plaintiff claims to represent has a distinct and separate cause of action against the Hiltons for the special injury and damage, if any, which that person may sustain by reason of the alleged nuisance or threatened nuisance.”

In holding that the class had no common interest, Orde, J. referred to Johnston v. Consumers’ Gas Co. In Johnston, a class action was brought on behalf of customers of the gas company to recover alleged overpayment. It was not necessary to finally decide whether the representative action was in order as the plaintiff failed to establish his own claim on the merits. Nevertheless, the court considered the propriety of the representative claim and concluded that it was not a proper case for a class action as the claim of each class member arose out of a separate contract with the defendant. The Appellate Division of the Ontario

---

102 Id., at 1040.
103 (1920), 48 O.L.R. 172.
104 Id., at 179-80.
105 (1898), 23 O.A.R. 566.
Supreme Court approved Preston v. Hilton in Turtle v. City of Toronto, another class action for damages for nuisance. Orde, J. considered the question again in A. E. Osler & Co. v. Solman and affirmed that the common interest essential to a class action could not exist when damages had to be individually proved.

The question of damages recovery in a class action has been examined in three recent cases. In Shaw v. Real Estate Board of Greater Vancouver, the plaintiff sought the return of moneys the defendant was alleged to have taken from class members without authority. There was no claim for damages, something the British Columbia Court of Appeal emphasized in upholding the representative claim. The Court stated that otherwise it would not have allowed the proceedings. In Drohan v. Sangamo Co. Ltd., the plaintiff sued on behalf of retired employees of the defendant to enforce an agreement to pay pensions, and in addition claimed damages for the employees. Grant, J. of the Ontario Supreme Court seemed prepared to accept the argument of the defendant that damages could not be recovered because they are personal and need to be proved separately. However, it was not necessary for the court to finally determine the question, and it disposed of the defendant's motion to strike out the proceedings on other grounds.

Farnham v. Fingold, in the Ontario Court of Appeal, is the most significant of the recent decisions. The action was brought on behalf of shareholders of a corporation claiming the payment of a large sum from individuals who formerly were shareholders holding a controlling interest in the corporation. The sum represented a premium which the defendants earned when they sold their shares. The plaintiff shareholder alleged that the defendants improperly gained this profit by using information which had come exclusively to them by virtue of their control position, and claimed that the defendants were accountable to the plaintiff class for the profit. The court did not have to resolve the question whether the claim was for damages, but on the assumption that this was the proper characterization, the Court concluded that a class action was in order because the individual entitlement of class members was simply to a pro rata share of the premium and no separate calculation was needed. In support of this conclusion, the Court cited Bowen v. MacMillan, a class action for "general damages to the class, arising out of wrongs alleged to have been done to the class as a class," in which the Judge in Chambers refused to strike out summarily the representative claim as being entirely without substance. The Court of Appeal in Farnham stated that if damages had to be individually established it would have disallowed the representative claims on "the ground that it would be unjust to permit

106 (1924), 56 O.L.R. 252.
112 (1921), 21 O.W.N. 23. As the law does not recognize a class as a separate entity it is difficult to understand how a class as such could get damages.
[such damages] to be claimed in a class action because the defendant would be deprived of individual discoveries and, in the event of success, would have recourse for costs only against the named plaintiff although his costs were increased by multiple separate claims."

_Farnham v. Fingold_ is a significant contemporary pronouncement on the propriety of a class action for damages. Though the matter was not directly in question, the case, at least in Ontario, is clearly strong persuasive authority for the proposition that a class action cannot be brought for damages which have to be separately calculated. The other recent decisions in _Shaw_ and _Drohan_ also support this position. Whether it is the necessity for separate damages assessments or the absence of procedural safeguards for the defendant of the kind mentioned in _Farnham_ that creates the obstacle is hardly material; the conclusion seems inescapable that Canadian courts under existing class action procedure will not entertain a class action for damages when the claim of each class member has to be individually determined.

The cases examined in the preceding paragraphs indicate that the necessity for individual damages calculations will bar a class action. The same cases, and others to be mentioned, show that there is yet another obstacle to bringing a class action of the consumer variety in Canada today. These decisions established that the common interest requirement in Rule 75 is not satisfied when the claims of class members arise out of separate contracts or transactions with the defendant. Thus, it does not matter that the class does not claim individual damages; a representative claim for pecuniary relief, whether for damages or not, will fail if each class member relies upon a contract separately entered into with the defendant.

The _Markt_ decision is again a convenient start for an examination of the authorities. The two majority members of the Court of Appeal dismissed the representative claim made on behalf of the cargo owners on the grounds that the claims arose out of separate bills of lading. The same conclusion was earlier reached in Ontario in _Johnston v. Consumers' Gas Co._, where a representative claim for the repayment of charges imposed on customers in excess of a statutory rate was disallowed on the ground that "... every consumer has a separate contract with the company, and the fact that the provisions of the statute as to reduction of price is to be regarded as a term of all such contracts, makes no difference in that respect, they are all separate

---


114 This seems to have been recognized by the plaintiffs in the _Firenza_ case. See note 78, _supra_. They claim $1,000 damages for each member of the class, which numbers approximately 5,000. The sum allegedly represents the loss in market value of all Firenza cars caused by the defects in the model for the years in question. The plaintiff thus appears to have avoided the necessity for individual proof of loss. _Moon v. Atherton_, [1972] 3 All E.R. 145, in the English Court of Appeal might be thought to support the proposition that individual damages can be recovered in a class action. The plaintiff class sued for damages and Lord Denning, M.R. said the action was proper. However, the comment was really _obiter_ as the only question the Court had to decide was whether a class member could be substituted when the plaintiff discontinued the action.

contracts still. Again . . . the right to recover [the overpayment] back is not a matter of course, but depends in each case on the circumstances under which they were made and, therefore, each consumer has, if anything, a separate cause of action.\textsuperscript{110} \textit{Johnston} was not cited in the recent \textit{Chastain}\textsuperscript{117} decision in British Columbia. \textit{Chastain} can be distinguished, if this is necessary, on the grounds that British Columbia Hydro did not provide power to customers under contracts separately entered into. The defendant was a public utility and had a statutory duty to supply power to all who requested it and would pay a reasonable price.

\textit{Shields v. Mayor}\textsuperscript{118} in the Ontario Court of Appeal in 1953 appears to be the latest Canadian decision denying a class action on the ground that the class claims arose out of separate contracts. The tenant of an apartment sued the landlord to recover rents he had received during the preceding several months in excess of the rent fixed by a war-time regulation. The plaintiff sued for herself and ten other persons who were tenants of the apartment at different times during the period. The Court, citing \textit{Markt, Johnston} and \textit{Preston v. Hilton} in support, concluded, "Each of the . . . [occupants] . . . having a separate contract with the landlord, and each paying her rent directly to the landlord, the action cannot be maintained as a class action." The separate contract question did not arise in \textit{Farnham v. Fingold}, and so it has not been examined by the Ontario Court of Appeal since \textit{Shields}. Thus, if \textit{Shields} and the earlier cases cited in the decision still represent the law, in Ontario, if not elsewhere, the necessity for proof of individual contracts by class members is another ground on which the courts are likely to refuse to extend the scope of the class action remedy.

The view that the class common interest breaks down once damages have to be separately assessed is technically correct, yet the decisions leave the impression that what really has moved the courts to deny class action status to damages claims is the concern to save the court system from the administrative burden that numerous individual damages calculations might impose. Also, the judicial attitude to entertaining damages class actions is not consistent with the practice of the court in allowing a class action to be brought for liquidated sums of money notwithstanding that the entitlement of each class member will require separate assessment, no matter how difficult this exercise might prove. The British Columbia Court of Appeal decision in \textit{Shaw} demonstrates the point. Bull, J.A., with whose reasons Nemetz, J.A. agreed, acknowledged that if at trial the defendant Real Estate Board was found liable "there would have to be long, detailed and difficult accountings . . . regarding the sources, amounts, distributions, and specific entitlements of individual members of the class."\textsuperscript{111} However, the Court did not view the complexity of the individual calculations as a bar to the maintenance of the claim as a class action. On the contrary, Bull, J.A. considered that if liability were established and so the accounting stage reached, "I cannot but

\begin{footnotes}
\footnote{110 (1898), 23 O.A.R. 566 at 573-74.}
\footnote{117 (1973), 32 D.L.R. (3d) 443.}
\footnote{118 [1953] O.W.N. 5.}
\footnote{119 (1973), 36 D.L.R. (3d) 250 at 255.}
\end{footnotes}
think that the representative action is the only fair and convenient way that
the remaining troublesome matters could be efficiently resolved." Regret-
tably, the majority went on to remark that the class action would have been
disallowed if the class had claimed individual damages, thus highlighting the
inconsistency in judicial approach.

The decision, nevertheless, is significant for two reasons. First, the de-
termination to allow the class action to continue despite the expected ac-
counting difficulties acknowledges that courts have a responsibility to promote
respect for substantive rights and that for this purpose they must take a
broad view of procedural rules. "Rules and forms of procedure are not ends
in themselves, but means to an end, which is the attainment of justice." Second, the decision rather weakens any argument that individual damages
assessments will impose intolerable administrative burdens on the court sys-
tem. If courts have the machinery for making calculations of the kind
required in Shaw, there ought to be no objection to individual damages cal-
culations for class members since the difference between the two types of
inquiry is essentially only one of form.

4. **Diversity of Common and Separate Questions**

The foregoing examination of class actions for individual damages and
for claims arising out of separate contracts shows that a class claim situation
can involve both common questions and separate questions that concern
only individual class members. Indeed, there will rarely be a situation in
which a complete identity of interests exists among the representative plain-
tiff and members of the class on every issue going to liability, and, if
pecuniary relief is claimed, on the quantum of recovery. Even if class mem-
bers claim the same relief, whether a declaration, an injunction or the same
sum of money, and on identical causes of action, separate adjudications will
be necessary if the defendant challenges the assertion of particular individuals
to membership of the class.

Complete identity of interest on every issue represents the paradigm
situation for a class action and, in theory at least, the justification for the
procedure will weaken as the number of individual questions increases. Thus,
a point may be reached where questions common to the class are so sub-
ordinate to the separate questions affecting only individual members that the
class action ceases to be a viable alternative to independent proceedings.

---

120 Id., at 255.
121: **Union Bank of Australia v. Harrison, Jones & Devlin Ltd.** (1910), 11 C.L.R. 492 at 504, *per* Griffith, C.J.
122 "As a practical matter, a requirement of common relief has no compelling
importance and its absence presents no insuperable difficulties. A determination of
the interest of each member of the class in any damages recovered does not seem to us
dissimilar to a determination of each member's interest in a common trust fund, such
determination sometimes being required after the common issues have been resolved
in a class action. Only at such final stage do the individual interests become critical
and does the community of interest requirement lose significance" (**Daar v. Yellow Cab Co.** (1967), 63 Cal. Rptr. 724, 433 P. 2d 732 at 742).
The balance between common and separate questions will vary from case to case. Cases such as *Duke of Bedford, Chastain,* and *Shaw* illustrate one extreme. Each action raised a question of the legality of the conduct of a defendant purporting to act pursuant to statutory authority. An Act of Parliament (or regulation thereunder) of universal application was the source of the respective rights and obligations of class members and the defendant, not a contract made separately with class members, and so proof by the plaintiff of illegality was proof for all the class. Consequential declaratory and injunctive relief would extend automatically to the class and the personal intervention of individuals would not be necessary unless the defendant claimed that they did not belong to the class. However, the addition of a claim for pecuniary relief could introduce separate questions because if class members were not entitled to the same amount, the defendant could require each member to separately establish his recovery.

However, the typical consumer confrontation is not so much with statutory authorities as with business enterprises in the private sector. Consumer claims stem not from an Act of Parliament or regulation of universal application but from contracts separately made with the defendant. Contract claims present a greater diversity of common and separate questions than cases such as *Chastain.* Assuming a class action can be brought in a contract situation, judgment for the plaintiff on the common questions will extend to the entire class, but individual proof will be necessary on the separate questions before any one other than the plaintiff can obtain relief.\(^\text{124}\)

Some examples will demonstrate the problem.

Suppose a dealer in new motor cars warrants that the gas consumption of a particular new model for normal city driving will be approximately 30 miles per gallon. A motorist, relying on the warranty, buys one of the cars from the dealer, and the warranty proves to be false. On the assumption

---

that the value of the car would be greater if the warranty were true, the purchaser can recover the difference in value as damages for breach of warranty. Suppose further that the same warranty were made to 99 other purchasers. In a class action brought by one purchaser for himself and on behalf of all the others, a finding that the gas consumption of the model car in question could never be better than 15 miles per gallon given the most favourable conditions would establish a vital element of the case of each class member. However, a finding that the plaintiff was induced to purchase the car by the defendant's warranty would not extend to the other purchasers. Each class member would have to establish for himself the elements of warranty and inducement. There will be no common interest for two essential ingredients of the cause of action, apart altogether from the possibility that damages will vary among the class members and require separate assessment. Thus, a number of separate adjudications, each raising the issues of warranty, reliance and damages, would have to follow a favourable finding on the common question as to the breach of warranty.

The balance between common and separate questions in the example clearly rests with the latter, but, of course, it will change according to the facts of the particular case. Thus, proof of the making of the warranty would be less significant if the dealer had given the warranty by advertisement in the newspaper or on radio or television rather than verbally at the time of the sale to each customer. Once the advertisement was proved, all class members could rely on the finding, and though they would still have to show reliance, the defendant could hardly seriously contest their claim that they had noted the advertisement before buying the product. Again, proof of reliance would be unnecessary if the plaintiff alleged that the dealer's word concerning gas consumption constituted a contractual promise rather than a warranty.

Next, suppose the dealer in the motor car example made the statement about gas consumption fraudulently. In an action alleging fraud, the state of mind of the other party is material. The cause of action in fraud thus introduces an additional issue that must be established if the plaintiff and the class are to recover. However, proof for one class member as to the defendant's state of mind might constitute proof for the rest of the class because once it was determined that the dealer was fraudulent in giving the warranty for one sale it would be fair to assume, in the absence of contrary evidence, that his state of mind was the same when he repeated the warranty for subsequent sales. As fraud is usually a difficult charge to prove, a class action obviously has merit if the question is common to the class. Indeed, the advantage of a class action in securing a single determination on an issue such as fraud might outweigh whatever administrative difficulties are presented by the trial of the separate questions of the making of the repre-

---

125 The plaintiff has to show that the defendant made the representation on which he relied knowing it was false, or recklessly, not caring whether it was true or false (Derry v. Peek (1889), 14 App. Cas. 337 at 374.)
One final example derived from the original hypothetical motor car dealer situation will demonstrate again how the balance between common and separate questions can vary. Suppose the buyer from a dealer alleged that the model of the car in question was defective in design; for instance, that its brake or steering system was unsafe. Apart from any express warranty, the buyers could rely on the statutory warranties incorporated in every contract for the sale of goods that the goods will be reasonably fit for the purpose for which they are required and are of merchantable quality. Since the warranties are implied by law it is sufficient to prove that the warranty was broken. Thus, in a class action brought for all buyers of the car from the dealer claiming damages for breach of statutory warranties, the plaintiff and class members will have the same interest in the two elements that constitute the cause of action, the existence of the warranty and the breach consisting of a defect in design. Assuming liability is established, only the damages question will require separate proof once each claimant has qualified for membership in the class by showing that he was a buyer from the dealer.

5. Action Against Manufacturer or Seller

In all of the foregoing examples, the class members and defendant were

126 Courts in the United States have recognized that the class action can be a more effective procedure for adjudicating numerous claims based on fraud than separate proceedings brought by each victim (Advisory Committee on Rule 23, Proposed Amendments to the Rules of Civil Procedure, 39 F.R.D. 69 at 102-3; Green v. Wolf Corporation (1968), 406 F. 2d 291; Dolgow v. Anderson (1968), 43 F.R.D. 472; Berland v. Mack (1969), 48 F.R.D. 121.) These were decisions under Federal Rule of Procedure 23. California has a class action rule that in substance is the same as Ontario Rule 75 (Code of Civil Procedure, s. 382). The courts have held that the common interest requirement of section 382 is not satisfied if class members would have to litigate numerous questions to determine their individual right to recover subsequent to the rendering of any favourable judgment on questions common to the class. Thus, a class action could not be maintained for fraud if individual proof of the representation and reliance were necessary. However, in Vasquez v. Superior Court of San Joaquin County (1971), 94 Cal. Rptr. 796, 484 P. 2d 964, on demurrer to a class action allegation in a fraud claim, the California Supreme Court held that individual proof could be dispensed with if at trial the plaintiff was able to establish facts from which inferences could be drawn that the representations were made to each class member and that each class member relied on the representation. As to reliance, the Court considered that it is not necessary to show reliance upon false representations by direct evidence. Quoting Williston (12 Williston on Contracts (3d ed. 1970), 480), the Court concluded that reliance could be presumed from the fact that the representation was made as to a material matter and action was taken. If Canadian courts would take the same approach a class action based on fraudulent misrepresentations would be possible under the existing procedure. For comment on Vasquez, see R. Mainland, Class Actions in California: A First Look at Vasquez v. Superior Court (1971), 47 Los Angeles Bar Bulletin 13; Comment (1971), 18 UCLA L. Rev. 1041.

127 The Sale of Goods Act, R.S.O. 1970, c. 421. The statutory warranties cannot be excluded. The Consumers Protection Act, R.S.O. 1970, c. 82, s. 44A(2), makes void any written term or acknowledgement that purports to negative or vary any of the implied conditions and warranties under the Sale of Goods Act that apply to goods sold by a sale that is a consumer sale as defined by section 44A(1).
in the direct relationship of buyer and seller. In other situations, buyers may have a remedy against the manufacturer, though there is no contractual relationship with the manufacturer. If a manufacturer gives a warranty as to its product on which the buyer relies in contracting with the distributor and the warranty is broken, the buyer can recover damages from the manufacturer for the breach, whether or not he also has a cause of action against the distributor founded on a warranty given by the distributor in the same terms. The manufacturer's warranty is said to be a warranty collateral to the contract between buyer and seller.

Assuming a buyer has a warranty claim against both manufacturer and seller, the buyer can sue one or both of them at his option, and if he sues both, the two can be joined in the same writ. If the buyer sues in a representative capacity (on the assumption that a damages claim presents no bar), the class action will ordinarily benefit more consumers if the manufacturer is the defendant, either alone or with the seller, than if the action were brought against just the seller. With the manufacturer as defendant, every consumer who purchased the product in question in reliance upon the manufacturer's warranty can be represented irrespective of the identity of the seller of the product. On the other hand, a class action against the seller alone would not benefit buyers generally but only those who had bought the product from the defendant. However, there is one complication in bringing a class action against the manufacturer rather than the seller, namely, the element of reliance. As there is no contract between manufacturer and consumer the warranties created by The Sale of Goods Act cannot be imported into the relationship. The manufacturer will have given the warranty by advertisement in the media, a matter common to the class that is easily proved. Reliance, however, is a separate question, and individual proof will be necessary.

6. Superiority as Criterion for Class Action

The superiority of the class action to other available methods for determining the controversy should be the factor which determines whether a class action is to be allowed in the particular case. The courts ought not to decide the question on any a priori basis but rather should take the approach that the procedure is a flexible tool for securing economies of time, expense and judicial effort that can be adapted to a variety of situations. The necessity for individual proof on one or even a number of the issues on which liability depends should not bar a class action if the advantage gained by class

---


129 The Ontario government has proposed legislation to alter this situation by incorporating into the relationship of manufacturer and buyer warranties similar to those that apply as between seller and buyer (Ontario Ministry of Consumer and Commercial Relations, Green Paper on Consumer Product Warranties, 17 (1973)).
members in securing a finding on the common question outweighs any administrative problems the separate issues present. In assessing the benefit which a class action will bring to class members the court ought to consider what difficulties the separate proof of common issues will present and how this will affect the likelihood of individual actions being brought. The burden of proving common questions may well be so onerous that no individual will make the attempt if only he stands to benefit. This will particularly be so if the sum at stake is too small to justify the effort. However, the aggregation of multiple claims by a class action may make litigation worthwhile; what was impractical and unrealistic for an individual to prove just for himself becomes a legitimate exercise when the rights of hundreds and possibly thousands of people depend on the result. It is unlikely, for instance, that the Chastain plaintiffs would have challenged the defendant Authority in the British Columbia Supreme Court on what was a complex and difficult question of statutory interpretation if they had been limited to recovering only the deposits they had paid themselves. Again, suppose a class of consumers have claims against a car manufacturer on a collateral warranty, defective design being the breach alleged. Any more complex question for a layman litigant to establish is difficult to imagine. Denied the opportunity to combine their claims in a class action, few buyers will have the courage and resources to engage the car manufacturer single-handed. Further, even if there are some buyers determined to tackle the manufacturer individually, unless they sue as co-plaintiffs or their actions separately brought are consolidated, a finding of defective design for a buyer in one action will not bind the defendant in any other action. A class action would avoid this situation.

The class action rule for Federal courts in the United States recognizes that the claims of class members may raise questions that are not common to the class as a whole. The Advisory Committee responsible for drafting the Rule (F.R.C.P. 23) supported the class action as a means of securing economies of time, effort and expense, but concluded that these economies could only be achieved where the common questions predominate over any questions affecting individual members. A requirement that the common questions must so predominate before a class action will be allowed was therefore incorporated in the Rule. The draft class action legislation proposed for Canadian jurisdictions which concludes this article adopts the same test.

D. DISCOVERY AND COSTS IN CLASS ACTIONS

1. Discovery and Costs Against Class Members

Under current Canadian practice the members of a plaintiff class are, by reason of their non-party status, immune from some of the obligations that affect ordinary litigants. In particular, class members are not liable to give discovery nor will they be ordered to pay the defendant's costs if the

---

action fails. In some cases, the court held that the existence of these privileges rendered the class action an unsuitable procedure for determining damages claims which required individual assessments. The court stressed that by allowing the action the defendant would lose procedural rights enjoyed by parties in ordinary litigation, rights which he would have if class members had sued separately. The class action defendant, faced with numerous separate claims for damages, assuming a favourable finding on the common liability issue, would be denied discovery from each claimant, whether by production of documents or on oral examination, and could not recover costs from individual class members if he defeated their claim to participate in the judgment for the plaintiff.

2. Discovery

There is some merit in the objection that the present practice could produce procedural hardship for the defendant. The representative plaintiff is liable to give discovery, but this will not always be adequate to protect the defendant against the class claims, and the restriction is rather difficult to justify when class members, through the plaintiff, can compel the defendant to give discovery. In fairness, the defendant should have the same procedural opportunities as those enjoyed by the plaintiff and members of the class. However, the deficiencies in the existing procedure hardly support the court’s refusal to allow a class action for damages. The defendant can be similarly prejudiced in a class action for liquidated amounts, yet no class action has been denied for this reason. The solution is to amend the procedure to give the defendant discovery rights against class members whenever pecuniary relief is claimed, whether the amount sought is liquidated or not.

Discovery against class members under any new procedure should not be allowed until after judgment is pronounced for the plaintiff on the questions common to the class, assuming the action is successful. There are two reasons for this proposed limitation. First, only the common questions are in issue prior to judgment and discovery against the plaintiff should be

---

1 For the proposition that class members are not liable for costs or to give discovery, see Markt & Co. v. Knight Steamship Co., [1910] 2 K.B. 1021 at 1039; John v. Rees, [1970] Ch. 345 at 372; Moon v. Atherton, [1972] 3 All E.R. 145; Farnham v. Fingold, [1973] 2 O.R. 132. In McAllister v. O’Meara (1896), 17 P.R. 176, Boyd, C. suggested that class members who contribute to the expenses of the action may be found liable to costs, upon a proper application.

One of the Rules of Practice in Ontario relating to examination for discovery, rule 331(c), provides “Where an action is prosecuted or defended for the immediate benefit of a person or corporation, such person or any officer or servant of such corporation may without order be examined for discovery.” Whether the rule applies to a class action does not appear to have been decided.

sufficient to enable the defendant to meet the claim. Until judgment the class members are unidentified though identifiable, but the number rather than the identity of the members is significant for the defendant as the size of the class will determine the total liability. Only after judgment, when class members come forward to participate in the recovery, does the defendant need the protection of discovery to fully test individual claims. Second, there is a danger that the defendant could exploit discovery as a weapon of delay if class members were liable to give discovery before judgment. The defendant could stall proceedings almost indefinitely by serving discovery notices on a large number of class members and then insisting on full compliance before agreeing that the action was ready for trial.

3. Costs against the class

The absence of any right in the defendant to recover costs from class members who fail in their claim to participate in the judgment is another reason the courts have given for refusing to allow a class action for damages. The immunity of class members from liability for costs is a departure from the ordinary rule that the costs of litigation follow the event, and follows from the position that the class representative is technically the only party adversary of the defendant.

The defendant will be concerned with his costs recovery in two distinct situations; the first, if he wins the action, and the second, if he fails on the common questions. If the plaintiff loses the action, and thus the claim for the class as well, the defendant will be awarded costs from the plaintiff in the ordinary way. By suing for a class, the plaintiff threatens the defendant with a potential liability of far greater magnitude than the claim any individual class member would present. This consideration can properly be reflected in the quantum of the defendant's costs, but it has never been held to justify a costs recovery against class members. The costs liability of the representative plaintiff is deemed sufficient to protect the defendant. However, the situation is different if the plaintiff recovers judgment, thereby succeeding on the questions common to the class. If separate questions need to be determined before individual class members can recover, for instance, the assessment of damages, assuming damages claims are allowed, class members will have to intervene. At this point, the defendant in fairness should have the safeguard of the costs sanction in meeting the class claims on the separate questions. The questions would require a trial within the principal action, a kind of mini-trial, and they could be determined by a judge or master of the court. Class claimants and defendant would, in effect, be party adversaries on the separate questions, and by analogy with ordinary proceedings, the usual costs rule ought to apply.

Under present class action practice, a class claim can be brought for

---

138 See R. Jones, Discovery Available Against Absent Plaintiffs to Class Action (1972), 21 J. Public Law 189 at 197.
136 But see note 46, supra.
liquidated amounts, notwithstanding that no costs recovery is allowed against individual claimants. The proposed statute would change this practice and place liquidated claims and damages on the same footing as regards costs recovery from class members. Also, by extending the normal costs rule to the determination of the separate questions, the statute would give the defendant the same opportunity of utilizing the payment into court procedure as exists in ordinary proceedings.  

4. Costs for the class

Apart from the special position of class members, the ordinary rule for costs developed in Anglo-Canadian jurisdictions applies to class actions. Though costs are in the discretion of the court, the court will normally order that they follow the event. The rationale of the practice is twofold. First, the threat of liability for the costs of the other party in the event of defeat serves to deter the bringing or raising of unmeritorious claims or defences. These costs are in addition to those the unsuccessful party will have to pay his own lawyer. Second, the costs awarded the winner will compensate for the expenditure of time and money needed to secure success, an expenditure which the outcome of the action has justified. However, in all but a few situations, the costs which the losing party is ordered to pay, party and party costs, will be less than the costs the successful party will be charged by his lawyer. For convenience, and to distinguish them from party and party costs, the latter costs are called solicitor and own client costs.

To give the winning party a complete costs indemnity is thought to impose too heavy a penalty on the loser. Hence the discrepancy between party and party costs on the one hand and solicitor and own client costs on the other. The practice represents a compromise by the legal system between not allowing costs at all, which is the practice in most American jurisdictions, and requiring the losing party to pay the entire costs of his opponent. The gap between the two sets of costs does not normally present any difficulties in ordinary litigation in the County Court and the Supreme Court of Canada on the one hand and the Superior Court of the Federal Court of Canada on the other.

---

137 The procedure in Ontario is contained in Rules 306 to 318 of the Rules of Practice.

138 A full costs indemnity will be allowed, for example, in proceedings for the administration of an estate or the determination of a question of construction arising under a will or trust settlement, the costs of the parties being paid out of the fund the subject of the proceedings (see e.g., Re Butler (1965), 50 D.L.R. (2d) 210; Re Mc-Kinnon (1965), 55 D.L.R. (2d) 20; Re Stillman (1965), 52 D.L.R. (2d) 601). Also, costs can be used as a punitive measure, and the court has power to order a party to pay all the costs of his opponent as a penalty for misconduct in the litigation itself. See, e.g., Niznick v. Johnson (1961), 34 W.W.R. 101; Prager v. Kobayashi, [1968] 1 O.R. 694; Vanderclay Development Co. v. Inducon Engineering Ltd., [1969] 1 O.R. 41.

138A These costs are also sometimes called "solicitor and his client costs". In either case, the reference is to costs on an indemnity basis. See M. Orkin, The Law of Costs (Toronto: Canada Law Book, 1968) at 2.

Court. Most actions are brought for money claims, and judgment for the plaintiff in these jurisdictions will usually be for a substantial sum. The amount not covered by party and party costs is normally but a fraction of the judgment and the plaintiff will receive the balance of the judgment after his lawyer has deducted the excess.\textsuperscript{140}

The costs rules as they apply to class actions, particularly in the consumer area, are significant in a number of respects. First, the rule that costs follow the event is especially valuable given the potential for abuse in the aggregation of numerous claims effected by the procedure. Though individually the claims might be small, in combination they could threaten the defendant with a massive liability. Without the check on unmeritorious proceedings which the costs sanction provides, there is a danger that class actions of dubious merit will be brought with the object of coercing the defendant into making a substantial monetary settlement. Notwithstanding that the claim is questionable, the defendant could have a strong incentive for reaching such a compromise. A business of modest size might simply not be able to run the risk of defeat in face of a claim which, if established, is large enough to destroy the enterprise. Also, adverse publicity surrounding the action could prove almost as damaging. An isolated claim will normally go unnoticed, but a class action with the novel features of multiple claimants and large potential liability could easily attract considerable attention, particularly if consumers constitute the class and the defendant or its product is well known. If there is no media interest in the action initially, it does not require very much ingenuity for a handful of enterprising class members to generate their own publicity for the cause. They clearly do not intend to influence the court when it finally comes to determine the claims on the merits or even to solicit support from class members who previously had been unaware of the proceedings. Rather, their object is to put pressure on the defendant to reach a satisfactory settlement, the implicit promise being that the injurious activities will stop once he does so.\textsuperscript{141}

\textsuperscript{140} Strictly, party and party costs belong to the party to whom they are awarded, though the solicitor will be entitled to have them charged with payment of the costs due to him (\textit{Campbell v. Campbell and Lewis}, [1941] 1 A11 E.R. 274; \textit{Re Fuld}, [1967] 2 A11 E.R. 649).

\textsuperscript{141} The danger of abuse appears to be recognized in the Ontario Rules of Practice. Rule 373 provides that "Security for costs may be ordered, ... (f) where the action is brought by a nominal plaintiff; ... (h) where an action is brought on behalf of a class and the plaintiff is not possessed of sufficient property to answer the costs of the action, and it appears that the plaintiff is put forward or instigated to sue by others." However, the plaintiff is not a nominal plaintiff within sub-rule (f) if he has an actual interest in the subject of the dispute (\textit{McAllister v. O'Meara} (1896), 17 P.R. 176). Also, for the purpose of sub-rule (h), the court will not infer that the plaintiff was put forward or instigated to sue by others from the fact that members of the class will share in a successful outcome, and direct evidence on the issue is required (\textit{Ostrander v. Niagara Helicopters Ltd.} (1975), 4 O.R. (2d) 388.) See also, \textit{Rickert v. Britton} (1912), 5 O.W.N. 1008. The impact of adverse publicity as a deterrent to dishonest business conduct has been noted. See, e.g., \textit{Dolgov v. Anderson} (1968), 43 F.R.D. 472; J. Tydings, \textit{Fair Play for Consumers}, Trial, February 1970, 37; R. Dole, \textit{Consumer Class Actions Under the Uniform Deceptive Trade Practices Act} (1968), Duke L.J. 1101 at 1105; A. Travers & J. Landers, \textit{The Consumer Class Action} (1970), 18 U. of Ka. L. Rev. 811 at 814.
5. Inadequacy of Class Costs Recovery

The next aspect of costs in the class action context concerns the gap between party and party costs and solicitor and own client costs. As noted already, the discrepancy is not significant in most actions in the County Court and the Supreme Court because the typical judgment on a money claim is for a substantial sum, and the costs deficiency represents only a small proportion. By contrast, the individual claims of class members in a class action, including the claim of the plaintiff himself, are often quite small, particularly in an action for a consumer class. Indeed, the claims of individual members may well be so small that were it not for the class action there would be no litigation at all since separate actions could scarcely be justified. When the claim of the representative plaintiff is not large enough to warrant the trouble and expense of a separate action, the recovery for a class action plaintiff will in most cases be quite inadequate to meet the costs of his own lawyer after taking into account the costs the defendant will pay. The plight of the plaintiff is even worse if the class claims nothing but declaratory or injunctive relief.

The problem of the inadequacy of the plaintiff’s cost recovery in a class action is aggravated by the fact that the proceeding is usually much more expensive to conduct than the ordinary action. Despite the long history of the procedure, many aspects are still rather unsettled, and in a claim of any magnitude, the defendant will almost certainly challenge the propriety of the proceedings. Apart from having to anticipate and answer the procedural objections of the defendant, the unusually large dimensions of the dispute will create administrative problems for the plaintiff’s lawyer quite different from anything encountered in ordinary litigation. The taxing officer will recognize those complexities on the taxation of the lawyer’s bill for party and party costs, but no matter how generous the allowance, while the present practice of denying a complete indemnity remains, the plaintiff who claims only a small sum will inevitably finish out of pocket.

In actions for pecuniary relief, the sum recovered from the defendant for distribution among the class is an obvious fund for meeting whatever costs are not paid by the defendant. The excess costs could be made a first charge on the judgment amount, with the class receiving the balance. However, it is not entirely clear whether the court can order that the plaintiff's

---

142 In Ontario the amount of costs the taxing officer can allow for preparation for trial is fixed by a tariff. However, where the preparation for trial was unusually difficult the officer can compensate the party by allowing a greater fee for counsel at trial. The amount of the counsel fee is within the taxing officer’s discretion. (McCrone v. Brown, [1960] O.W.N. 287; Clarke v. A.-G. for Ont. (No. 2), [1967] 2 O.R. 393). See also, Re Solicitor (1920), 17 O.L.R. 432, aff’d 48 O.L.R. 363.
costs be paid out of the class recovery.\textsuperscript{143} Even if the practice were authorized, it would not help a class plaintiff who sought merely declaratory or injunctive relief.

Costs are a real impediment to bringing a class action if whatever amount the plaintiff recovers will not be sufficient to meet his own costs, even after taking the costs paid by the defendant into account.\textsuperscript{144} A practice that virtually assures the plaintiff that, though successful, he will finish out of pocket hardly provides an incentive to sue. The joinder of several class members as plaintiffs does not necessarily provide a solution for if their separate claims are small, the combined recoveries will still be inadequate to meet the costs deficiency. Few people can afford to set principles so high that they will embark on litigation in the face of certain economic loss. This is especially so among low and middle income earners, those affected most by the types of business misconduct for which the class action is often the only practicable remedy. The economically disadvantaged simply cannot afford to litigate. A separate action is quite beyond reach, and the prospects of recovery are not really enhanced if one brings a class action for all, because those represented will equally lack the ability and incentive to make any contribution to the cost.\textsuperscript{145}

6. Legal Aid

Legal aid could bridge the costs gap by meeting the entire costs liability

\textsuperscript{143} No plaintiff suing on behalf of a class could safely expect that in the event of success the court would allow him to take from the amount recovered for the class the difference between his solicitor and client costs and party and party costs. In the United States, where as a rule the losing party will not be ordered to pay costs, the lawyer for a representative plaintiff has been allowed his costs out of the recovery for the class (Buell v. Kanawha Lumber Corp. (1912), 201 F. 762; Gamboni v. County of Otoe (1954), 159 Neb. 417, 67 N.W. 2d 489; A. Homburger, \textit{State Class Actions and the Federal Rule} (1971), 71 Colum. L. Rev. 609 at 649). The situation in Canada is not so clear. In \textit{Shabinsky v. Horwitz} (1973), 32 D.L.R. (3d) 318 (Ont. H.C.), the plaintiff recovered a trust fund on behalf of a class and was allowed the difference between solicitor and client costs and party and party costs from the fund. This is a sensible approach but it is of questionable validity. The court did not mention and appears to have overlooked a number of authorities that establish that solicitor and client costs will only be awarded from a fund where the fund is not sufficient to meet the claims of class members in full. See \textit{Thomas v. Jones} (1860), 1 Dr. & Sm. 134, 62 E.R. 329; \textit{In Re New Zealand Midland Rly. Co.}, [1901] 2 Ch. 357 at 367; \textit{In re W.C. Horne & Sons Ltd.}, [1906] 1 Ch. 271. The rule was developed for creditors' actions. In \textit{Montreal Trust Co. v. Abitibi Power and Paper Co.}, [1943] O.W.N. 468, a bondholders' action, Kellock, J.A. acknowledged that it was somewhat illogical that the amount of recoverable costs should depend on whether or not the fund received from the defendant was sufficient to satisfy the claims of class members in full, but felt bound nevertheless to apply the rule.

\textsuperscript{144} The plaintiffs in \textit{Chastain} were fortunate to be represented by a public interest lawyer who was prepared to accept for his fee whatever costs could be recovered from the defendant. (As reported to the author by Mr. Ian Waddell of the British Columbia Bar, counsel for the plaintiffs in \textit{Chastain}.)

of the representative plaintiff to his own lawyer. Schemes for legal aid exist in the various provinces, but in Ontario, if not in other provinces, class action funding will not be granted. This restriction is hard to justify, especially since the class action will often be the only procedure that can bring relief to the very persons whom legal aid is intended to benefit. Lacking the resources to meet the certain cost burden of a class action, and disqualified nevertheless from legal aid, the prospective class action litigant will have no avenue for redress unless he can enlist the support of a lawyer who is prepared to accept whatever is recovered from the defendant for costs, assuming the action succeeds, and who will forego his fee altogether, and possibly his expenses, if the action fails. Understandably, few lawyers may be prepared to act on these terms, and in one jurisdiction at least the arrangement might not even be valid and enforceable.

7. Costs Recommendations

The inadequacy of costs recovery from the defendant constitutes a deterrent to a class action which cannot be justified when set against the public advantage to be gained from the mass adjudication of numerous claims which the procedure can achieve. The problem is particularly acute when the claim is for declaratory or injunctive relief, or when the action is for pecuniary relief, but the individual claims are small. Three solutions to the problem are suggested, and any one or more of them could be appropriate in the particular case, depending on the circumstances. First, class actions should be brought within the legal aid scheme so that the class action plaintiff is placed in the same position as a plaintiff in ordinary litigation as regards eligibility for aid. Second, the courts should be given a discretion to award the plaintiff a complete indemnity against the defendant for all costs and expenses reasonably incurred in bringing the action. This will require a practice amendment since it is doubtful whether the court now has power to make such an order unless the defendant has misconducted himself in the proceedings. The justification for special costs rules in consumer class litigation will be examined at the conclusion of this section of the article. Third, when a fund of money is recovered from the defendant, the court should have power to order that the fund bear the plaintiff's costs

---

146 E.g., in Ontario. See The Legal Aid Act, R.S.O. 1970, c. 239. Legal aid is not necessarily entirely free as the client may be required to contribute to the costs, depending on his financial situation (s. 16(3)).

147 Regulation 39(b)(i) of The Legal Aid Regulations, R.R.O. 1970, Reg. 557, provides that legal aid may be refused if the applicant is one of a number of persons having the same interests under such circumstances that one or more may sue or defend on behalf of or for the benefit of all. A Task Force on legal aid in Ontario has concluded that with few exceptions the practice has been to refuse leave under regulation 39, and has recommended that legal aid funding be provided in appropriate cases for group proceedings, including class actions (The Report of the Task Force on Legal Aid, Chapter 11 (1974)).


149 See note 138, supra.
insofar as they are not covered by the costs paid by the defendant, and before the fund is distributed among the class.

The final aspect of costs that has special significance for class actions, particularly the consumer variety, is the rule that costs follow the event. Costs for the victor in litigation compensate for his trouble and expense in vindicating his position, though not always completely. As well, the threat of costs liability is supposed to deter the bringing or raising of unmeritorious claims or defenses. The threat, however, may well discourage litigation by a party who has a sound and valid claim or defence (though ex hypothesi its strength must be problematical) because he simply cannot afford to run the risk of defeat. The outcome of litigation can never be entirely certain, and no matter how strong the case might appear, no prudent lawyer will assure success for his client in a serious contest. The costs of a party's own lawyer intensifies the dilemma as the loser will have to pay these costs in addition to those of his opponent.

Persons of limited means are therefore likely to be discouraged from litigating altogether when faced with an adversary determined not to capitulate, and the possibility of liability for two sets of costs should the action fail. Legal aid will not entirely allay the costs fear for the scheme provides just the costs the litigant would otherwise have to pay his own lawyer. It does not pay the costs that will be awarded against the party should he be unsuccessful.\(^{150}\)

For claims of small amount the proper forum is a small claims court, the jurisdiction of which is normally limited to $400.00.\(^{151}\) These tribunals are intended to provide an expeditious, inexpensive and informal machinery for adjudicating disputes involving small sums of money.\(^{152}\) To preserve these characteristics, lawyer participation in the proceedings has been discouraged by allowing only minimal recoverable costs, the assumption being that the litigants can conduct proceedings themselves, aided where necessary by the court and its officials. Legal aid does not usually extend to small claims courts,\(^{153}\) and the summary nature of the jurisdiction probably explains the exclusion from the scheme.

The existence of small claims courts might suggest that a broader class action remedy for consumers is not really necessary. Why, it might be argued, can no significant recoveries be expected unless a class action can be brought when courts are available that have been created for the specific purpose of

\[^{150}\] The regulations provide for payment out of the Legal Aid Fund of the costs awarded against a legally aided party (The Legal Aid Regulations, R.S.O. 1970, Reg. 557, ss. 129 to 131), but only one application for payment has been successful (Ontario Law Reform Commission, Report on Administration of Ontario Courts, Part III at 156 (1973)).

\[^{151}\] The Small Claims Act, R.S.O. 1970, c. 439, ss. 54, 196.


\[^{153}\] The grant of assistance is discretionary (The Legal Aid Act, R.S.O., c.239, s.13(b)(ii), and in practice is rarely made. The Task Force on Legal Aid has recommended that duty counsel should be assigned to Small Claims Courts to provide litigants with preliminary advice and assist in presenting a case (The Report of the Task Force on Legal Aid, 67 (1974)).
adjudicating on small claims? Are these tribunals not sufficient to secure redress for small claimants? The argument, however, is not sound, and for two reasons. It exaggerates the efficacy of small claims courts in the consumer context, and it does not answer entirely the several grounds advanced for the class action by consumer advocates.

Small claims courts in theory offer the litigant with a small claim an informal, expeditious and inexpensive adjudication of his dispute. In practice, however, the tribunals fall rather short of this ideal. The deficiencies of the jurisdiction are well described elsewhere, and it is sufficient to note some of them. For example, the place and times of sitting of the courts often effectively restrict their accessibility for persons who find it difficult to travel long distances or who cannot afford to leave their job to attend. Also, the tribunals do not advertise their existence and so many prospective litigants will never consider taking proceedings, even supposing they understood their rights had been infringed.

Despite the summary character of small claims tribunals, the consumer claimant who does decide to sue faces some obstacles. The first is costs. The rule that costs usually follow the event is applied in small claims courts, and though recoverable costs are quite low, they can still be substantial enough to deter the claimant with a just claim from litigating. Also, legal aid is not available in small claims courts. Finally, the courts are equipped to deal only with the straightforward case. They simply do not have the procedural machinery for properly deciding technical and complex factual questions of the type that can arise in consumer litigation, nor do the judges have the legal skills required for determining novel and difficult points of law. The County Court or the Supreme Court is the appropriate arena for such disputes.

But even if the existing hindrances to suing in small claims courts were abolished altogether, of the consumers injured by the misconduct of a particular business enterprise, there would probably still be comparatively few who would trouble to bring proceedings themselves, particularly if the individual claims were quite small. This is a significant consideration given the potential of a consumer class action as a deterrent to business wrongdoing.

In the realm of private litigation as opposed to remedial action initiated by some specially constituted governmental agency, the class action is by far the most effective method for securing relief for consumers who have been damaged by an identical deceptive practice perpetrated by the same

---


First, the action will be brought in a higher court, where the quality of judicial decision-making both on questions of fact and law will be superior to that normally encountered in small claims tribunals. The aggregation of claims will raise the amount in controversy above the jurisdictional limit of the lowest courts, and necessitate an action at a higher level, almost certainly in the Supreme Court. The common question, however, is the same in whatever court the claim is determined. But an action that was not practicable in the small claims jurisdiction in view of the complexity of the issues raised becomes a worthwhile exercise in the Supreme Court when the rights of hundreds and perhaps thousands of persons depend on the outcome. Second, where individual claims are small, a successful class action will bring compensation to more consumers than would be the case if the action were not brought, notwithstanding that distribution of the judgment amount may present problems if the class is large and the members cannot readily be identified. Where individual claims are small, few, if any, class members would have brought an action for themselves.

In the consumer area, the class action, by aggregating numerous separate claims, performs three valuable functions. First, as noted above, the action will secure a wider spread of compensation for the consumers affected than would be recovered if they had to sue separately. Second, the action compels the dishonest businessman to disgorge the profits he has received from his improper practices. Left to their own initiative, few consumers will sue at all, and so without a class action, the combined recovery will represent just a fraction of the total profit gained by the defendant from his activities. Indeed, the prospect of having to meet individual claims, save perhaps for a few insubstantial amounts, is usually so slight that the threat of litigation is simply no deterrent to the unscrupulous manufacturer or supplier who is prepared to employ any stratagem, no matter how unethical, to sell his product. The collective remedy provided by the class action could prove to be the deterrent that is needed. Indeed, deterrence is the third justification for the class action. A dishonest trader might not be overly sensitive about adverse publicity surrounding litigation against him, but an action that poses a potential liability towards a class possibly numbering hundreds or even thousands is another matter. A threat of this magnitude may well provide the check that will stop the businessman with fraudulent inclinations from carrying out his plans.

The class action for damages, when employed to obtain the redress of consumer grievances, is a procedure of considerable social importance. It is perhaps the most effective private remedy that has been created to combat large-scale business malpractice. At a single stroke a class action can secure compensation for hundreds and possibly thousands of consumers damaged by the improper conduct of the same business enterprise. In addition, judgment in the action will warn both the particular defendant and others in business that any repetition of the behaviour will likely bring the same consequence. A successful consumer class action will thus yield benefits that extend far beyond the particular class members who were represented. However, the full potential of a damages class action, both in securing mass compensation for consumers and in deterring business misconduct, will never be realized with the existing costs situation. On the assumption that in future a
class action for damages will be allowed, the costs rules hardly offer any encouragement to consumers to invoke the procedure against the business malefactor. Two aspects of the costs rules will discourage consumers from utilizing the class action, particularly when the individual claims are small. First, the combined judgment amount and costs recovery from the defendant will not meet the plaintiff's costs liability to his own lawyer. Second, the plaintiff will have to pay the defendant's costs if the action fails. Though a consumer claim may have merit, success cannot be assured, and so faced with the possibility of a double costs burden the individual willing to sue for a class will be rare indeed.

Recommendations on the first costs problem were made earlier. The recommendation for the second is rather more radical. It is proposed that the usual rule that costs follow the event be modified to the extent that the court would have no power to award costs to the defendant. Thus, if a plaintiff won the action for the class, the defendant would have to pay costs in the normal way. However, if the plaintiff lost the action, the court would make no order for costs at all, leaving the defendant to pay his own costs of the litigation. This recommendation is certainly a departure from the traditional costs rule, but it is felt to be justified by the special social significance of the class action procedure in the consumer context.

---

156 "The Rule 23 class action 'as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice' — a cross between administrative action and private litigation" (Dolgow v. Anderson (1968), 43 F.R.D. 472 at 481, per Weinstein, J.).

157 A consumer research study conducted by the University of Pennsylvania Law School concluded: "In many instances fraudulent operators are careful to avoid cheating individuals out of large sums of money because they realize that 'no one billed only fifty dollars is going to pay a lawyer to get his money back.' Thus the only cases lawyers are willing to handle are those brought either by the unusual individual who will pay more than the amount of his claim in order to see justice done, or those defrauded out of amounts large enough to justify the expenditure of legal fees. The number of consumers having no redress because the amount lost is not commensurate with the attorney's fee constitutes the vast majority" (Comment, Translating Sympathy for Deceived Consumers into Effective Programs for Protection (1966), 114 U. of Pa. L. Rev. 395 at 409).


159 Supra, note text at D7.

159A The point has been acknowledged by the Ontario Task Force on Legal Aid. Of the costs of group proceedings, including class actions, the Task Force states— "...we are emboldened to suggest at this point that it is no longer self evident that costs should follow the event. So much of today's litigation involves contests between private individuals and either the state or some public authority or large corporation that the threat of having costs awarded against a losing party operates unequally as a deterrent. The threat of costs undoubtedly works heavily against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake. We would therefore propose an amendment to The Legal Aid Act casting upon a successful respondent in any such proceedings the burden of satisfying the court or tribunal before costs are awarded in his favour that no public issue of substance was involved in the litigation or that the proceedings were frivolous or vexations" (Report of The Task Force on Legal Aid, 100 (1974)).
sumer litigation the defendant is invariably a business enterprise with far superior financial resources than those of the plaintiff. A corporate defendant can absorb litigation costs that would ruin an individual. The one-way costs rule proposed will help redress this imbalance between plaintiff individual and corporate defendant by removing the fear of the disastrous financial consequences of defeat. Admittedly, there is a danger that with the abolition of the costs sanction the class action procedure will be abused, and actions without substantial merit will be brought for the sole purpose of forcing the defendant to settle. To reduce, if not to eliminate, this danger, it is proposed that the plaintiff will not qualify for the costs immunity unless the court first certifies that the action is brought in good faith and the claim appears to have merit. The court will be required to determine this question within a short time after the commencement of the action.

There is some precedent for the costs proposal in United States practice. In most American jurisdictions the parties in ordinary litigation normally bear their own costs but, under the Clayton Antitrust Act, the court may award costs, including a reasonable attorney's fee, to a plaintiff who succeeds in a suit brought to recover damages for a violation of the anti-trust laws. There is no costs recovery for the defendant if the action fails.

E. UNITED STATES EXPERIENCE

The class action procedure has been developed furthest in the United States, particularly since the introduction of a new class action rule for Federal courts in 1966. In that short period there has been a large increase in the volume of class action litigation with proceedings being brought on behalf of such diverse groups as “all subscribers of business telephones in New York County, all Master Charge credit card holders similarly situated, all consumers of gasoline in a ‘given’ state or states, all homeowners in the United States, and even all people in the United States.” Experience with


101 Other federal statutes in the United States that direct the allowance of attorneys' fees to a successful plaintiff without corresponding rights to a prevailing defendant are referred to by A. Homburger, State Class Actions and the Federal Rule (1971), 71 Colum. L. Rev. 609 at 654.

102 Federal Rule of Civil Procedure 23. A number of states have adopted class action provisions substantially the same as the Federal rule, e.g., Arizona, Colorado, Delaware, Indiana, Kansas, Kentucky, Minnesota, Montana, Ohio, South Dakota, Tennessee, Washington. See A. Homburger, State Class Actions and the Federal Rule (1971), 71 Colum. L. Rev. 609 at 631. Massachusetts has since joined the list.

103 The extent of the increase is hard to determine as complete records of class actions have not always been kept, and some reports seem to be exaggerated. For instance, according to the American College of Trial Lawyers, in one Federal district alone, the Southern District of New York, more than 1,300 class actions had been commenced to the end of 1971 (Report of Special Committee, 13 (1972). But it has been pointed out that this number was less than 5% of all actions brought in the Southern District during the period (A. Homburger, Private Suits in the Public Interest in the United States of America (1974), 23 Buff. L. Rev. 343 at 366). On the other hand, the Commerce Committee of the United States Senate has reported that in the District Court for the District of Columbia the increase in class action filings is far greater than the rate for all civil actions (Class Action Study, 5 (1974)).

104 Report of Special Committee of American Trial Lawyers, 6 (March 1972) (with supporting citations).
the new procedure has proved extremely controversial, and has spawned a vast outpouring of professional writing from both enthusiasts and detractors.65 Supporters maintain that the procedure is the most effective weapon yet devised by which the private citizen can attack business abuse,66 while opponents condemn it with such labels as "legalized blackmail,"67 a potential "engine of destruction"68 and a "Frankenstein monster."69 The critics admit the necessity for checking business misconduct but claim this objective can be accomplished by methods that produce less distortion to the adjudicative process and to the roles traditionally assigned judges and lawyers than is caused by the class action. They contend that in endeavouring to attain the goals set for the new procedure by its creators, the courts are being compelled to depart from conventional judicial techniques and to sacrifice substantive principle in ways that Congress has not authorized.70

According to the critics, the essential vice of the modern class action is the attempt to use the procedure to recover damages. There is less ob-

---

65 Hence this observation of the Court of Appeals in Eisen v. Carlisle & Jacquelin (1973), 479 F. 2d 1005 at 1018:— "... there has followed such a quantity of comment pro and con on the questions of law we are to decide in this case, by law professors, by judges, and especially by lawyers specializing in class actions, expressed in numerous articles, opinions and published speeches that the task of even attempting to enumerate all of these for purposes of documentation is too much for us." For bibliographies of class actions, see (1971), 26 The Record of the Association of the Bar of the City of New York 412; Los Angeles County Law Library, Class Actions: A Selective Bibliography (1974).


69 In Eisen v. Carlisle & Jacquelin (1968), 391 F. 2d 555 at 572, Judge Lumbard, dissenting, gave this label to the controversy, which the majority of the court had sanctioned for class action treatment.

70 Eisen v. Carlisle & Jacquelin (1973), 479 F. 2d 1005 at 1013, 1018. W. Simon, Class Actions — Useful Tool or Engine of Destruction (1972), 55 F.R.D. 375 at 386 (a shift from "compensation to confiscation").
jection when the object is declaratory and injunctive relief for the class.\textsuperscript{171} By contrast, damages claims are said to impose tremendous administrative burdens on an already overwhelmed court system.\textsuperscript{172} Administrative problems aside, opponents of the procedure argue that in many cases a damages award constitutes a penalty quite out of proportion to the gravity of the defendant's business misconduct and the benefits gained by individual class members. With an aggregation of a multitude of separate claims, liability under a class action judgment can be quite massive, yet the claims are often for such small amounts that many class members never receive any payment. The damages distribution is incomplete because class members are not readily identifiable, and the individual claims are not large enough to warrant doing anything but publish notices in an attempt to bring the judgment to their attention. For instance, in \textit{Eisen v. Carlisle & Jacquelin}, an anti-trust treble damages action, the class as originally constituted consisted of some 6,000,000 odd-lot traders on the New York Stock Exchange, of whom only about 2,000,000 could be readily identified. The average damages a class member would recover if the action succeeded would be a mere $3.90.\textsuperscript{173} Even though class members are identified, and are sent individual notices, comparatively few will respond in many cases.\textsuperscript{174}

1. \textit{Fluid Class Recovery}

In quantifying damages against a class action defendant, a number of American courts have calculated the total loss inflicted by the defendant, the damages to the class as a whole, and have purposely disregarded the fact that a large part if the award will never be distributed to class members. This approach has been called the fluid class theory of recovery.\textsuperscript{175} It is at variance with the traditional view that damages are intended to compensate the victims of wrongful conduct for their injury and loss. By contrast, the fluid recovery theory acknowledges that many of the persons whom the award is supposed to benefit will not get compensation, the liability of the defendant being fixed by reference to the estimated number of members of

\begin{itemize}
\item \textsuperscript{171} Report of Special Committee of American College of Trial Lawyers, 2 at 29 (March, 1972); \textit{Eisen v. Carlisle & Jacquelin} ((1973), 479 F. 2d 1005 at 1019.
\item \textsuperscript{173} (1974), 94 S.Ct. 2140. The Supreme Court's ruling in \textit{Eisen} on the requirement of notice to the class means that if the action is to continue, the class as originally constituted will need to be redefined so as to substantially reduce its size. See notes 74, 75, supra.
\item \textsuperscript{174} E.g., in \textit{Cherner v. Transistor Electronic Corp.} (1962), 201 F. Supp. 934, a securities action that resulted in a 5.3 million dollars settlement fund, some 150,000 claims were mailed to class members, Transistor stockholders who purchased stock before February 20, 1962. 50,000 claims were returned, and 33,000 were ultimately approved.
\item \textsuperscript{175} For a history of the development of this theory, see M. Rosenfeld, \textit{The Impact of Class Actions on Corporate and Securities Law} (1972), Duke L.J. 1167 at 1179. See also, \textit{News and Comment, Antitrust and Trade Regulation Report}, No. 559, A-22 (1972); A. Miller, \textit{Problems in Administering Judicial Relief in Class Actions Under Rule 23(b)(3)} (1972), 54 F.R.D. 501 at 507.
\end{itemize}
the class rather than to the members who will establish their claim. In the words of the Circuit Court in *Eisen*:\(^{176}\)

All the difficulties of management are supposed to disappear once the 'fluid recovery' procedure is adopted. The claims of the individual members of the class become of little consequence. If the damages to be paid were only the aggregate of the sums found due to individual members of the class, after their claims had been processed, it is fairly obvious that in cases like *Eisen* the expenses of giving the notices required by amended Rule 23 and the general costs of administration of the action would exceed the amount due to the few members of the class who filed claims and the individual members of the class would get nothing.

But if the 'class as a whole' is or can be substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous, affording, we are told, plenty of money to pay all expenses, including counsel fees, and a residue so large as to justify reduction of the odd-lot differential for years in the future, for the benefit of all traders, past, present and future, who are to be considered to be members of 'the class as a whole.'

The theory of fluid class recovery is premised on the expectation that a large number of class members will not claim the damages assessed for the class as a whole,\(^{177}\) thus leaving a substantial part of the award undisposed of. In dealing with this residue, courts in the United States have worked by analogy with the *cy près* doctrine applied to charitable gifts in the law of trusts. If a donor has clearly expressed an intention to benefit charity, the gift will not be allowed to fail because the mode, if specified, cannot be executed, but the law will substitute another mode as near as possible to the mode specified.\(^ {178}\) The following comment from an advocate of the fluid class recovery theory explains the application of the *cy près* approach to damage distribution:—\(^ {179}\)

In many class actions the wrongdoing is clear. Defendants have exacted huge sums through wrongs perpetrated on millions of people. However, the usual smallness of each individual claim presents a problem. Either inertia (especially in our affluent society), or the often difficult task of gathering up proofs of claim, tends to make the injured class member unwilling or unable to pick up his share of the recovery effected by the volunteer plaintiff. In such situations, should the class action be dismissed, at least as to those who do not seek recovery?

Two schools of judicial thought are contending for opposite answers. The traditionalist view is for dismissing class action in such cases on the principle that where members of the class do not claim their damages, the action should be dismissed. This would seem to be the inevitable consequence of the classic principle that the class member is really a plaintiff, albeit not individually named, and if he cannot or does not bother to present his claim, then the defendant should not be compelled to pay.

\(^{176}\) *Eisen v. Carlisle & Jacquelin* (1973), 479 F. 2d 1005 at 1017.

\(^{177}\) In *Eisen*, the problem of determining total damages was minimal because an accurate evaluation of individual damages could be made without individual proof of injury from the defendant's records and from the repetitious nature of the transactions (Note, *Eisen v. Carlisle & Jacquelin — Fluid Recovery, Minihearing and Notice in Class Actions* (1974), 54 B.U.L. Rev. 111 at 117).


But another emerging school of judicial philosophy takes a less orthodox and more dynamic view of the animating spirit of the class action and its embodiment, Rule 23. The adherents of this school hold that more important than precise restitution to the particular persons aggrieved is the prophylactic purpose of Rule 23. Proceeding on this premise, they hold that where wrongs are done to masses of people who for one or another reason are unable or unwilling to present their claims, nonetheless the wrongdoer must be made to disgorge. Permitting the wrongdoer, they say, to retain the fruits of their wrong would encourage preying on the public. How then compel a defendant to pay in spite of the fact that there is no one to claim the payment?

The genius of the law in fashioning remedies to cope with problems has long been one of its proudest boasts. In approaching this dilemma, it once again exhibits its ingenuity.

If precise restitution to the victims is impracticable or impossible, the judges reason, then the recovery should go to some broad category which, by and large, includes the aggrieved members of the class. In this fashion, even if the injured person is not avenged, at least the wrongdoer is deterred. Thus they implement the declared purpose of Rule 23: to discourage wrongdoing.

The trial court in Eisen cited three cases as “respectable precedent” for fluid class recovery. Though the cases were distinguished on appeal, the Second Circuit holding that they provided no precedent for fluid class assessment under Federal Rule of Civil Procedure 23, they do demonstrate the concept in the operation. The first case, Bebchick v. Public Utilities Commission, was not technically a class action and Rule 23 was not in question, but nevertheless the fluid class principle was applied. The transit company of the District of Columbia was found to have increased bus fares without authority. The fares could not be refunded as those who paid the fares could not be identified. The court therefore directed that the amount of the illegally charged fares be set up in the books of the transit company to be used “to benefit bus-riders as a class in pending or future rate proceedings.” In State of West Virginia v. Pfizer Co., a consolidation of some 60 actions known as the Drug Cases, various states and municipalities recovered $100 million from a number of pharmaceutical companies for violations of the anti-trust laws relating to price-fixing. Of the recovery, $37 million was made available to meet claims of some estimated 150 million consumers, plus attorney’s fees and costs, and the balance paid to the states and municipalities represented to be used on public health facilities. However, as noted by the appeal court in Eisen, the court fixed the damages on a fluid class basis following a compromise of the proceedings and not by determination at a trial of the action. Finally, in Daar v. Yellow Cab Co., the class alleged overcharges in taxi fares. On demurrer, the California Supreme Court upheld the class action. The court evidently anticipated that individuals who had been damaged by the alleged overcharge would ultimately have to prove their separate claim, but this did not become necessary as the action was later settled, the defendant agreeing to reduce future taxi fares until the past overcharges were repaid to the riding public. The Second

Circuit in Eisen distinguished Daar on several grounds, one being that the state class action statute in Daar was in very different terms from Federal Rule 23.184

The Second Circuit in Eisen held against fluid class recovery in the strongest language: "... even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads, amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the fluid recovery concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."185 The Second Circuit dismissed the action without prejudice to its continuance insofar as the plaintiff asserted an individual claim against the defendant. On appeal, the Supreme Court did not rule on the fluid class theory. The Court agreed with the Second Circuit that the action could not be brought for the class as originally constituted, and upheld the dismissal. However, the Supreme Court noted that the dismissal was without prejudice to the plaintiff redefining the class. It therefore vacated the Second Circuit’s judgment of dismissal and remanded the cause for further proceedings consistent with the opinion.186

The Supreme Court’s disposition in Eisen did not carry an endorsement of the Second Circuit’s holding on fluid recovery, and the question of the validity of the concept still awaits the judgment of the Court. If the Court eventually rules the theory invalid, a legislative solution to the problem of calculating and distributing damages for a large class may be attempted.187

What lesson does United States’ experience with fluid class recovery provide for Canadian jurisdictions at this juncture? The issue cannot be avoided if there is to be any serious endeavour to expand the range of the class action remedy. Once damages recovery for a class is allowed, problems of assessment and distribution of the award are inevitable, especially when the class is large and individual claims are comparatively small. The problems encountered in the United States were probably to a large degree unanticipated by the draftsmen of amended Rule 23, and it would be helpful if United States courts were closer to an answer than they appear to be at the moment. Nonetheless, United States experiments with large class damages awards are valuable pointers for developments in this country. They highlight the administrative complexities that will have to be dealt with, and the controversy they have provoked has put the conventional concepts of damages assessments under searching scrutiny. Though the task will be dif-

184 (1973), 479 F. 2d 1005 at 1012. For a criticism of the Second Circuit’s treatment of the three cases relied on by the district court as precedent for fluid class recovery, see Note, Eisen v. Carlisle & Jacquelin — Fluid Recovery, Minihearings and Notice in Class Actions (1974), 54 B.U.L. Rev. 111 at 118, 120.
185 (1973), 479 F. 2d 1005 at 1018.
186 (1974), 94 S. Ct. 2140.
ficult, Canadian endeavours to find a solution at least will not be complicated by the due process considerations that confront American innovators. 188

Damage assessment and distribution is the critical issue to emerge following the expansion of the class action procedure to embrace damages claims. There is no problem when the individual claims are substantial, the class is not large and the members are readily identifiable. Virtual total individual participation in the recovery can then be expected and damages calculation on a “class as a whole” basis need not be considered. The dilemma occurs when for such reasons as the small amount of the separate claims, the large size of the class and the difficulties of identifying and notifying the members, class involvement following judgment will be only minimal, and the totality of damages inflicted by the defendant can be determined fairly readily and with reasonable accuracy. 189 In this situation, the fluid class solution calls for a total damages assessment and a court direction for the distribution of the unclaimed residue. Critics of this approach correctly point out that it conflicts with the traditional damages theory in two respects. First, it is premised on the expectation that most of the victims of the defendant’s illegality will not get compensation, at least not directly. Second, a distribution of the damages residue by the kind of _cy prés_ analogy applied in cases such as _Bebchick_ and _Daar_ will benefit individuals who were not injured by the defendant’s wrongdoing and did not belong to the plaintiff class.

The traditionalist criticism of fluid class assessment, by focusing on the beneficiaries, ignores the position of the defendant, and also the deterrent potential of the class action device. Fluid class recovery certainly does imply the conferring of benefits on individuals who were not injured by the defendant’s misconduct, and possibly to the exclusion of class members who were. However, the award does not affect the substantive obligations of the defendant. It is not a penalty because the measure of the recovery is the total amount of the damage inflicted by the defendant’s wrongdoing or of the defendant’s unjust enrichment, as the case may be. The award is identical to what the defendant would pay if each class member came forward and proved his loss. It hardly seems open to the defendant to plead that he ought to be relieved of all financial responsibility towards the victims of his judicially determined wrongdoing merely because they have not made a claim. As to the objection that the beneficiaries of the unclaimed residue will include individuals who did not belong to the class, one American com-

188 The Second Circuit in _Eisen_ struck down fluid recovery as “an unconstitutional violation of due process of law” (Note 185, _supra_). Though the court did not elaborate, the objection appears to be that “the device may illegally abridge the substantive rights of the members of the plaintiff class or of the defendant under the fifth amendment. The criticism can be made that requiring the defendant to pay damages all of which will not ultimately be received by those persons actually injured amounts to a deprivation of his property without due process of law. . . . The argument . . . is . . . of greater merit with respect to the substantive rights of class members. Those members of the class who do not receive notice and consequently fail to file claims for damages have arguably been deprived of their property without due process”, (Note _Eisen v. Carlisle & Jacquelin — Fluid Recovery, Minihearing and Notice in Class Actions_ (1974), 54 B.U.L. Rev. 111 at 123-24.)

189 For example, as in _Eisen_. See note 177, _supra_.

mentator has rather acutely observed, "The windfall that does occur should be viewed as an unavoidable byproduct of the basic relief; it should no more make such relief improper than does the fact the third parties may benefit from injunctions make that relief improper. More generally, so long as defendants' rights are not abridged, it is unclear what policy is served by striking down a remedy which may be the only effective way to vindicate the rights of plaintiff class members, simply because it also benefits third parties." 190

Furthermore, to restrict the defendant's liability just to class members who establish their claims following notice of the judgment would seriously impair the deterrent value of the class action remedy in situations where few class members could be expected to come forward. The rejection of fluid recovery would allow the defendant to keep the bulk of the proceeds acquired from his unlawful conduct. While this consequence does not quite amount to an intimation that the defendant is free to resume his activities, it is hardly a warning that he will be the loser if he does.

This author favours the fluid recovery assessment of damages for a class in the appropriate case. A successful class action for consumers can bring compensation to the people injured by business malpractice. To compel the defendant to part with the improperly gained fruits of his endeavours and to deter a repetition of the wrongdoing are two no less important class action functions. However, where full-scale participation by class members in a damages recovery is not practicable, an assessment of damages in gross is essential if the latter objectives are to be achieved, assuming, of course, the damages can be so calculated. The problem is to ensure that fluid recovery is applied in practice.

Legislation will help achieve the desired class action objectives, and Section F of the article contains a draft set of recommendations. The proposed statute will first allow an action to be brought where class members claim individual damages, and next give the court a discretion to order

190 Note, Managing the Large Class Action: Eisen v. Carlisle & Jacquelin (1974), 87 Harv. L. Rev. 426 at 453. "The reluctance of the courts which have approved "fluid class recoveries" to allow wrongdoers to escape the consequences of illegal conduct because of technical difficulties in proving or allocating damages is by no means a new development in American jurisprudence. Two well-established doctrines of the law of torts demonstrate this. First, uncertainty of the precise amount of damage suffered by a plaintiff is not a sufficient reason to refuse an award of damages as long as there is proof showing some damage and affording a basis upon which the amount can be reasonably calculated. Second, where plaintiff's damages could have been caused by only one of two or more negligent defendants and plaintiff is unable to show which one of them caused the damages, he will recover from all of the defendants and the burden of proof on the issue is shifted to the defendants. It will be noted that under the first doctrine, the defendant is in danger of being required to pay more than his share of compensation and under the second, he may be required to pay for damages which he had not caused at all. A defendant in a case where a "fluid class recovery" is granted is under neither of these dangers; for it is the plaintiff who must show both the total amount of damages and the fact that the defendant was the cause thereof" (A. Homburger, Private Suits In The Public Interest In The United States of America (1974), 23 Buff. L. Rev. 343 at 372-3 (citations omitted)).
the defendant to pay damages in a total sum. To legislate the removal of existing restraints on damages class actions is reasonably straightforward. Fluid recovery assessment, however, is a more difficult subject. The rules for measuring damages are almost entirely a development of the common law, and legislative regulation has been infrequent. Certainly, no legislative model exists for the type of damage assessment and distribution which constitutes fluid class recovery. Nor do the common law rules assist very much. Their evolution has been haphazard and unsystematic, and it is difficult to discern from them any broad statements of principle of universal application. Compensation, the prevention of unjust enrichment and deterrence of wrongdoing are undoubtedly themes that underlie the law of damages, but the emphasis upon them varies according to the particular rule in question. What makes fluid recovery unique is the attempt to achieve all three objectives by the one process. Compensation for every person who has suffered at the hands of the defendant is the primary goal, but if this is not practicable, at least the defendant will be made to part with the proceeds of his wrongdoing, and his experience should provide an example for others.

The proposed legislation deals separately with the two steps involved in fluid class assessment:— the fixing of the total liability and the distribution of the residue after individual claims have been met. Section 10(1) of the draft authorizes the court to determine the total amount of the pecuniary liability of the defendant to all members of the class, provided the amount can be calculated with reasonable accuracy without individual proof by the members, and to order the defendant to pay the amount into court. The expression “pecuniary liability” in the section applies the fluid recovery assessment technique to claims for liquidated sums as well as to damages. So far the discussion of fluid recovery in this article has emphasized damages, but the calculation of liability in gross is no less essential for an effective class action for liquidated amounts than for a class action for damages. Fixing the liability of the defendant to the class as a whole serves to prevent unjust enrichment and to deter wrongdoing no matter how the pecuniary liability is characterized, and while the payment of a debt due to a class member is strictly not compensation for loss, the distinction for the beneficiary is hardly significant.

Once the defendant has paid into the court the amount fixed as the total liability to the class, the procedure for processing the claims of individual

---

281 Section 3(4) of the draft legislation is designed to do this.
282 Some examples of legislative intervention are The Fatal Accidents Act, R.S.O. 1970, c. 164, s. 3(3) (insurance policy proceeds or premiums not to be counted in assessing damages in respect of death); The Trustee Act, R.S.O. 1970, c. 470, s. 38(1) (in action for injuries resulting in death no damages allowed for the death or for loss of expectation of life); The Libel and Slander Act, R.S.O. 1970, c. 243, s. 5(2) (damages limited to actual damages in libel action against newspaper or broadcaster). The causes of action in the first two examples are themselves statute created.
283 "... [The law as to damages still awaits a scientific statement ...] [it is] a branch of the law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider." (The Susquehanna, [1925] P. 196 at 210, per Atkin, L.J.). See also, Admiralty Commissioners v. S.S. Cheklang, [1926] A.C. 637 at 642-43, per Lord Sumner (quoted in H. Street, Principles of the Law of Damages, 1 (1962)).
class members is regulated by section 9. Section 10(3) empowers the court
to dispose of the residue of the amount left in court after the claims of
members and the costs and expenses of the action have been paid.

The fluid recovery procedure set up by the legislation leaves two im-
portant questions to the discretion of the court. Section 10(1) cuts the knot
that limits the defendant's liability to what will be recovered by class mem-
bers, and as an alternative, the court is now free to measure liability by
reference to either the total loss inflicted by the defendant or the total sum
by which the defendant was enriched, according to whether the class mem-
bers claim damages or liquidated sums. Also, the provision which authorizes
the court to dispose of the residue of money paid into court (s.10(3)),
makes no direction as to what the court is to do.

The situations in which the question will arise as to whether or not
to fix liability on the basis of the class as a whole, or as to how to dispose
of a surplus, are much too diverse to cover in advance by legislative pre-
scription, and a court will have to exercise its own judgment according to
the circumstances of the particular case. For instance, if a successful plain-
tiff class includes members who are in a continuing business relationship
with the defendant, say as department store charge account customers, the
court could direct the defendant to credit the accounts with the amount due
to each customer and order him to pay into court a sum sufficient to meet
the claims of members who were not customers.

The larger question is whether liability should be calculated as a lump
sum at all. The rationale of the proposed legislation is that by fixing the
defendant's total liability the court can prevent unjust enrichment and deter
future wrongdoing. Essentially, the question is one of discretion, and in
exercising the discretion the court must, after assessing the gravity of the
defendant's dereliction, determine whether the public interest in securing
the class action objectives would fairly be advanced by fixing liability in
gross. At this point, the comment of an American writer on the procedure
under the Federal Rules for granting or withholding certification of a class
is pertinent:— "Compare a class action instituted to vindicate the rights of
members of the Playboy Club to receive bar chits, or a class action threaten-
ing the opponent of the class with 'a horrendous, possibly annihilating
punishment, unrelated to any damage to the purported class or to any
benefit to defendant, for what is at most a technical and debatable violation
of The Truth in Lending Act' with a class action that forces a taxicab com-
pany to disgorge unjustified charges collected from thousands of unsuspecting
customers through improper setting of taxi meters. Is it not self-evident that
these actions are not on the same level of social significance and do not
deserve the same
treatment?"

With regard to the disposal of any residue of money paid into court by
the defendant for the class as a whole, United States experience suggests
that in most cases the parties will settle the question themselves by agree-

---

194 A. Homburger, Private Suits in the Public Interest in the United States of
ment, leaving the court with only the function of deciding whether the arrangement is feasible and can be enforced if it is not carried out. In the rare situation where the parties do not agree, the exercise of devising a scheme for applying the residue for the benefit of consumers of similar interests to those of the original consumer class ought not to be beyond the imagination of the court.

The very existence of a power in the court to order a defendant to pay on a total class basis should enhance the deterrent value of class litigation. The dishonest trader will then no longer be able to count on having to pay only the class members who come forward to claim; he faces the possibility of being ordered to pay the entire sum lost by the class whatever the response of individual members. Also, the existence of the power should encourage the compromise of class actions once they are commenced. So long as the defendant's liability is limited just to class members who make a claim, a defendant will be inclined to make no more than a token offer of compromise if he feels that only a few individuals will seek to participate in the judgment. The situation changes once the court is free to ignore member participation in quantifying liability. With a risk of liability to the whole class, the defendant is likely to be more realistic and make a settlement offer that the class representative finds attractive and is prepared to accept.

Whether fluid recovery will work in practice is not easy to predict. Indeed, the same query can be made of most of the innovations introduced in the draft legislation. In implementing the proposal, the legal profession, both bench and bar, obviously has a critical role. The prospects are good if the judges and lawyers who will have the responsibility of administering the new procedure understand and are sympathetic to its underlying objectives, and if in resolving the problems that undoubtedly will arise, they display the same resourcefulness and ingenuity they have demonstrated in other fields.

F. PROPOSED LEGISLATION
1. Scope and Form of Proposals

This final section of the article contains recommendations for changes to the existing class action procedure that are intended to overcome the shortcomings that have been described. The recommendations are in the form of a draft enactment and are accompanied by explanatory notes. However, a few general remarks are necessary before proceeding to the draft.

The scope of the class action procedure which the legislation would create is restricted in two respects. The procedure can be invoked only by consumers, as defined by section 1, and it does not apply to actions against a class. The class action rules now in force in all jurisdictions are not confined to any particular subject matter of claim, and they allow an action to be brought both by and against a class representative. There are two reasons for limiting the proposed procedure to actions on behalf of a consumer class. First, the entire thrust of the article has been to show that in many situations the class action is the only effective private remedy that exists for
consumers who have been damaged by the same business practice, especially where individual losses are small. Without the class action, consumers will be denied compensation, and perhaps equally as important, the merchant responsible for their loss will be permitted to keep profits gained from activities which, at the very least, do not conform to accepted standards of business behaviour. There is a special justification for arming consumers with a weapon to establish and enforce business standards as every member of society is a consumer and all will stand to benefit from the exercise. A vital and potent class action procedure in the hands of the public would help influence the forces that control the marketplace to be more responsive to the need to act fairly and not exploit their position.

The second reason for not extending the new procedure to all claims relates to the treatment of costs in the draft legislation. Section 11 contains a special costs provision to the effect that only the plaintiff can be awarded costs at the trial of the action. Furthermore, the court can award costs to the plaintiff on a solicitor and client basis. On the other hand, the defendant will not get any costs at all if he wins the action. The orthodox costs rules can unnecessarily deter litigation and the special need for an effective class action remedy in the consumer area is felt to justify these departures from the ordinary position. On the other hand, a plaintiff representing class members who cannot fairly be described as consumers ought not to be given the same favoured treatment.

The enactment of the proposed statute would not affect the existing Rule of Practice, which would continue to govern representative actions by individuals not coming within the consumer definition and actions against a representative defendant.

Another aspect of the new class action procedure that needs to be noted is the form in which it is proposed to be introduced. The intention is that the procedure should be enacted in legislation rather than made a Rule of Court. In Ontario, for instance, and the situation is typical of other Canadian jurisdictions, a Rules Committee normally has the responsibility of implementing changes in court procedure. However, the authority of the Committee is limited to matters of practice and procedure, and the substantive law is beyond its competence. In at least two respects, the draft changes rules that arguably are not practice and procedure in nature. These are the provisions that limit the res judicata effect of a class action judgment and that allow fluid recovery assessment of the defendant's pecuniary liability. If these provisions were embodied in a Rule of Practice rather than a statute, there is a risk they would be struck down as ultra vires the Rules Committee.

Finally, the use of American precedent and experience that will be evident from the draft statute and annotations calls for some comment. Some

195 The Judicature Act, R.S.O. 1970, c. 228, s. 114(10)(b).
may reject the draft simply for this reason, disregarding whatever merit the proposals might have. Others may accept the underlying intent of the scheme yet condemn the mode of presentation, perhaps arguing that in sheer volume of detail the draft surpasses even American endeavours to legislate in advance for every foreseeable contingency that might arise in the progress of a class action. On this latter view, the better course would have been to have left the task of steering the procedure in new directions to the wisdom and good sense of the judges. If the proposals are to be condemned for these reasons, there are several grounds for rebuttal.

First of all, the pace of change from the bench in responding to the need to extend the class action remedy to consumer transactions in the marketplace is governed by the judicial method, which demands a case-by-case approach. And there is really not much cause for optimism if it is hoped that the courts will move along the desired course. The recent Chastain107 and Shaw108 decisions in British Columbia were notable victories for consumers, but they are significant more for the readiness of the courts to accept the burden of calculating the entitlements of very large numbers of class members than for any new formulation of principle. Indeed, though strictly it was not necessary for its decision, the British Columbia Court of Appeal in Shaw quoted with approval the majority view in Markt109 that the existence of separate contracts was a bar to a class action, and stated that the procedure could not be used to recover “personal” damages. The Ontario Court of Appeal reiterated the individualized damages proscription in Farnham v. Fingold.200

Only by legislation can the outmoded restrictions that have burdened the class actions for so long be stripped away and the procedure permitted to develop as a consumer remedy in a wider context. To achieve this goal it is necessary to specify with some degree of particularity the obstacles that bar class claims at present, and expressly abolish them. For the future, however, the critical characteristic for the class action will be the predominance of common questions over those affecting only individual members. In this feature lies the justification for incorporating United States precedent. The verbal formulae adopted in the Federal courts in 1966 with F.R.C.P. 23, have successfully destroyed the restrictions that surrounded the original procedure and have presented consumers with a remedy that can be employed in a wide variety of situations. In exploring and defining the boundaries of the new process United States courts have developed a considerable body of jurisprudence. By contrast, the experience of Canadian courts and lawyers with the class action is very limited and the knowledge and expertise that has now accumulated in the United States is really too valuable to be ignored. The adoption of the Federal terminology should help ensure that it is not.

107 Note 29, supra.
108 Note 92, supra.
109 Note 99, supra.
200 Note 111, supra.
Second, though the United States influence on the draft has been strong, the reliance has not been undiscriminating and it is by no means complete. It is most visible in the provisions that define the scope of the class action remedy, and for the reasons already given. By comparison, a number of aspects of the procedure are quite new. For example, the costs provisions are entirely original and reflect the different role that costs have in litigation in Canadian jurisdictions as compared with the United States. The provisions for disposing of the individual claims of class members once the common questions have been decided against the defendant are yet another innovation. The section dealing with notice to the class is something of a hybrid. A notice provision is a new class action feature for Canadian jurisdictions and is certainly inspired by the American precedent. However, unlike the United States rule, which reflects due process considerations, notice is not made mandatory. The draft stresses the adequacy of class representation and the expectation is that once this requirement is satisfied only minimal notice will be directed in most cases. Finally, the concept of fluid class recovery, though developed in American jurisprudence, is expressed in legislative form for the first time in the draft proposal.

2. Draft Legislation

MODEL CONSUMER CLASS ACTIONS ACT

An Act to allow the enforcement in one action of the claims of numerous persons similarly situated as regards the purchase or lease of goods or services from or the grant or provision of credit by the same person.

1. Interpretation—In this Act:—

"Consumer" means an individual who seeks or acquires

(a) by purchase or lease any goods or services,
(b) the grant or provision of credit,
for personal, family or household purposes.

"Class" means a class of consumers.

"Class action" means an action maintained as a class action pursuant to an order made under this Act.

"Court" means the Supreme Court.

"Goods" means tangible chattels bought for use primarily for personal, family or household purposes, including goods which, at the time of sale or subsequently, are to be so affixed to real property as to become a part of such real property, whether or not severable therefrom.

"Services" means work, labour and services for other than a commercial or business use, and includes services furnished in connection with the sale or repair of goods or with the occupation of premises.

The statute allows an action to be brought on behalf of a class of consumers as defined in section 1. The Supreme Court of the province in which the statute is in force is the tribunal that has jurisdiction.
The definitions of the terms "consumer", "goods" and "services" in section 1 are adapted from section 1761 of the California Consumer Legal Remedies Act (Stats. 1970, c.1550, p.3157, §1). However, the terms "consumer" and "services" are given a wider operation than in the California provision. A consumer includes an individual who seeks or acquires credit for personal, family or household purposes, and services furnished in connection with the occupation of premises are covered by the "services" definition. The inclusion of credit transactions will allow a consumer class to enforce legislation enacted for the protection of borrowers, for instance, legislation fixing maximum interest rates or requiring truth in lending. By including services furnished in connection with the occupation of premises the statute will make the class action procedure available to tenant groups holding premises from the one landlord who are prejudiced in the same way by the conduct of the landlord in relation to services he is required to provide for the premises whether by statute or under tenancy agreements.

The terms "consumer" and "services" are defined so as to restrict the procedure to transactions of a domestic nature. Business transactions are excluded because it is felt that there is a greater need for a vital class action procedure in the area of personal and household consumption of goods and services. Domestic consumers are probably more vulnerable to deceptive commercial practices than men of business, and as they will usually have only a small stake in the dispute and fewer resources there will not be the same incentive for them to bring an individual action.

2. When class action allowed—One or more members of a class may sue in the court as representative party on behalf of all provided:

(1) the class is numerous;
(2) there are questions of law or fact common to the class;
(3) the claims of the representative party are typical of the claims of the class;
(4) the representative party will fairly and adequately protect the interests of the class.

This section sets out the minimum requirements for a class action under the statute. An action cannot proceed as a class action unless the four enumerated conditions are satisfied. Section 3(3) contains some additional requirements which the court will consider when the plaintiff applies for leave to maintain the action as a class action.

Section 2 is adapted from Rule 23(a) of the Federal Rules of Civil Procedure (called hereafter "F.R.C.P.") in the United States. The Federal Rule, however, applies to claims both by and against a class while the draft statute is limited to the former situation.

The first three sub-sections are essentially an elaboration of the prerequisites for maintaining a class action that are stipulated in the existing Rule of Practice (Rule 75 in Ontario). Sub-section (1) follows Rule 75 in requiring that the class be numerous. This reflects the original rationale of the class action. The procedure was developed in order to avoid the harsh consequences of the rule in equity that all persons interested in a controversy
must be joined as parties. When the persons interested were so numerous that joinder could not reasonably be expected equity would allow one of such persons to represent all the others. The factor of the class size was incorporated in the present Rule of Practice when it came into operation with the introduction of the Judicature Act system. A class action in effect denies class members their day in court. The requirement that the class be numerous ensures that this privilege will not be lost if the potential class is so small that the members would probably litigate the dispute as parties, whether by joinder as co-plaintiff in the original action or in separate proceedings.

The part of F.R.C.P. 23(a) that is equivalent to sub-section (1) stipulates that the class is to be "so numerous that joinder of all members is impracticable." The provision for joinder of parties in the Federal Rules explains this requirement. Though not nearly so strict as the former equity practice, the Rules emphasize the joinder as parties of all persons interested in a controversy and, as a general rule, joinder is compulsory (Rule 19). The class action is an exception to this rule (Rule 19(d)). A class action can be brought if joinder of the persons interested, the class members, is not practicable (C. Donelan, Prerequisites to a Class Action Under New Rule 23 (1969), 10 Boston College Ind. & Comm. L. Rev. 527 at 529-31). See also Moscarelli v. Stamm, (1968) 288 F. Supp. 453. In Canada, it is not necessary to place the same stress on the impracticability of joinder as parties since joinder is not usually compulsory. As a rule, the defendant cannot insist that a plaintiff join other persons who have the same interest as himself in the controversy as co-plaintiffs. The class action in Canadian jurisprudence does not represent such a significant departure from the traditional party joinder situation as in the United States, and it is felt that the requirement that the class be numerous sufficiently indicates when a class action is appropriate. The action should not be allowed where the numbers affected are so small there is a reasonable likelihood they will participate directly in the controversy as parties.

Sub-sections (2) and (3) state more fully the "same interest" element of the present Rule of Practice. They follow F.R.C.P. 23(a) and are the raison d'être of the class action procedure: the existence of questions of fact or law that are common to the claim of the plaintiff and to the claims of the class members whom he represents. Sub-section (2) deals with the claims of the class, and sub-section (3) looks to the position of the representative plaintiff. The reason for this separate treatment of the two aspects of the common interest requirement lies in the provisions of the statute which follow. Sub-section (2) must be read with section 3(3), which provides that the questions that are common to the class must also predominate over questions affecting only individual class members. The third sub-section "emphasizes that the representative ought to be squarely aligned in interest with the represented group" (B. Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1967), 81 Harv. L. Rev. 356 at 387 n. 120). It needs to be read in conjunction with sub-section (4), which requires that the plaintiff will fairly and adequately protect the interests of the class. The condition that the plaintiff's claim is typical of the claims of the class is intended to preclude actions that are inimical to the interests of class members. (Donelan, supra, 534)
Sub-section (4) is taken from F.R.C.P. 23(a) and is entirely new for Canadian jurisdictions. It would impose on Canadian courts for the first time a positive obligation to inquire into and determine the adequacy of the representation provided by the plaintiff who sues on behalf of the class. One of the matters the court will be expected to consider is the calibre of the lawyer who acts for the plaintiff (s.4(1)(b)).

Sub-section (2) is examined more fully in the commentary to section 3(3), and sub-section (4) is dealt with under section 4.

3. **Order that action be maintained as class action**

   (1) After the commencement of an action brought under section 2, the plaintiff shall apply to the court for an order that the action is to be maintained as a class action.

   (2) The plaintiff shall apply to the court under sub-section (1):—

   (a) if the defendant has filed an appearance, on notice to the defendant within one month after the date of the appearance or within such further time as the court may allow,

   (b) if the defendant has not filed an appearance within the time limited by the rules of procedure of the court, within one month after the date of the default or within such further time as the court may allow,

   and in default of such application by the plaintiff the court may upon motion by the defendant make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons.

   (3) The court shall order that the action is to be maintained as a class action if the conditions set out in section 2 are satisfied and the court finds that:—

   (a) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members;

   (b) a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and

   (c) the action is brought in good faith and appears to have merit.

   (4) The court shall not refuse to order that the action is to be maintained as a class action only on the ground that:—

   (a) the relief claimed in the action on behalf of the members of the class or of some of them is or includes a claim for damages;

   (b) the relief claimed in the action on behalf of the members of the class arises out of or relates to separate contracts or transactions made with or entered into between members of the class and the defendant;

   (c) any damages claimed for members of the class will require individual calculation.
(5) If on application by the plaintiff as provided by sub-section (2), the court determines that the action is not to be maintained as a class action, the court shall make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons.

(6) An order that an action is to be maintained as a class action shall:—

(a) define the class on whose behalf the action is brought;
(b) describe briefly the nature of the claim made on behalf of members of the class and specify the relief claimed;
(c) define the questions of law or fact common to the class;
(d) specify a date before which members of the class may exclude themselves from the class.

(7) The relief claimed for members of the class shall not include damages for the death of or bodily injury to any person.

(8) An order that the action is to be maintained as a class action may be altered or amended before judgment in the action.

This section introduces another new feature for class action procedure. Following the scheme of F.R.C.P. 23, it provides that an action commenced as a class action cannot be continued as such without the leave of the court. If leave is refused, the court is required by sub-section (5) to amend the proceedings so as to eliminate any reference to the representative character of the action. This practice is normally followed under the present class action Rule when it is held that the plaintiff has not satisfied the common interest condition. See text at B2, supra. The elimination of the representative claim will ensure that any judgment subsequently pronounced in the action will bind only the immediate parties, a result which is reinforced by section 6.

The making of an order under section 3 has important consequences. Not only will the action proceed as a class action, but also the special costs rules in section 11 will apply to the proceedings.

The plaintiff has the burden of obtaining an order that the action is to be maintained as a class action. Sub-section (2) fixes the time within which the application is to be made, though further time may be granted by the court. If the court is to be authorized to extend the time for applying, the power has to be conferred by statute for the reason that the Rule of Practice that allows the court to extend time (Rule 178 in Ontario) applies only to a time prescribed "by the rules, or by an order", and not to one fixed by statute (McCarron v. Metro Life Ins. Co. (1899), 35 C.L.J. 421; Atkinson v. Dominion of Canada Guarantee Co. (1908), 16 O.L.R. 619 at 632). If the plaintiff fails to apply for an order that the action be maintained as a class action, the court must make the same amendments to the proceedings that are required when the court has refused to make an order (sub-section (2)).

Sub-section (3) is a key provision in the new procedure. It contains additional requirements to those of section 2 that must be satisfied before the court can allow an action to be maintained as a class action. Parts (a)
and (b) of sub-section (3) are imported from F.R.C.P. 23(b)(3) and part (c) is new. Part (a) must also be read with sub-section (4).

Part (a) of sub-section (3), the predominance of common questions provision, applies whenever an action raises both questions of law or fact common to the plaintiff and the class and questions that affect only individuals. There will invariably be such a combination of common and individual questions, even in the most straightforward case. Thus, for instance, if declaratory or injunctive relief is granted in a class action, individuals who claim the benefit of the judgment will have to step forward and prove membership of the class (Duke of Bedford v. Ellis, [1901] A.C. 1, 11). Again, in a situation such as Chastain v. British Columbia Hydro and Power Authority (1973), 32 D.L.R. (3d) 443, after the court has declared that the defendant obtained money without lawful authority from the class, the members of which have yet to be identified, individuals who seek to recover must establish both that they belong to the class and the amount of their entitlement.

In situations of the kind raised by Duke of Bedford and Chastain, Canadian courts have held that the common interest requirement of the present Rule is satisfied, though in truth the claims involve individual questions in the sense described. Individual questions have only assumed significance for the courts when the right of each class member to relief derived from separate contracts with the defendant rather than from a single source such as a statute, or when the remedy sought was damages which had to be individually assessed. In either case the courts have not allowed a class action. In consequence of this refusal Canadian courts have never reached the point of considering whether a class action would be appropriate for damages claims for breach of a warranty made in identical terms to a group of consumers or for claims based on a fraudulent misrepresentation that has induced consumers to act to their detriment.

The object of part (a) of sub-section (3), in conjunction with sub-section (4), is to abolish the restriction that does not allow a class action when the members of the class seek damages that require individual calculation or the claims arise out of separate contracts or transactions with the defendant. Sub-section (4) will ensure that the courts do not in future dismiss a class action on the ground only that the action presents one or both of these characteristics. Under the new procedure the predominance of the common questions is the critical test.

To understand the expanded scope of the class action remedy that could be expected with the criteria contained in part (a) of sub-section (3), and sub-section (4), it is helpful to refer to some of the writing in the United States on F.R.C.P. 23(b)(3), on which provision the sections are modelled. The Advisory Committee that drafted the Federal Rule in 1966 wrote an explanatory note which accompanied its proposals (39 F.R.D. 69, 95). With regard to Rule 23(b)(3) the Committee said: "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, without sacrificing procedural fairness or bringing about other undesirable results."
The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, 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. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions.” (The citations have been omitted.) To this statement can be added the remarks of Judge Weinstein in *Dolgow v. Anderson* (1968), 43 F.R.D. 472 at 490. He said: “The common issues need not be dispositive of the entire litigation. The fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible.” Finally, “Under the flexibility of the new Rule 23, it is not likely that the administrative difficulties will outweigh the advantage of handling in one action the similar claims of hundreds of purchasers based upon essentially similar or identical circumstances.” *(Brennan v. Midwestern United Life Ins. Co. (1966), 259 F. Supp. 673 at 684.)*

The new provisions will allow a class action to be brought in a case such as *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021. In *Markt* the shippers who comprised the plaintiff class claimed damages under contracts separately made with the defendant but which contained an identical term to the effect that the defendant would not carry contraband of war. It was in the existence of this identical term that Buckley, L.J., the dissenting member of the Court of Appeal, found a sufficient common interest to sustain a class action. Similarly, facts such as those in *Shields v. Mayor*, [1953] O.W.N. 5, should produce a different result. In *Shields*, the plaintiff on behalf of a class of tenants claimed the repayment of rent the defendant landlord had charged in excess of the rate fixed by a war-time regulation. The Court of Appeal dismissed the representative claim on the ground that the tenants held the premises under separate contracts with the defendant.

In the United States it has been held that under F.R.C.P. 23 or its state equivalent, the existence of separate issues concerning the damages sustained by class members, their claims also being based on individual contracts with the defendant, do not prevent the common issue of liability

In fraud cases, United States courts have followed the suggestion of the Advisory Committee and found that the predominance of the common issues test is satisfied notwithstanding that individual proof of reliance on the fraudulent representation will be necessary. "We can see no reason why the trial court, if it determines individual reliance is an essential element of the proof, cannot order separate trials on that particular issue, as on the question of damages, if necessary." (*Green v. Wolf Corporation* (1968), 406 F. 2d 291 301). See, also, *Kronenberg v. Hotel Governor Clinton Inc.* (1966), 41 F.R.D. 42 at 45; *Weisman v. M.C.A. Inc.* (1968), 45 F.R.D. 258 at 263; *Berland v. Mack* (1969), 47 F.R.D. 11. The Advisory Committee, in the note quoted earlier, mentioned the possibility of material variations in the representations made to each individual and thus potential variations in the issue of misrepresentation for members of the class. However, there would not be this complication if the representation was made in identical terms to each class member, being communicated to them in writing, in a newspaper advertisement, or broadcast on the radio or television. It is hoped that the new procedure will encourage Canadian courts to follow the United States example and hold that in actions based on fraud common questions such as the making of the representation and its falsity would sufficiently predominate over individual questions of reliance and damages as to justify a class adjudication on the common questions.

Part (b) of sub-section (3) is the next provision that needs to be examined. Even if common questions of law or fact do predominate, the court, by virtue of part (b) must still find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. This "superiority" criterion serves as a reminder that a class action is only one of a number of procedural devices for handling multiple litigation (B. Kaplan, *A Prefatory Note to “The Class Action — A Symposium”* (1968), 10 Boston College Ind. & Comm. L. Rev. 497 at 498.) Among the alternatives are a single action agreed to by the parties as a test action or a consolidation of separate actions already commenced, and these may have greater practical advantages than a class action (*Advisory Note*, 39 F.R.D. 69, 103). On the other hand, the fact that individual claims are too small to justify separate actions would justify the conclusion that a class action was the superior method for determining the controversy. As the Court of Appeals, 7th Circuit, said in relation to the former F.R.C.P. 23 "[I]t . . . should be construed to permit a class suit where several persons jointly act to the injury of many persons so numerous that their voluntarily, unanimously joining in a suit is concededly improbable and impracticable. . . . To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give an advantage which would be almost equivalent to closing the door of justice to all small claimants.
This is what we think the class suit practice was to prevent.” (Weeks v. Bareco Oil Co. (1941), 125 F. 2d 84 at 88, 90.) See also, Holman v. Packard Instrument Co. (1968), 399 F. 2d 711; Berland v. Mack (1969), 48 F.R.D. 121.

Part (c) of sub-section (3) places on the plaintiff at the outset of the action the burden of showing that he sues in good faith and that his claim has merit. This is a reversal of the procedure now followed in ordinary actions, including class actions under the existing Rule. Under the present practice, if the plaintiff’s claim lacks substantive foundation or is brought frivolously or vexatiously or is oppressive, the court will not intervene unless the defendant makes an objection. The initiative for impeaching the plaintiff’s claim before it reaches the stage of a final decision on the merits thus lies with the defendant. The departure from normal practice which the proposal in part (c) represents is thought to be justified by the serious consequences that will follow for the defendant once the court makes an order under section 3 that the action is to be maintained as a class action. The proceedings will prove expensive for the defendant whatever the outcome. If the action succeeds, the defendant will have to bear all the costs. On the other hand, if the defendant prevails, section 11(2) denies him costs against the plaintiff.

Soon after the introduction of the new F.R.C.P. 23 in the United States a practice developed through judicial decision which subjected the class claim to a preliminary scrutiny by the court to determine whether it had merit. See Dolgow v. Anderson (1960), 43 F.R.D. 472 at 501-03. The practice was later criticized (Miller v. Mackey International, Inc., (1971), 425 F. 2d 424), and finally the Supreme Court held that it was not authorized by the Federal Rules (Eisen v. Carlisle & Jacquelin, (1974), 94 S. Ct. 2140). Nevertheless, the principle of some form of preliminary hearing on the merits has received the support of at least one American commentator. See, e.g., M. Blecher, Is the Class Action Rule Doing the Job? Plaintiff’s Viewpoint (1973), 55 F.R.D. 365 at 370.

In satisfying the court that the action is brought in good faith it should be sufficient for the plaintiff to show that he is genuinely concerned to secure redress for the class, and that the class claim is not made for the purpose of vexing the defendant or to coerce him into making a settlement. With regard to the requirement of showing merit, it is appropriate to analogize from the test applied in Canadian jurisdictions which allow a plaintiff to obtain a speedy judgment without a full hearing. The defendant can avoid summary judgment by showing that he has an arguable defence. See Holmested & Gale, Judicature Act of Ontario and Rules of Practice, vol. 1, 602-622 (1968). Applying this test to the question of apparent merit, the plaintiff need not demonstrate conclusively that on both the law and the facts the claim will succeed. These are matters for the judge at trial to determine. It should be sufficient for the plaintiff to show that on contentious points of law the claim is reasonably arguable and, if the facts are in dispute, that there is a reasonable prospect that the trial court will find them for him. For questions of law, the test is essentially the same as that applied when the defendant moves to strike out a statement of claim.
for not disclosing a cause of action. The court will not grant the motion unless the pleading is bad beyond argument.

Sub-section (8) is based on F.R.C.P. 23(c)(1). It allows the court to alter or amend the order that the action is to be maintained as a class action if, upon fuller development of the facts, the original determination appears unsound (Advisory Note (1966), 39 F.R.D. 69 at 104).

4. Adequacy of Representation

(1) In determining whether the plaintiff will fairly and adequately protect the interests of the class for the purpose of section 2(4), the court may consider:

(a) if the plaintiff is not represented by counsel, whether the plaintiff is competent to adequately present the claim made on behalf of the class;

(b) if the plaintiff is represented by counsel, whether such counsel has sufficient skill and experience to adequately present the claim made on behalf of the class.

(2) If at any time after the court has determined that the action is to be maintained as a class action and prior to judgment it appears to the court that the plaintiff will not fairly and adequately protect the interests of the class the court shall:

(a) set aside the order that the action is to be maintained as a class action and make all such amendments to the proceedings as will eliminate therefrom all reference to representation of absent persons, or

(b) substitute for the plaintiff any member of the class who consents to be so substituted and who in the opinion of the court will fairly and adequately protect the interests of the class.

This section has to be read with section 2(4), which stipulates that the representative parties will fairly and adequately protect the interests of the class. The court cannot make an order under section 3 that the action be maintained as a class action unless this condition is satisfied.

Section 2(4) is taken from F.R.C.P. 23(a). It is a critical provision on account of the potentially serious consequences of a class action for members of the class. If the action fails, the members will be bound by the judgment and thus precluded from bringing separate proceedings themselves. In some situations class members may be prejudiced even though the action has succeeded. (See Note 77, supra.) The risk of prejudice would be only slight if all class members were aware of the action and those who wished to do so could take steps to exclude themselves from the operation of the eventual judgment. However, notice to all the class can never be assured, especially when the membership is large. Section 5(1) authorizes the court to direct notice to the class, but it is envisaged that notice will be the exception rather than the rule, and that even when notice is ordered, it will not be expected to reach the entire class.
The subject of prejudice from an adverse judgment for class members who had no notice of the proceedings was examined earlier (see text at B3 supra). The conclusion was that class members who never intended to sue for themselves could not show they had been prejudiced. Members of the class in this category would include individuals who originally had considered their claim too small or the proof too difficult to warrant the trouble and expense of litigation. The class member liable to be prejudiced by the absence of notice was the person who had seriously thought of bringing an action himself. Assuming that the member would have retained competent counsel had he brought proceedings, and that the prospects of success on the claim were reasonable, he will have suffered prejudice if the adverse judgment that in fact eventuates is the result of the ineptitude of the plaintiff or his counsel in managing the class claim. For a class member in this situation, the risk of prejudice following the lack of notice will be minimized, if not eliminated altogether, if the representative parties and their lawyers exercise the same vigour and competence in presenting his claim as could be expected if he were to sue himself. Hence the requirement that the court be satisfied that the representative parties will fairly and adequately protect class interests.

Section 4(1) specifically directs the court's attention to the question of the legal representation of the plaintiff. Where the representative plaintiff has not engaged counsel (s.4(1)(a)), it is expected that the court could rarely be satisfied that the interests of the class were "fairly and adequately protected." Sub-section (b) presents a more difficult question. It calls for an inquiry that for Canadian courts is quite novel, and for obvious reasons there will be some reluctance to make it. It is predicted, however, that the question will need to be seriously considered on very few occasions. A defendant will likely never object that the opposing lawyer is not competent to present the claims of the class, and if the plaintiff himself is not satisfied with the performance of his lawyer he is free to dismiss him. The provision has been inserted for the protection of the class members and it is expected that only after objection made by a class member will the courts ever have to decide whether the lawyer for the class has "sufficient skill and experience to adequately present" their claim.

United States courts have considered the competency of the lawyer representing the class under the corresponding provision in F.R.C.P. 23. The court in Eisen v. Carlisle & Jacquelin (1963), 391 F. 2d 555 at 562, held: "[A]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation." This included diligent and vigorous prosecution of the claim (Herbst v. Able (1969), 47 F.R.D. 11 at 15). In Dolgow v. Anderson, (1968), 43 F.R.D. 472, the question of the competence of counsel for the class was raised by the defendant, who argued that the representation might be so poor that on constitutional grounds judgment in the action would not have any res judicata effect. The statement of the court in dismissing the objection indicates that the hearing of the motion which is required by section 3 of the new procedure will give plaintiff's counsel an opportunity to demonstrate his ability to conduct the litigation. Judge Weinstein said: "Plaintiffs' counsel is admitted to practice in both state and federal courts.
Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession. In point of fact, irrefutable evidence of his competence and fervor is reflected in the papers and arguments thus far submitted by the plaintiffs’ attorney. He has demonstrated that he is both willing and competent to undertake the responsibilities which this litigation entails.”

The competency of counsel is one aspect of the concept of the adequacy of the class representation. Another aspect is the matter of the coincidence of the interests of the representative party with those of the class. There must be no conflict between their respective interests (Herbst v. Able, (1969), 47 F.R.D. 11 at 15; C. Wright, Class Actions (1970), 47 F.R.D. 169 at 172). The same concern to avoid a conflict that might prejudice the class underlies the requirement of section 8 that a class action is not to be dismissed or compromised without court approval.

Sub-section (2) empowers the court to reconsider its determination that the action is to be maintained as a class action if it appears that the representative parties are no longer fairly and adequately protecting the class interests. It is anticipated that the court would normally make such a finding after objection by a class member, but it would be open to the court to act of its own motion. Having found that the representative parties were not qualified to represent the class, the court may either set aside the section 3 order and strike out the representative claim, the action then proceeding as a claim by the plaintiff in his personal capacity, or substitute a class member for the representative party.

The attention to the adequacy of the class representation that is demanded by section 2(4) reflects the concern that some class members may be prejudiced if the action fails. Prejudice caused by a successful outcome is another problem. It was mentioned earlier and will be examined more fully in relation to section 7.

5. Notice to class

(1) If the court makes an order under section 3 that an action is to be maintained as a class action, the court may order that notice be given to members of the class on whose behalf the action is brought advising them of the pendency of the action and that the court will exclude them from the class if they so request by a specified date and that judgment in the action, whether favourable or not, will include all members who do not request exclusion.

(2) If the court makes an order that notice be given to members of the class, the court may in its discretion

(a) give directions as to:—

(i) the members of the class to whom the notice is to be given,

(ii) the terms of the notice,

(iii) the mode of giving notice, including notice by advertisement;
(b) order that the defendant give the notice or pay the cost of giving the notice.

(3) The court shall take the following matters into account when determining whether to order that notice be given to members of the class or in considering what directions to give under sub-section (2):—

(a) the cost of giving notice in relation to the amount of any sums claimed in the action on behalf of individual members of the class;

(b) whether members of the class are likely to suffer substantial prejudice if they do not receive notice of the pendency of the action.

This section authorises the court to direct notice to the class of the pendency of the action once it is determined that the action is to be maintained as a class action. It differs from the Federal rule in several respects. The most important point of departure is that the section gives the court a discretion as to notice whereas the Federal provision makes notice mandatory (F.R.C.P. 23(c)(2)). Even in the United States the notion of a discretion in the court as to notice is not entirely novel for at least one State, Massachusetts, though modelling its class action provision on Rule 23, has not incorporated the compulsory notice stipulation (Rules of Civil Procedure 1974, Rule 23).

Notice to the class has proved the most controversial feature of class action procedure in the United States under Rule 23. Rule 23(c)(2) provides that each class member shall be advised that he has the right to exclude himself from the action or to enter an appearance through counsel, and further, that the judgment, whether favourable or not, will bind all class members not requesting exclusion. The court is required to 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 “is designed to fulfill requirements of due process to which the class action procedure is of course subject” (Advisory Committee Note (1966), 39 F.R.D. 98 at 106-107). From the time the Rule was introduced it was debated whether the words “all members who can be identified through reasonable effort” were to be read literally or whether notice to a sample of such members selected at random was sufficient. The question seems now to have been finally determined by the Supreme Court in the recent Eisen decision (1974), 94 S.Ct. 2140. The Court said: “We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort. . . . In the present case, the names and addresses of 2,250,000 class members are easily ascertainable, and there is nothing to show that individual notice cannot be mailed to each. For these class members, individual notice is clearly the ‘best notice practicable’ within the meaning of Rule 23(c)(2) and our prior decisions.”

The Supreme Court decision in Eisen also resolved another contentious point of practice under Rule 23, the question of which party was to bear
the initial cost of giving notice. It was held that the Rule gave no authority to a court to order the defendant to pay the cost. "The usual rule is that the plaintiff must initially bear the cost of notice to the class . . . as part of the ordinary burden of financing his own suit." At the date of the appeal the cost to the plaintiff of giving individual notice to the two million members of the class was $315,000.

Under the present class action rule in Canadian jurisdictions there is no requirement of notice to the class and in practice notice is not given. In considering whether some requirement of notice should be incorporated in a new class action provision it is essential to remember that the rather strict notice rules that obtain in the United States reflect the need to observe the constitutional mandate of due process, and that no similar compulsion exists in Canada. There is thus no danger that any new class action procedure will be set aside for failing to prescribe standards for notice to the class that United States courts would regard as minimal in order to secure the observance of due process. In a word, the United States experience with regard to the necessity for notice is largely irrelevant in the Canadian context.

In giving the court a discretion to direct notice, section 5 contemplates that in some situations no notice will be required at all and that in others notice will be only minimal. The object of notice is to avoid prejudice to class members caused by the binding nature of the judgment that ultimately may be pronounced in the action. The notice gives them the opportunity to exclude themselves from the class. Yet widespread notice to the class may prove so costly as to be prohibitive. Sub-section (3) endeavours to strike a balance between these conflicting considerations. The court is required to take the matters mentioned in sub-section 3 into account in exercising the discretion as to notice. Part (a), for instance, might justify the court dispensing with notice altogether in a situation such as Chastain where the class numbered thousands and the individual sums at stake were not large. Part (b) deals with the risk of prejudice to class members who do not get notice. Prejudice in this sense was examined earlier (see text at B3 supra), and it was concluded that the risk was not very great, particularly if the claims of class members were so small that they probably would not have sued themselves, or if the class was adequately represented by the plaintiff and his lawyer.

The new procedure emphasizes the adequacy of class representation rather than notice to the membership as the measure for safeguarding the interests of class members in the event of an adverse judgment. The court must be satisfied that the representative parties will fairly and adequately protect the interests of the class before it can allow the action to be maintained as a class action (s.s.2(4), 3(3), 4(1)(b)) and in reaching its decision the court may take into account the skill and experience of counsel retained by the representative parties. It is submitted that when this requirement is satisfied notice to the class becomes of secondary importance.

Notice given to a class member under the statute will inform him of the pendency of the action and afford him an opportunity of either excluding himself from the class or challenging the adequacy of the representation. The opting-out function of the notice could not be fully served unless it was
communicated to every member of the class, but this is hardly practicable. Comprehensive service, however, is unnecessary if the notice is viewed primarily as a means of allowing the class to test the quality of the class representation. This purpose will be adequately carried out if notice is sent to a sufficient number of randomly-selected class members. It is probable that their response will be representative of the class as a whole. (B. Kaplan, *Federal Rules Amendments* (1967), 81 Harv. L. Rev. 356 at 396; R. Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, (1968), Duke L. J. 1101 at 1126).

Two further comments are appropriate in relation to the discretion of the court under section 5 to order notice and to direct how the notice is to be given. First, if experience in the United States is any guide, notice will ordinarily evoke little response from class members. Even where notice is mailed to each member less that 1% of the class has requested exclusion in most cases (A. Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?* (1970), 25 Business Lawyer 1259 at 1266; *Report of Special Committee of American College of Trial Lawyers*, 11 (March 15, 1972); W. Simon, *Class Actions — Useful Tool or Engine of Destruction* (1972), 55 F.R.D. 375 at 379; *Hohmann v. Packard Instrument Co.* (1968), 399 F. 2d 714). Second, though section 5 authorizes service by advertisement, such service may in fact prove illusory. "It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed" (*Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306 at 315.) In the words of two commentators, the Supreme Court in *Mullane* "recognized what many judges and lawyers long had felt — notice by publication generally is equivalent to no notice at all" (Maraist and Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action* (1970), 49 Tex. L. Rev. 1 at 8.)

Section 5 (2) (b) authorizes the court to order the defendant to bear the cost of notice to the class. The defendant has an interest in the question of notice as he will normally have to pay the cost if the action eventually succeeds. Except in this limited sense, whether notice is given to the class or not does not really concern the defendant as judgment in the action will bind members of the class whether they received notice or not. This provision should help discourage a defendant from pressing the court to direct elaborate notice when the motive is not to protect class members but to embarrass the plaintiff with the expense of the notice. If the defendant insists on notice, the court may make him pay the price.

6. **Judgment after proceedings amended to exclude representative claim**

Whenever pursuant to this Act the court amends proceedings so as to eliminate therefrom all reference to representation of absent persons the court at the trial of the action shall give judgment in such form as to affect only the parties to the action.
This provision is adapted from Rule 23 of the Massachusetts Rules of Civil Procedure 1974. It has been examined in relation to section 3.

7. Binding effect of class action judgment

Judgment in a class action shall not affect:—

(1) a member of the class on whose behalf the action is brought who has excluded himself from the class;

(2) a member of the class who has not so excluded himself except to the extent that the judgment determines the questions common to the class which are defined in the order that the action is to be maintained as a class action and which relate to the claim described and the relief specified in the order.

This must be read together with section 3(6) and (7). The foundation for the three provisions is the common law rule that judgment in a class action binds both the immediate parties and members of the class. In view of some of the special features of the new procedure proposed in the draft it is appropriate to prescribe the extent to which a judgment in an action brought under the statute will have res judicata effect. The provisions deal with the res judicata question from two aspects, namely, what members of the class does the judgment bind, and to what extent are those members bound.

The risk of prejudice to class members resulting from an adverse judgment was examined under section 5. The statute seeks to minimize this risk by requiring the court to be satisfied that the class is adequately represented. This will give some assurance that at the eventual trial the claim of a class member will be presented no less effectively than if he had brought a separate proceeding. In addition, class members may exclude themselves from the class. A person who has opted-out of the class is not affected by judgment in the class action (s.7(1)), whether favourable or not, and he may sue the defendant in his own action, provided the claim is not statute barred.

A class action judgment can prejudice the position of some class members even though the judgment is favourable. For instance, if the class recovers a damages judgment for breach of the condition of merchantable quality which is implied in the sale of a product by The Sale of Goods Act, a class member would probably be barred by the judgment from suing separately in respect of personal injuries sustained by reason of the defect in the product. See Spencer-Bower and Turner, Res Judicata, 378-382 (2d, 1969); 50 Corpus Juris Secundum, 121, §676. This aspect of res judicata was examined in Note 77, supra. The statute attempts to prevent prejudice of this kind in consequence of a judgment for the class. The situations in which judgment in a class action on one cause of action might bar a second action for different relief on another cause of action arising from the same factual situation are too varied to be enumerated, even assuming they could be stated with any precision, which is far from clear. (Indeed, the concept of a cause of action is itself so elusive that the use of the term has been avoided.) Instead, the approach has been to restrict the binding effect of the judgment within the narrowest definable limits.
This objective is sought to be accomplished by section 3(6) and 3(7) and section 7 in the following ways:

1. As to what persons are bound:

   (a) by defining the class on whose behalf the action is brought in the order that the action is to be maintained as a class action (s.3(6)(a));
   
   (b) by allowing members of the class so defined to exclude themselves from the class (s.3(6)(d));
   
   (c) by removing class members so excluded from the effect of the judgment (s.7(1)).

2. As to the extent a person is bound by the judgment:

   (a) the order that the action is to be maintained as a class action shall describe the nature of the claim made on behalf of the class and specify the relief claimed and define the common questions (s.3(6)(b) and (c));
   
   (b) such relief shall not include damages for the death of or bodily injury to any person (s.3(7));
   
   (c) judgment in the action shall affect the class members bound (s.7(1)) to the extent only that the judgment determines the claim described and the relief specified in the order and insofar as the claim and the relief relate to the common questions defined in the order (s.7(2)).

Claims for damages for death or bodily injury are excluded from the scope of the class action procedure for two reasons. First, the procedure is not really appropriate to claims of this nature. It is designed for consumers who have been economically disadvantaged in the acquisition of goods and services. Also, there is not the same need for a class action in death or injury cases since the amount at stake will warrant an individual action. Second, the exclusion of death or injury claims helps to reinforce section 7(2) in the case where some members of the class have such a claim. In this situation the object of section 7(2) is to ensure that the death or injury claim is preserved notwithstanding that the class action judgment, whether favourable or not, has determined questions of fact on which the tort claim also rests. In a word, the class action judgment binds neither the defendant nor the class member.

8. No discontinuance, etc., without leave

A class action shall not be discontinued or dismissed or compromised without the approval of the court and the court may order notice of such proposed discontinuance, dismissal or compromise to be given in such manner as the court directs.

This provision follows F.R.C.P. 23(e).

Under existing practice, a representative plaintiff is free to reach a settlement of his claim with the defendant and the leave of the court is not
required. Also, the plaintiff can discontinue the action without leave provided he acts within the time specified by the Rules (Rule 320 in Ontario and see Note 50, \textit{supra}). Neither settlement nor discontinuance will extinguish the cause of action of the class members and they are entitled to commence separate proceedings. The plaintiff's actions, however, might produce a complication. If time has expired under the relevant limitation period when the plaintiff terminates the action, it will be too late for class members to sue individually. In addition, if the action raises a novel question that affects the interests of consumers generally, the settlement will destroy the opportunity of establishing a useful precedent (see R. Dole, \textit{Consumer Class Actions Under the Deceptive Trade Practices Act} (1968), Duke L.J. 1101 at 1103).

The difficulty caused by the running of time under the limitations statute can be overcome by substituting a class member for the original plaintiff and allowing him to carry on with the action. This can certainly be done in the case of discontinuance (see Note 50, \textit{supra}), and there is no reason why the same course could not be followed where the plaintiff's claim has been satisfied pursuant to a compromise (see \textit{La Sala v. American Savings \& Loan Association} (1971), 98 Cal. Repr. 849, 489 P. 2d 1113). The problem is really one of notification for it is possible under present practice that members of the class will not learn what has happened to the action until some time after it has been brought to an end. Though the court probably has the power to reinstate the action with a class member substituted for the plaintiff, the power is discretionary and the court might refuse to assist the class if an appreciable period has elapsed since the plaintiff terminated the action.

Section 8 provides that a class action shall not be discontinued or dismissed or compromised without the leave of the court, and gives the court power to direct notice of the proposed termination. If the plaintiff is proposing simply to dispose of his own claim, the purpose of the notice will be to inform the class of that fact and give members the opportunity to be substituted in order to carry on the action. Under the new procedure, the court's jurisdiction to order the substitution is derived from section 2(4) since by discontinuing or settling the claim the plaintiff will have ceased to "fairly and adequately protect the interests of the class."

On the other hand, if the plaintiff is purporting to settle the claim on behalf of the entire class as, for instance, by accepting a sum of money to be subsequently distributed to the class, the purpose of notice will be to give class members an opportunity to object to the settlement. The compromise of the personal claim of a representative does not bind the class, but the compromise of the class claim is another matter. If a party can carry a representative claim to the point of a judgment which will bind the class, there seems to be no reason in principle why he should not be able to compromise the claim for the class provided there is a suitable safeguard. The requirement of court approval should provide the necessary protection.

The extent of distribution of notice to the class is left to the discretion of the court. Consistent with the approach taken by the statute towards notice of the pendency of the action under section 5, it is contemplated that
only limited notice will normally be given. In devising settlement procedures under the new provision the courts should take care to avoid the problem adverted to by Professor Richard F. Dole, Jr. in the latter part of this comment:— "A major issue concerning the practicability of class actions for damages is whether enlightened settlement procedures can lessen the administrative burdens inherent in these actions. An important sub-issue is whether the representative nature of class suits requires such safeguards against collective settlements as will themselves burden the courts" (The Settlement of Class Actions for Damages (1971), 71 Col. L. Rev. 971 at 976).

9. Notice to class after judgment on common questions

Where at the trial of a class action the court gives judgment for the plaintiff and the judgment does not determine a question or questions of law or fact that affect only individual members of the class on whose behalf the action is brought, the following provisions shall apply:—

(1) The court shall order that notice be given in such manner as it may direct to members of the class.

(2) The notice shall:
   (a) inform members of the class of the proceedings;
   (b) direct them to file within a time to be specified in the notice such particulars of the claim against the defendant for the relief specified in the order that the action be maintained as a class action as the court shall require;
   (c) state that in default of the filing of a claim a class member shall not recover against the defendant the relief specified in the order that the action be maintained as a class action except by separate action brought by the class member against the defendant.

(3) In default of the filing of a claim as provided by sub-section (2), a class member shall not recover against the defendant the relief specified in the order that the action be maintained as a class action except by separate action brought by the class member against the defendant.

(4) The court shall determine the claim of a class member filed in accordance with sub-section (2) and may pronounce such judgment on the claim as the court thinks fit.

(5) In such proceedings to determine the claim of a class member the class member and the defendant shall have the same rights of discovery against each other and be subject to the same liability for costs as the parties in an ordinary action in the court and the defendant shall have the same right to pay money into court as the defendant in an ordinary action.

This section establishes the procedural machinery for disposing of the claims of individual class members in the event that the court gives judgment for the plaintiff. Since the plaintiff's claim will be typical of the claims of the
class the judgment will dispose of the questions of law or fact that are
common to the plaintiff and the claim and leave only questions that affect
individual class members to be determined.

Sections 2(2) and 3(3)(a) ensure that the court cannot deny class
action status to a suit on the ground that the claim raises questions that affect
only individual class members. The suit can be maintained as a class action
provided the common questions predominate. To a limited extent even the
existing rule allows a class action that involves individual questions. Whether
or not a person is actually a member of the class is such a question, and so
is the calculation of the separate entitlement of class members in an award
of money other than damages. The statute expands the range of situations
that raise both common and individual questions for which the class remedy
is available. Claims for damages that require separate assessment and claims
arising out of separate contracts are now specifically included (s.3(4)), and
it is hoped that by applying the "predominance of common questions" test
the courts will authorize class action treatment for claims based on war-
ranties given or representations made in identical terms to a class of consumers.

After the court has found the common questions against the defendant,
the members of the class will need the opportunity to establish their in-
dividual claims by obtaining a favourable finding on the questions that affect
only them. This may call for notice to the class, and the particular circum-
cstances will dictate the form of notice that is appropriate. Whether the court
will order that individual notice be attempted on all the members or merely
on a random sample or whether it will regard notice by advertisement in the
media as sufficient, or perhaps order a combination of individual notice and
advertisement, should be governed by the size of the class, the amounts of
individual claims, and the cost of notice. The fact that the class members
can be identified is an important factor. For instance, if the defendant has a
record of the names and addresses of class members and is in regular cor-
respondence with them, the court might order it to enclose a notice in the
next communication to the members. A department store sending monthly
accounts to its charge customers is a good example. See the opinion of
(1974), 94 S. Ct. 2140; H. Kalven & M. Rosenfeld, The Contemporary Func-
tion of the Class Suit (1941), 8 U. of Chi. L. Rev. 684 at 693; Comment,

Sub-section (2) and (3) will not necessarily bar the rights of class
members if they do not file notice of claim within the time specified by the
court. The class members lose the right to participate in the judgment, but
they are free to bring a separate action against the defendant provided the
relevant limitation period has not expired. Few separate actions are likely to
be brought if the individual claims of class members are only small. In any
subsequent action, questions between the plaintiff and the defendant that
were common questions in the class action will have been determined by the
class action judgment, and only questions that affect just the plaintiff will
remain to be decided. In view of the possible serious consequences of default
in filing a claim, the court is likely to require more extensive service and
publication of notice of the judgment than in the case of the earlier notice
of the pendency of the action provided by section 5, particularly if the individual amounts at stake are substantial.

Finally, sub-section (4) and (5) deal with the actual determination of individual claims if they are contested by the defendant. It is felt that pleadings will not be necessary as once the common questions have been disposed of there should be no more than one or two issues between individual class members and the defendant and these can be easily defined in an informal way. The ordinary rules as to discovery and costs will apply as between the defendant and each claimant (subject to section 11, infra). This should overcome the objection to class actions for damages requiring separate assessment that was raised in the Markt decision ([1910] 2 K.B. 1021) and Farnham v. Fingold, [1973] 2 O.R. 132. See text at C.3 supra. In addition, the payment into court procedure applying in an ordinary action is made available to the defendant.

The procedure for disposing of the individual questions in a class action that section 9 sets up may appear somewhat complicated. It is considered, however, that the section does no more than establish the minimum requirements for securing the maximum benefit for the class from the favourable judgment without sacrificing procedural fairness for the defendant. It might be appropriate to echo the thought of Benjamin Kaplan, one of the authors of F.R.C.P. 23, when contemplating how courts in the United States would handle individual claims under the new procedure. “These procedures can have a nightmarish look when the members are very many and their stakes are very modest. . . . I expect the problems will appear less formidable when they actually arise than they do now in anticipation. Yet imagination and even daring may be required of counsel in devising abbreviated but fair procedures leading to hand-tailored relief which may well be quite novel in form.” (B. Kaplan, A Prefatory Note to “The Class Action — A Symposium” (1968), 10 Boston College Ind. & Comm. L. Rev. 497 at 499.)

10. Assessment of total pecuniary liability

(1) When the question or questions affecting only individual members of the class and not determined by the judgment for the plaintiff is or include the amount of the pecuniary liability of the defendant to each member of the class, and the total amount of the liability to all members of the class can be calculated with reasonable accuracy without individual proof by the members, the court may determine the total amount of the liability and order the defendant to pay the amount into court.

(2) Proceedings after the defendant has paid money into court pursuant to an order made under sub-section (1) shall be conducted in accordance with section 9.

(3) If within such time as the court by order directs, the entire amount paid by the defendant into court has not been paid or applied in satisfaction of the claims of members of the class or the costs and expenses of the action, the court may dispose of the balance of the amount as it thinks fit.
The intended operation of section 10 is explained supra, text at E1.

11. Costs of class action

(1) Subject to sub-section (2) of this section, the costs of a class action are in the discretion of the court and the court has full power to determine by whom and to what extent the costs shall be paid.

(2) No costs shall be awarded to the defendant to a class action at any stage of the action, including appeal, except that the court may award costs to the defendant on:
   (a) a motion under section 3;
   (b) the determination of the claim of a class member under section 9(4);
   (c) an interlocutory motion.

(3) Where the court awards costs to the plaintiff at the trial of a class action or to a class member on the determination of a claim under section 9(4),
   (a) such costs shall be awarded on the basis of solicitor and own client unless the court otherwise directs;
   (b) if a defendant has paid money into court pursuant to section 10, the court may order that the whole or part of the costs be paid out of the money in court, and to the extent that the costs are not ordered to be paid or are not paid out of the money in court, the court shall order the defendant to pay the balance of the costs.

This section deals with the costs of proceedings brought under the statute. Where the court has made an order that an action is to be maintained as a class action the section varies the ordinary rule that costs follow the event. The court may order the defendant to pay costs if the action succeeds but it cannot order the plaintiff to pay the defendant's costs in the event that it fails. The defendant can be awarded costs in only three situations. First, if the plaintiff fails to obtain an order under section 3 that the action is to be maintained as a class action (s.11(2)(a)), or does not move to obtain the order in time and the representative claim is struck out on the motion of the defendant. Second, if the defendant defeats a claim made by an individual class member on a determination made under section 9(4) (s.11(2)(b)). The defendant could also be awarded costs if on the determination he successfully invoked the payment into court procedure as permitted by section 9(3). Third, the defendant can recover costs on an interlocutory motion, for example, a motion that the plaintiff produce documents on discovery (s.11(2)(a)).

Sub-section (3)(a) contemplates that when costs are awarded against the defendant, either on the trial of the action that determines the common questions or on a claim made subsequently by an individual class member, the costs will normally be allowed on a solicitor and client basis. The intention is that the plaintiff or class member, as the case may be, should receive a full indemnity for his costs of recovery.
Consumer Class Actions

Solicitor and own client costs will be paid by the defendant, but where the defendant has paid money into court to meet the total liability to the class pursuant to section 10, the court is given a discretion by section 11(3)(b) to determine whether the costs will be borne wholly by the money in court or wholly by the defendant in addition to the payment in court or partly by the money in court and partly by an additional payment. The court, for instance, could direct the defendant to pay costs on a party and party basis independent of the amount in court and allow the plaintiff to receive out of court the sum needed to meet the solicitor and own client costs. Sub-section 3(b) removes any uncertainty that might exist at present concerning the power of the court to allow the plaintiff's costs to be paid out of any fund recovered for the class (see Note 143, supra).

The costs provisions of the statute undoubtedly represent a striking departure from the rules that traditionally apply. However, it is considered that there is a special justification for a different approach to costs in the case of an action for a consumer class. The reasons have been examined earlier (supra, text at D7). Also, it has to be remembered that the statute establishes safeguards against the abuse of the procedure. Within a short time after the commencement of the action the plaintiff must obtain the order that the action is to be maintained as a class action. The order will be refused and the representative claim struck out unless the plaintiff can establish (inter alia) that the action is brought in good faith and the claim has merit (s.3(3)(c)).

12. Appeal from class action order

For the purpose of any statute or rule of law or practice which regulates appeals in the court

(1) an order that the action is to be maintained as a class action shall be deemed to be an interlocutory order of the court;

(2) an order that an action is not to be maintained as a class action, whether made pursuant to section 3 or section 4(2)(a), shall be deemed to be a final order of the court.

The section is concerned with the procedure for appealing a decision of the court on the question whether an action can be maintained as a class action. Court rules ordinarily provide that a final order can be appealed as of right and an interlocutory order only by leave. (See, for instance, in Ontario:— The Judicature Act, R.S.O., c.228, s.29(1)(a); Rules of Practice, r.499(1)). However, the rules do not indicate whether an order is final or interlocutory in the particular case. The usual test is that an order is final if it finally disposes of the rights of the parties (Holmested and Gale, Ontario Practice Year Book, 231 (1974)), but the test is sometimes difficult to apply. With class actions, there is the added complication that members of the class are not ordinarily treated as parties. Section 12 removes any possible ambiguity by making it clear that for the purpose of appeal an order allowing an action to be maintained as a class action is interlocutory while an order that an action cannot be so maintained is final.
The refusal of the court to allow the plaintiff to maintain an action as a class action will mean that class members lose the opportunity to recover relief in the action. In this sense it is fair to treat the court's order as final, though strictly the refusal does not finally dispose of the class claims unless the limitation period has expired. However, the practical effect of an order denying leave to maintain the action as a class action will be that few members of the former class will recover, and for this reason the conferring of an appeal as of right is appropriate.

The grant of leave to maintain an action as a class action, though it might lead ultimately to the defendant being found liable to the class, does not finally dispose of any rights. The order is therefore properly characterized as interlocutory. The defendant can appeal the order, but only by leave. In Ontario, for instance, the defendant can obtain leave from a judge (other than the judge appealed from) to appeal to the Court of Appeal if there are conflicting decisions on the question and the judge considers it desirable that an appeal be allowed or if there appears to the judge to be good reason to doubt the correctness of the order and the appeal involves matters of such importance that in the opinion of the judge leave should be given (Rules of Practice (Ont.) r. 499 (3)).

13. Applications to be heard by judge

Without affecting the generality of any statute or rule of law or practice, the following matters shall be disposed of by a judge of the court:

(1) a motion that an action is to be maintained as a class action;
(2) a motion by the defendant under section 3(2);
(3) a motion under section 3(8) to alter or amend an order that an action is to be maintained as a class action;
(4) an application for an order or directions under section 5;
(5) a motion under section 8 for the approval of the discontinuance or dismissal or compromise of a class action.

This section is designed to ensure that the applications specified are disposed of by a judge rather than a master of the court. It is felt that the particular matters are of such importance that a judge should have exclusive jurisdiction to deal with them.