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CLASS ACTIONS IN CANADA

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Our legal system has long encountered difficulty in its attempts to reconcile group interests with the unitary concept of the civil suit; for absent incorporation or the intervention of statute, only private individuals are capable of suing and being sued. Associations not incorporated, can have no independent legal personality, and consequently they may only avail themselves of the courts when each member brings his own separate law suit. In practice however, considerations of cost and convenience usually preclude this method of proceeding, and extended groups may find themselves without recourse to the judicial process. It is within this context that the class action assumes importance.[1] By enabling one person to sue on behalf of a great many others, a collective legal personality can be established; as in theory everyone is made a party through representation.[2]

Although provisions for representative actions are included in the remedial sections of such statutes as the Ontario Business Corporations Act,[3] the device garners the most attention in its general character as part of the rules of civil procedure. Of late, those class action rules have been the subject of considerable amendment in both the United States[4] and England, as well

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[1] Representative actions in Ontario are governed by R.75 of the Rules of Practice, which states:

> R.75: 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.

The rules in the other provinces are much the same, save for Quebec where no similar procedure exists and Nova Scotia where Rule 5:09 has been recently enacted to read much like the U.S. Federal Court Rule, set out, in part, at note 3 *infra.*

[2] It should be noted that there can, of course, be defendant classes as well as plaintiff classes, but it is only with the latter that the present work is concerned, for different considerations arise with suits against a class, particularly where questions of damages are involved. Insofar as possible, the present work attempts to focus upon the plaintiff suit and the principles and issues related to it. For an account of the problems encountered by defendant classes as well as plaintiff classes see D. J. Sherbaniuk, *Actions By and Against Trade Unions in Contract and Tort* (1958), U. of T. L. J. 151; Also J. F. Keeler, *Contractual Actions for Damages Against Unincorporated Bodies* (1971), 34 M.L.R. 615.

[3] R.S.O. 1970, c. 53, s. 99:

> 99. — (1) Subject to subsection 2, a shareholder of a corporation may maintain an action in a representative capacity for himself and all other shareholders of the corporation suing for and on behalf of the corporation to enforce any right, duty or obligation owed to the corporation under this Act or under any other statute or rule of law or equity that could be enforced by the corporation itself, or to obtain damages for any breach of any such right, duty or obligation.
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> (2) An action under subsection 1 shall not be commenced until the shareholder has obtained an order of the court permitting the shareholder to commence the action.

Technically speaking, these suits are considered derivative as being on behalf of the corporation rather than representative of each individual interest. For an analysis of the differences between these two kinds of actions, see the judgment of Morand, J., in *Farnham* v. *Fingold,* [1972] 3 O.R. 688; *Goldex Mines Ltd.* v. *Revill,* [1973] 2 O.R. 389 (Ont. H.Ct.). In the U.S.A., at the state level, the inclusion of class action procedures within a substantive statute is more common. For example see Article 93A, ss. 9 of the Massachusetts General Laws 1971, which generally provides for class damage suits by injured consumers.

[4] The Americans amended F.R.C.P. 23 in 1966 and gave it a broader scope than its predecessor. The wording of the Rule is far more detailed than our own, and is here set out in part, in order that reference may be had to the factors which American federal courts are directed to consider. F.R.C.P. 23:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of:
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> (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
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (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
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> (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.

as in Canada[5] at the federal court level. Nevertheless, the preponderance of representative litigation in this country is governed by the provincial codes and with few exceptions. Their wording has not been signifigantly altered within the last 100 years. Moreover, decisions made pursuant to those rules suggest a lack of conceptual appreciation for the purpose and function of representation. If one is to achieve an initial understanding in this area of Civil Procedure, then it can best be gained from an examination of the Court of Chancery's reasons for establishing the practice almost 300 years ago. Admittedly, the cases from Equity may not have any proper modern application[6] but there are invaluable theoretical lessons to be learned through analysis.

PART I—HISTORICAL ORIGINS OF THE—— REPRESENTATIVE ACTION——

The General Equity Party Rule

In seventeenth century England, judicial authority was divided between the Court of Chancery, which exercised an equitable jurisdiction,[7] and the

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[5] Until 1965 the English Rule was almost identical to our own but in that year O. 15, r. 12, of the Supreme Court Practice was enacted to read, in part, as follows:

> 12.— (1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
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> (2) At any stage of proceedings under this Rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under Rule 6 adding that person as a defendant.
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> (3) A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue, or as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

At the Federal Court level in Canada, Rule 1711 of the General Rules and Orders of the Federal Court of Canada was enacted in a form almost identical to the above English Rule. Given the untested scope of that Court's jurisdiction it is conceivable that class procedures might play a significant role in future determinations.

[6] See text *infra*, at notes 74-77.

[7] On the Equitable origins of the class suit see generally: J. Story, *Comments on Equity Pleadings* (8th ed., Boston: 1870); F. Calvert, *A Treatise upon the Law Respecting Parties to Suits in Equity* (London: 1837); Mitford (Redesdale), *A Treatise on the Pleadings in Suits in the Court of Chancery* (5th ed., London: 1847); S. Stoljar, *The Representative Action: An Equitable Post Mortem* (1956), 3 Univ. of Western Australia L. Rev. 479.

Common Law Courts which were concerned with entirely "legal" matters.[8] As the procedure in each court became conditioned by the nature of its jurisdiction, significantly dissimilar methods were developed for the selection of parties. The Common Law took a narrow stance in dispute settlement and held that it was generally necessary and sufficient to join as parties only those persons whose direct and immediate legal rights had been affected.[9] In contrast, Equity sought a "more complete justice"[10] and attempted to adjudicate upon the rights of everyone having any interest in the dispute. As a result, the Court of Chancery formulated a general party rule whereby:

> . . . all persons materially interested, either legally or beneficially, in the subject matter of the suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind them all.[11]

This difficult doctrine of necessary parties still pervades some aspects of modern practice, and the reasons for its application are as valid today as they were many years ago.[12] Essentially, Equity was seeking a final disposition of every issue which related to a given situation. The presence of all interested parties allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard. In this way, Chancery was

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[8] According to the unitary concept of the civil action, common law litigation was considered to be solely a two party adversarial matter, save in those specific instances where actual joinder could be implemented. As Calvert, *supra,* note 7 at 3, stated:

> "In this respect, there is a manifest distinction between the practice of a Court of Law and that of a Court of Equity. A Court of Law decides some one individual question, which is brought before it; a Court of Equity not merely makes a decision to that extent, but also arranges all the rights, which the decision immediately affects."

[9] In Chitty on Pleading (7th ed. London: 1844) at 3, the following is set out: "The general rule is, that the action should be brought in the name of the party whose legal right has been affected, (a) against the party who committed or caused the injury, (b) or by or against his personal representative."

[10] Calvert, *supra,* note 7 at 2. Also, *Knight* v. *Knight* (1734), 3 P. Wms. 331, 24 E.R. 1088; *Richardson* v. *Hastings* (1844), 7 Beav. 323, 49 E.R. 1089.

[11] Story, *supra,* note 7 at ss. 72, p. 75. The author there notes that historically, there appeared to have been several different formulations of the rule couched in vague language which was not characteristic of such "very logical thinkers" as Lords Redesdale and Eldon. He attempts at ss. 76 *c* to explain this by stating:

> "The truth is that the general rule in relation to parties does not seem to be founded on any positive and uniform principle; and therefore it does not admit of being expounded by the application of any universal theorem as a test. It is a rule founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of the courts of Equity to suppress multifarious litigation, and partly in the dictate of natural justice that the rights of persons ought not to be affected in any suit without giving them an opportunity to defend them . . . we express but a general truth in the application of the doctrine, which is useful and valuable, indeed as a practical guide, but is still open to *exceptions* and qualifications and limitations; the nature and extent and application of which are not, and cannot, independently of judicial decision, be always clearly defined."

[12] The doctrine has been more fully developed in the United States. See Fleming, James, *Civil Procedure* (Boston: 1965) at 413-41. For the present Canadian position, see Williston and Rolls, *The Law of Civil Procedure* Vol. 1 (Toronto: 1970) at 241-45.

able to protect itself from a multiplicity of litigation and from the injustice and embarrassment of subsequent inconsistent determinations.

There were occasions, however, when a strict application of the general rule worked hardship by preventing a valid group of litigants from asserting their rights. As Equity would not proceed to a decree without the presence of all interested parties, one person's inability or refusal to participate in an action could thereby exclude all others from their remedy. In response to this inequity, the Court of Chancery embarked upon a process of gradually making exceptions or adjustments to its party joinder rules, in an attempt to preserve the intent and purpose of those requirements, while escaping from the rigours of their formality.[13]

Given the historical context of seventeenth and eighteenth century England, serious economic and social problems might have resulted had some relaxation not occurred. In the final years of feudalism, a forum was needed for the resolution of disputes between tenants and lords or parsons and parishioners, and clearly the Courts of Common Law, given their unitary concept of the civil suit were inappropriate for such numbers. Had Equity's approach to party selection remained inflexible, compliance with its requirements would have been so impracticable as to preclude relief; yet Chancery adapted its practices to suit the social climate of the times and extended the application of its procedures for multiple party claims. New pressures for further relaxation began to mount during the eighteenth century. As England entered the age of imperial expansion and industrial revolution, businessmen collectivized and combined in extensive commercial undertakings, but the modern limited liability company had yet to make its appearance.[14] As a result, these commercial organizations lacked a separate legal personality and Equity was petitioned to entertain the claims of extended groupings of businessmen. Ultimately it did so, through a series of adjustments which eventually coalesced into the representative or class action.

In the following cases, the reader may be struck by an apparent lack of cohesion, for the decisions encompass extremely broad and diverse sets of circumstances. Moreover the *ad hoc* approach to the determinations further compounds the problem.[15] There is, however, one principal unifying link and that is Equity's attempt to fairly resolve substantive claims, without losing sight of its procedural goals.

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[13] Story refers to this process as a series of "exceptions", but a more correct terminology would seem to be "adjustments", or "qualifications". Although changes occur in the formulation and application of the rule, the fundamental aims and purposes are preserved and accordingly it seems inaccurate to speak of exceptions.

[14] *Supra,* note 7 and *infra,* note 38.

[15] Calvert, *supra,* note 7 at 4, comments on this *ad hocism* in the following way: "It must, however, be observed, that the object at which judges have aimed in giving their judgments has been, to lay down the rule with sufficient accuracy for the case immediately before them."

The Early Feudal Cases

The earliest reported cases involving representational adjustments[16] to Equity's party joinder requirements first appear in the late seventeenth century,[17] where numerous feudal tenants and parishioners were permitted to participate in litigations over commonly held general rights,[18] despite the absence of one or more necessary parties. In the first of these, *Brown* v. *Vermuden* (1676), Brown, the Vicar of Worselworth, sought to enforce a decree for tithes of lead ore which his predecessor had obtained against all the miners of the parish.[19] Since he had not been named as one of the defendants in the earlier action, Vermuden asserted that he should not be bound. The Lord Chancellor, however, held that "[i]f the Defendant should not be bound, Suits of this Nature, as in the case of Inclosures, Suit against the Inhabitants for Suit to a Mill, and the like, would be infinite and impossible to be ended".[20] Vermuden could not be said to have been prejudiced by this result, for his position, as it related to the parson, was substantially the same as that of his fellow parishioners, and the duty to tithes, here arising by special custom, was general and common to them all. In a similar vein, the Vicar of Wirksworth obtained a decree a few years later in *Brown* v. *Booth* which bound future as well as existing parishioners.[21]

In the lord and tenant cases, the primary issue involved the resolution of a general feudal right which was common to all tenants, such as the right to grind corn at a mill, or a right of common pasturage.[22] In *Brown* v. *Howard*[23] for example, a few tenants instituted an action against their lord

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[16] Although a theoretical appreciation for representation is not expressed until much later (*Chancey* v. *May* (1722)) the term is used here to distinguish this line of adjustment from others occurring at the time which involved matters not relevant to the present work.

[17] Stoljar, *supra,* note 7 at 480 cites *City of London* v. *Richmond* (1701), 2 Vern. 421, 23 E.R. 370 as the first clear appearance of the representative idea, apparently picking up the reasoning of Plumer, M. R., in *Meux* v. *Maltby* (1819), 2 Swanst. 277, 36 E.R. 621, but the earlier authorities such as Story and Calvert place the date well back in the 17th century. References appear in *Brown* v. *Vermuden* (1676), 1 Chan. Ca. 271 at 283, 22 E.R. 796 at 802, to earlier decisions which unfortunately do not appear to have been reported.

[18] In the 17th century, the phrase "general right" was used in the sense of a proprietary right in which a number of people shared a communal interest. In the feudal situation, one could assert its relevance, but the notion becomes extremely difficult to apply in later circumstances. For an explanation of general rights, See Z. Chafee, *Bills of Peace with Multiple Parties* (1931-32), 45 Harv. L. Rev. 1297 at 1308-16 and Calvert, *supra,* note 7 at 46-55.

[19] *Brown* v. *Vermuden, supra,* note 18, at 802 E.R. The earlier action, between the vicar and the other miners does not appear to have been reported.

[20] *Id.*, at 802 E.R. The reference here to suits involving mills and inclosures, indicates that earlier "adjustments" had occurred, but these cases are not reported. The reference to the Lord Chancellor most likely meant Lord Nottingham.

[21] *Brown* v. *Booth* (1690), 1 Eq. Ca. Abr. 164, 121 E.R. 960. Also *Rudge* v. *Hopkins* 2 Eq. Ca. Abr. 170, 22 E.R. 145, where the parishioners brought suit against a parson.

[22] *How* v. *The Tenants of Bromsgrove* (1681), 1 Vern. 22, 23 E.R. 277.

[23] (1701), 1 Eq. Ca. Abr. 104, 21 E.R. 960.

seeking to determine the amount of taxes owing to the manor upon the death of either the lord or a tenant. The Court in considering the propriety of a suit brought in the absence of necessary parties, stated:

> . . . and it was insisted upon, that there being but some of the Tenants Parties to this Bill, the rest would not be bound by this Trial: but Ld. K. held they would; and said he remembered the Case of *Nether Wiersdale* between Lord *Gerard* and some few Tenants, and Lord *Nottingham's* Case in the Dutchy, concerning the Customs of *Daintree* Manor . . . and said in these and a hundred others, all were bound, though only a few Tenants Parties; else where there are such Numbers, no Right could be done, if all must be Parties; for there would be perpetual Abatements; and it is no Maintenance for all the Tenants to contribute, for it is the Case of all; . . .[24]

Those underlying considerations of practicality and convenience which had motivated Lord Nottingham's relaxation of the party rule in the instance of parishioners,[25] here influenced the Lord Keeper Sir Nathan Wright and led him to make a similar adjustment in the case of feudal lords and tenants.[26]

By the beginning of the eighteenth century, Equity would no longer adhere to its strict party requirements in situations where all of the four following conditions were met: (1) The subject matter of dispute was a general proprietary right in which all parties had a common interest: (2) The parties were so numerous that actual joinder would have been impracticable: (3) There was a special relationship, or privity, between each group member and the adversary: and, (4) There was privity *inter se* the members of the group.[27]

Qualifications (3) and (4) were abandoned by Lord Chancellor Hardwicke in *The Mayor of York* v. *Pilkington*,[28] where the plaintiff sued to settle the city's claim to an exclusive right of fishery in the River Ouse. He also sought an accounting of the fish that had already been taken by the defendants, who were the lords and occupiers of the adjacent riparian lands. They maintained however, that no general right could be asserted against them as they were distinct and separate parties whose titles were derived

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[24] *Id.*, at 960 E.R. The cases referred to involving Lords Nottingham and Gerard do not appear to have been reported.

[25] *Brown* v. *Vermuden, supra,* note 17.

[26] Although the principle that the rights of no man are to be decided in his absence was as valid three hundred years ago, as it is today, little problem arose in binding missing parties in these situations. Technically, a decision is considered binding or *res judicata* only as to those persons who participated in the suit in order that no-one's interest or position would be adversely affected without having an opportunity of defending himself. As the court would ensure that the interests of absent parties were identical to those of present parties, no real prejudice could occur. The binding effect of class decrees has been the cause of great debate and confusion in the United States where the suit has been more developed and where the possibility of monetary awards further complicates the issues. See generally, Wright and Miller, *Federal Practice and Procedure,* Civil ss. 1751 and the articles referred to therein.

[27] Chafee, *supra,* note 18 at 1306 considers the privity thinking expressed in qualifications (3) and (4) to be characteristic of the older Equity judges and quotes Pound in *The Spirit of the Common Law* (1921) as attributing this reliance on privity to the influence of feudal proprietary notions.

[28] (1737), 1 Atk. 282-84, 26 E.R. 180.

from several different sources, and further that there was not any privity between the plaintiff and themselves. The Lord Chancellor found the suit properly constituted and in considering the privity question, noted:

> In this respect it does differ from cases that have been cited of lords and tenants, parsons and parishioners, where there is one general right, and a privity between the parties. But there are cases where bills of peace have been brought, though there has been a general right claimed by the Plaintiff, yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and where many more might be concerned than those brought before the court . . .; but because a great number of actions may be brought, the court suffers such bills, though the defendants might make distinct defences, and though there was no privity between them and the city.[29]

The Court thereby allowed a trial of the general right, namely, the exclusive right of fishery in which all parties had a common interest. Once this common question was resolved, anyone could subsequently raise a separate defence at common law and show why the decree should not be binding upon him. In this way, Equity entertained representative claims where group members had distinct rights in addition to those which made up their common interest.[30]

The Early Commercial Cases

By the beginning of the eighteenth century, representational adjustments to the process of party selection materialized in other substantive areas of Chancery practice. Their first appearance in the commercial setting was in 1701 with the decision of the Lord Keeper, Sir Nathan Wright, in *City of London* v. *Richmond*.[31] In that case, the city constructed a water pipe in the district of *Cheapside*, and instead of charging water rates, the council opted for a fixed annual return by leasing the entire enterprise to Houghton. He, in turn assigned the lease to Richmond and three others in trust for the benefit of nine hundred people who had purchased shares in the venture. The project proved unprofitable. When the city sued Richmond and three other trustees for arrears of rent, they raised as their defence the insufficiency of parties, but the Lord Keeper overruled the objection, finding that "the assignees by dividing of it into so many shares, had made it impracticable to have them all before the court".[32]

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[29] *Id.*, at 181 E.R. The mention of prior adjustments is obscure but the Lord Chancellor could be referring to *London* v. *Perkins* 4 Bro. Par. Ca. 168, where the City of London brought bills for duties and only called a few of the citizens who dealt in the dutiable wares before the court. As the action was to only establish a general right to the duties, it was held to be proper.

[30] It is important to note at this point that a great number of these adjustments arose in actions called Bills of Peace. In essence, a plaintiff could seek a final resolution of a matter in Chancery where it appeared that he would necessarily have to participate in several separate actions at Law. In *Mayor of York* v. *Pilkington*, the Bill of Peace was brought to establish the exclusive right of fishery against the several trespassers. The relationship between Bills of Peace and representative procedures is extremely complicated and some maintain that the class action found its source in the Bill of Peace. For the best analysis of their historical development see Z. Chafee, *Bills of Peace with Multiple Parties, supra,* note 18.

[31] (1701), 2 Vern. 421 E.R. 870.

[32] *Id.*, at 871 E.R.

The same consideration arose several years later in *Chancey* v. *May*[33] where the manager and treasurer of a partnership brought suit "in behalf of themselves, and all other proprietors and partners",[34] against the former treasurers and managers for an accounting of several suspected misapplications and embezzlements. The eight hundred partners were not all named as parties but the suit was allowed on the following grounds:

> *1st*, Because it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties. *2ndly*, Because it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice if all were to be parties.[35]

The court supported its decision, by saying that all the rest were *in effect parties*. Here we find the first clear recognition of the representative theory which underlies the modern class suit. In the earlier cases, the Chancellors spoke of a decree binding absent parties, or of a relaxation of the general party rule, yet prior to *Chancey* v. *May*, the idea of representation had not really been articulated. Significantly, the phrase "on behalf of themselves and all others", after this case began to appear with greater frequency in both pleadings and judgments. This should not be taken to imply the existence of a fully established theory of representation by 1722, but rather should be seen as a rudimentary framework for subsequent considerations of class litigation.

From Lord Eldon to Statutory Codification

Following *Chancey* v. *May*, and throughout the remainder of the eighteenth century, few noteworthy representative actions were reported. Those that did arise failed to display any significant advances or alterations, except perhaps, for changes in the nature of claims and claimants which they revealed. Gone were the feudal lords and tenants and in their stead appeared such institutions of commerce as insurance companies, mining adventures and the crews of privateers. Plaintiffs became classes of partners or creditors and the most common remedy, the bill for an account. By the end of the century, the complexities of the commercial situation had placed added strains upon the legal system to entertain a broader range of group claims. In response to these pressures, the law relating to representative actions was clarified and expanded by Lord Eldon in a series of decisions from 1802 to 1809.[36]

The first of these cases *Lloyd* v. *Loaring*,[37] involved a lodge of Free-

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[33] (1722), Prec. Chan. 592, 24 E.R. 265.

[34] *Id.*, at 265 E.R.

[35] *Id.*, at 266 E.R.

[36] Lord Eldon (1801-1827). In *Bedford* v. *Ellis*, [1901] A.C. 1 at 10, Lord Macnaghten reviewed the representative suit precedents and stated that "it is impossible, I think, to read such judgments as those delivered by Lord Eldon in *Adair* v. *New River Co.* in 1805 and in *Cockburn* v. *Thompson* in 1809, without seeing that Lord Eldon took as broad and liberal a view on this subject as anyone could desire". His approach to the office of Lord Chancellor however, is generally regarded as being characterized by conservatism and caution.

[37] (1802), 6 Ves. Jun. 773, 31 E.R. 1302.

masons and the theft of secret documents by a dissident member, Loaring. In order to prevent the threatened destruction of the papers, the chief officers brought suit on behalf of the lodge for an injunction. The defendant objected, claiming that the plaintiffs could not sue as a group, for an unincorporated association was not to be considered a legal entity. Lord Eldon agreed, maintaining that it was "the absolute duty of courts of Justice not to permit persons, not incorporated to affect to treat themselves as a corporation".[38] The plaintiffs were, however, granted an amendment to sue on behalf of themselves and all other club members as individuals, save for the defendant Loaring. As long as the claim was made by individuals in their collective rather than group capacity, each would possess a common interest in the documents and the problem of corporate appearance would not arise.

Three years later, in *Adair* v. *The New River Company*,[39] an individual plaintiff, the assignee of the Crown's share of profits in a certain corporation, brought an action for an account of moneys owing against the corporation and some of its officers. The shares were held by many different people, including the fluctuating memberships of some very complicated trusts, and when the defendants objected to the insufficiency of parties, Lord Eldon had the following to say:

> The consideration is, very different, if it is necessary to decide this point, whether it is possible to hold that the rule shall be applied to an extent, destroying the very purpose, for which it was established: viz. that it shall prevail, where it is actually impracticable to bring all parties, or where it is attended with inconvenience, almost amounting to that, as well as where all can be brought without inconvenience. It must depend upon the circumstances of each case: but upon all the authorities for the purpose of getting a decree it is not necessary, to bring all parties interested.[40]

Eventually, the case was defeated on its merits, but the Chancellor's concern for convenience and his willingness to approach each case on its particular circumstances reflected a growing atmosphere of flexibility.

The general trend of relaxation was continued in Sir W. Grant's Rolls Court determination of *Good* v. *Blewitt*.[41] The captain of a privateer filed a bill against the vessel's owners, seeking an account and distribution of captures, but the defendants objected, claiming that the crew members should have also been named as parties. The Master of the Rolls found the case to be similar to *Chancey* v. *May*,[42] and observed that "here too was there a great number of persons associated together for the purposes of the adventure under the agreement common to all."[43] He thought it impracticable to demand the actual presence of all crew members, particularly where some might be dead or away at sea. Accordingly, an amendment was allowed, changing the style of cause to an action by the captain on behalf of himself

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[38] *Id.*, at 1304 E.R. The corporate character awaited a somewhat delayed appearance, for as Stoljar, (*supra*, note 7 at 485-87) remarks, a real distinction had yet to be made between partnerships and limited companies.

[39] (1805), 11 Ves. Jun. 429, 32 E.R. 1153.

[40] *Id.*, at 1159 E.R.

[41] (1807), 13 Ves. Jun. 397, 33 E.R. 343.

[42] *Supra*, note 33.

[43] *Supra*, note 41 at 345 E.R.

and all others who had been on the ship and, in effect, the crewmen became parties.

Perhaps Lord Eldon's most extensive analysis of representative procedures appears in *Cockburn* v. *Thompson*,[44] where several persons filed a bill for an accounting on behalf of themselves and all other proprietors of a voluntary association against their solicitor. The defendant's objection for want of parties was dismissed, the Lord Chancellor holding, after a careful and complete review of the authorities:

> The strict rule is, that all persons, materially interested in the subject of the suit, however numerous, ought to be parties: that there may be a complete Decree between all parties, having material interests: but that, being a general rule, established for the convenient administration of justice, must not be adhered to in cases, to which consistently with practical convenience it is incapable of application.[45]

and further:

> The principle being founded in convenience a departure from it has been said to be justifiable, where necessary; and in all these cases the Court has not hesitated to depart from it, with the view by original and subsequent arrangement to do all that can be done for the purposes of justice; rather than hold, that no justice shall subsist . . .[46]

Had Lord Eldon not departed from the general rule, the affairs of unincorporated organizations would have been beyond the law's protection.[47] Without representation the courts would not have been accessible to such groups, and as a result their very existence might have been threatened by uncontrolled internal lawlessness.

The flexible, expansive approach of the above decisions was continued through to *Meux* v. *Maltby*[48] (1818), but in a line of authority dealing with the dissolution of unincorporated partnerships, the application of representative procedures began to fall prey to judicial conservatism. In these cases the Court's focus began to move from factors of convenience to an examination of the common interests among group members and the slightest evidence of dissimilarity became sufficient grounds to deny the collective claim.[49] Even-

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[44] (1809), 16 Ves. Jun. 321, 33 E.R. 1003.

[45] *Id.*, at 1006 E.R.

[46] *Id.*

[47] Although the Chancellor had earlier expressed his refusal to invest non-corporate entities with legal personality (*supra*, note 38), it is unlikely that he would have totally undermined them for such a result would have been wholly disconsonant with the policies of commercial expansion from which they developed. See however, note 49, *infra*.

[48] (1818), 2 Swanst. 277, 36 E.R. 621, and see also *Weale* v. *West Middlesex Waterworks Co.* (1820), Jac. & Walk. 358, 37 E.R. 412.

[49] For a more complete analysis of these cases see Stoljar, *supra*, note 1 at 487 ff; and Calvert, *supra*, note 1 at 40 where the author stated that "Lord Eldon took alarm at the conduct of companies of 1825, . . . he did all in his power to discourage the formation of them, by establishing in the Court of Chancery very strict rules upon their forms of proceedings". The Lord Chancellor expressed this change of heart in a series of cases beginning with *Davis* v. *Fish* (1823), cited in You. 425, 159 E.R. 1059 and continuing through *Van Sandau* v. *Moore* (1826), 1 Russ. 331, 38 E.R. 171. His attitude towards companies was not out of touch with the times, for in 1825, Parliament repealed the Bubble Act by Geo. 4, c. 91.

tually, both the extended partnerships and the procedural treatment which they had attracted fell into disuse, their demise hastened by developments in modern company legislation.[50]

The suits concerning dissolutions comprised only one area of representative suit development and the restrictive treatment which they received was not reflected in the other cases of the period.[51] In a series of decisions between 1836 and 1841 for example, Lord Cottenham insisted that procedures should reflect the demands of modern society. His views were best enunciated in *Taylor* v. *Salmon*,[52] a case involving corporate directors and the execution of a lease, where in overruling an objection for want of parties, the Lord Chancellor stated:

> I have before taken occasion to observe (see *Mare* v. *Malachy*, I *Mylne & Craig*, 599) that I thought it the duty of this court to adapt its practice and course of proceedings as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy.[53]

Three years later, using almost identical language in *Walworth* v. *Holt*,[54] the Lord Chancellor reiterated the position, and added that "this has always been the principle of this Court, though not at all times sufficiently attended to".[55] This flexible attitude continued until the Common Law Courts and the Court of Chancery merged following the Supreme Court of Judicature Act in 1872, and representative actions came to be governed by a codified rule of civil procedure.[56]

The Requirements of Chancery's Representative Suit

In examining the evolution of the representative suit, it becomes clear that by the middle of the nineteenth century, most if not all of the important developments had taken place. Equity would generally permit such actions where there was a group or class of individuals with collectively similar interests, and factors of convenience rendered compliance with party joinder requirements impracticable. Few attempts were made to suitably define con-

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[50] Beginning with The Joint Stock Companies Act, 7 & 8 Vict. c. 110 and continuing through a series of statutes which culminated in The Companies Act of 1862, 25 & 26 Vict. c. 89, the modern corporate form evolved and supplemented these earlier, less sophisticated institutions.

[51] See *Long* v. *Yonge* (1830), 2 Sim. 369, 57 E.R. 827; *Evans* v. *Stokes* (1836), 1 Keen 25, 48 E.R. 215, and also *Small* v. *Atwood* (1831), You. 407, 159 E.R. 1056 and *Walworth* v. *Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238, restricting the narrow application to dissolution suits.

[52] (1838), 4 My. & Cr. 137, 41 E.R. 53.

[53] *Id.*, at 56 E.R.

[54] (1841), 4 My. & Cr. 619, 41 E.R. 238.

[55] *Id.*, at 241 E.R.

[56] Supreme Court of Judicature Act, 36 & 37 Vict. c. 66. Schedule A, s. 10, see note 73 *infra*.

venience,[57] but a great deal of attention was paid to methods of determining the proper class composition, which by this time meant the discovery of a common interest among group members,[58] or the requirement that the relief sought was "in its nature beneficial to all".[59] Both of these phrases reflected Chancery's underlying concern with the absent parties who would have been bound by its decree. When the Court examined the individual interests and found uniformity, no question of prejudice could arise for the represented interests of absent parties would be the same as those advanced before the Court by the representatives.

Sometimes, the requisite singularity of interest would have been previously established through reference to other laws. For example in questions involving personal estates, the general party rule would have required the presence of all creditors and legatees were it not customarily sufficient that only the administrator or executor appear.[60] In a great number of other cases however, the Court inquired into various aspects of class composition, and difficulties arose where the constituent interests were derived from different sources, or where a competition for priority existed among class members. In the latter situation, Equity refused the representation, for as Sir Lancelot Shadwell said in *Newton* v. *Egmont* (1832):

> Notwithstanding the inconveniences arising from numerous parties, there are some cases in which they can not be dispensed with . . . In this case, where the question is priority of charge, the very nature of the question makes it necessary that all the creditors should be parties; it implies a contest with every other person claiming an interest in the land.[61]

The question of the defendants' liability in these cases would be one in which all were interested, but that common character was vitiated by the potential

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[57] If one examines the cases, the usual indicia of inconvenience appear to be the likelihood of absence (see *Good* v. *Blewitt, supra,* note 41) and the existence of large numbers. No case can be found, however, where a suit was refused on the grounds of insufficient numbers, and apart from Lord Eldon's recollection in *Lloyd* v. *Loaring* (*supra,* note 37) of a "case very familiar, in which the Court has allowed a very few to represent the whole world", most numbers varied between the 38 of *Bainbridge* v. *Burton* (1840), 2 Beav. 539, 48 E.R. 1290, and the 60,000 of *Davis* v. *Fish* (*supra,* note 49).

[58] See *A.G.* v. *Heelis* (1824), 2 Sim. & Stu. 67, 57 E.R. 270 at 274, where in speaking of an action by some townsfolk to enjoin the collection of certain taxes, the Vice Chancellor Sir John Leach stated:

> "The object of the bill is to avoid the payment of the assessment in question, and every individual assessed has in that respect one common interest."

[59] In *Gray* v. *Chaplin* (1825), 2 Sim. & Stu. 267, 57 E.R. 348 at 350, Sir John Leach stated:

> "In order to enable a plaintiff to sue on behalf of himself and all others who stand in the same relation with him to the subject of the suit, it must appear that the relief sought by him is in its nature beneficial to all those whom he undertakes to represent."

[60] *Spragg* v. *Binkes* (1800), 5 Ves. Jun. 583, 31 E.R. 751. Calvert *supra,* note 7 at 22-25 notes that "the law has furnished representatives of the interest in question" and remarks that similar situations occur in the case of bankruptcy and where the Attorney General represents the public interest.

[61] (1832), 5 Sim. 130, 58 E.R. 286 at 289.

for conflict which could arise as class members sought to rank ahead of each other.[62]

Difficulties also arose when group members' interests were derived from separate or different sources. This problem, however, did not materialize in cases involving general proprietary rights, for the Court could consider the central issues by referring to the property rather than the owners' origins of title. In *Warrick* v. *Queens College Oxford*,[63] for example, some freeholders sued the college in a representative capacity to restrain an interference with commonly held land. Lord Hatherly, in overlooking the different derivations of title, held:

> I take it that the view of this Court is, that all persons having a common right which is invaded by a common enemy although they may have different rights *inter se*, are entitled to join in attacking that common enemy in respect of that common right.[64]

On the other hand where no proprietary right existed, then a different basis for each constituent claim often constituted so serious a disparity of interest as to invalidate representation. In *Jones* v. *Garcia del Rio*,[65] Lord Eldon refused an action on the above grounds, where creditors sued for the return of money which they had been induced to lend by fraud. Each person's cause of action originated from a separate agreement and therefore a separate fraud. Accordingly, the interests were in effect, several rather than common. This position was re-assessed some years later in *Beeching* v. *Lloyd*[66] where upon similar facts Vice Chancellor Kindersley allowed the victims of separate but identical frauds to sue for an accounting, despite the fact that their rights arose under different agreements. The rationale was proprietary — for the money which the several plaintiffs were fraudulently induced to invest was partly used to purchase an estate and therefore comprised a common fund in which all had a common proprietary interest.[67]

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[62] This position was somewhat modified several years later in *Aldrich* v. *Westbrook* (1842), 5 Beav. 188, 49 E.R. 549 and *Skey* v. *Bennett* (1843), 2 Younge & Coll. 597, 63 E.R. 181, where mortgagors were allowed to sue on behalf of themselves and other creditors despite the fact they claimed a right of prior satisfaction out of the mortgaged property.

[63] (1871), L.R. 6 Ch. App. Cas. 716.

[64] *Id.*, at 726. See also *Mayor of York* v. *Pilkington, supra,* note 29 and *Commissioner of Sewers* v. *Glasse* (1871), L.R. 7 Ch. App. Cas. 456 where at 466 Sir W. M. James, on facts not unlike *Warrick,* overruled similar objections that "although the Defendants may possibly have several and distinct rights, the right put in issue by the bill is one general right which all these persons are interested in disputing".

[65] (1823), Tur. & R. 297, 37 E.R. 1113. Although the case is here included for the purpose of example, it must be considered so coloured by circumstance as to be of questionable value. Not only did some creditors actually express a willingness to abide by the loan and not to sue, but Lord Eldon displayed great reticence in allowing the "King's Judge" to become involved in a contract dispute with a country (the Peruvian government) which the Sovereign did not recognize. See also note 49, *supra.*

[66] (1855), 3 Drew. 227, 61 E.R. 890.

[67] *Beeching* v. *Lloyd* was later used in a long line of Canadian authority to develop the "fund concept" referred to by D. J. Sherbaniuk, *supra,* note 2 at 170-76.

Where there was more than one clearly recognizable class of interests, Equity sought to accommodate them rather than refuse the action for want of commonality. As the Master of the Rolls, Sir John Romilly stated in *Bromley* v. *Williams*:

> . . . if there be three or four classes who have separate and conflicting interests, then you may select two or three from each class to represent that interest, in the same way as if the whole class had been brought before the Court.[68]

In this way several classes could appear in one action, representing different interest groupings. Where only one class appeared as plaintiffs, and some members had an interest inimical to the group, the Court would "make the other persons who have conflicting interests, or some, on behalf of the rest if numerous, Defendants".[69]

Before departing from Equity, mention should be made of the various forms of relief which representative plaintiffs commonly sought. Although a great many of the earlier suits involved declaratory judgments and injunctions, the remedy most frequently sought was the bill for an accounting. As damage actions arising out of contractual or tortious injuries belonged to the Common Law and not Chancery, it was Equity's primary means of ordering and supervising the distribution of money. Yet, in light of the modern practice in class money claims,[70] surprisingly little attention was ever given to a distinction between represented and individual claimants. In recalling the privateer case of *Good* v. *Blewitt*,[71] and the loan case of *Beeching* v. *Lloyd*[72] one must be struck by the Courts readiness to employ the remedy of account in situations of great administrative complexity.

In making a final assessment of representative suit requirements in the Court of Chancery, one must continually keep in mind the liberal and flexible attitude which characterized its application and development. A procedural rule which managed at different times to encompass the affairs of feudal tenants, ladies clubs, corporate shareholders, bankrupts, sailors, creditors, and others had to be extremely adaptable to the exigencies of changing circumstance. In this respect the approach of the Chancellors is worthy of note, for it is clear that in their application of a previously untested procedure, they continually sought a proper balance between the interests of fairness and efficiency.

The Present Status of Equity's Representative Suit

When the two great branches of English law were fused by the Supreme Court of Judicature Act in 1873, the following words were included in the

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[68] (1863), 32 Beav. 177, 55 E.R. 69 at 73.

[69] *Id.*, at 75 E.R.

[70] See *infra*, note 174 ff.

[71] *Supra*, note 41.

[72] *Supra*, note 66.

Schedule to the statute, and the procedure which had been devised and developed in the old Court of Chancery became codified:

> s. 10 Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued or may be authorized by the Court to defend in such action on behalf of or for the benefit of all parties so interested.[73]

Although the section appears to do no more than rephrase a few lines from the Chancery cases which preceded it, there is mixed authority as to what effect this codification was to have upon the prior interpretations of the general equitable rule. The leading House of Lords' decision seemed to imply in 1901 that the effect would be minimal,[74] but nine years later, Lord Justice Fletcher Moulton in the English Court of Appeal decision of *Markt & Co. Ltd.* v. *The Knight Steamships Co. Ltd.* took a different approach:

> In extending it the rule also formulates it. It may or may not accurately express the practice of the Court of Chancery at that date, but that is immaterial. It is the language of the rule that must govern us now, and even if it could be shewn [sic] that before the Judicature Act the Court of Chancery would have applied the procedure in cases not within the language of the rule, that would not affect the present practice in any branch of the Supreme Court.[75]

This position does appear to be more consistent with the effect given to codifications in other areas of the law,[76] but there is recent evidence that courts are coming to reassess the *Markt* decision, and more carefully examine

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[73] Supreme Court of Judicature Act, 36 & 37 Vict. c. 66, Schedule, s. 10 declared in force 1874. More commonly referred to as Order XVI. Rule 9 of Amendment of 38 & 39 Vict. c. 77. The wording of the English rule up until 1965 was substantially the same as the present Ontario Rule 75, which was first enacted in 1881 as Rule 98 and attained its present form in 1913. For the wording of R. 75, see, note 1 *supra.*

Ont. Rules 74 to 85 also involve representative procedures but deal with specific situations such as the settlement of trusts (R. 79). Worthy of note is R. 84 which states:

> In actions for the protection of property and in cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

[74] *Duke of Bedford* v. *Ellis,* [1901] A.C. 1, where Lord Macnaghten stated that the rule relating to representative suits had hardly changed at all since the time of Lord Eldon and was only meant to apply the practice of the Court Chancery to all divisions of the High Court. Several years earlier in *Wood* v. *McCarthy,* [1893] 1 Q.B. 775, Wills, J., similarly remarked:

> "But then it is contended on behalf of the defendants that Order 16, Rule 9 has altered the practice. I do not think so. I think that rule was intended to make the practice of the Court of Chancery applicable to all actions, and I feel sure that there was no intention to narrow the beneficial doctrine which had previously prevailed."

For a statement by an Ontario court to a like effect see the opinion of Orde J.A., in *A.E. Osler & Co.* v. *Solman* (1926), 59 D.L.R. 368.

[75] *Markt & Co. Ltd.* v. *Knight Steamships Co. Ltd.* (1910), 11 Asp. 460, [1910] 2 K.B. 1021 at 1038. Lord Justice Vaughan Williams appears to come to a similar conclusion at 1029 K.B.

[76] The leading case on the effect of statutory codification is *Bank of England* v. *Vagliano Bros.,* [1891] A.C. 107, where at 144, Lord Herschell commented on the Bills of Exchange Act, 1882, by saying:

> "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood . . ."

the equitable origins of the codified rule. This, of course, does not suggest any attempt on the part of the judiciary to actually apply Chancery decisions in modern cases. Rather, it indicates a preparedness to find in those decisions a conceptual basis for the modern rule and, moreover, displays a readiness to adopt in spirit the historically flexible and liberal approach of the Chancellors.[77]

PART II — THE MODERN CLASS ACTION——

The two leading cases on modern plaintiff class actions were decided in England before the First World War, and until recently, the Canadian position has remained relatively unchanged from that time. In the first of these decisions, *Bedford* v. *Ellis*,[78] the House of Lords liberally interpreted the codified rule, in a manner much like the Court of Chancery, whereas the approach in *Markt & Co.* v. *Knight Steamships Co. Ltd.*[79] was restrictive and virtually stultified subsequent lines of development. By comparing these two decisions and analyzing them in the light of later authorities one can better comprehend the two major issues in class suit discussion, namely — class composition and remedy selection.

The *Bedford* case centred around an Act passed by the English Parliament in 1828, which regulated the erection and location of vendors' stalls in Covent Garden Market and granted preferential rights of user to certain groups of produce growers.[80] When the owner of the market, the Duke of Bedford, interfered with these statutory space allocations and charged higher rents than those set out in the schedule to the Act, a representative suit was instituted on behalf of the producers for a declaration that the Duke's conduct violated the Act and for an injunction restraining any further transgression. In addition, the named plaintiffs, in their personal capacity and not as representatives sought an accounting of rent payments made during the preceding six years. There was no evidence of any pre-existing relationship among the growers, and in fact class members were virtual strangers to each other. Furthermore none of the usual indicia of proper class composition such as association membership or common property ownership were present,

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[77] For example, in *John* v. *Rees*, [1969] 2 All E.R. 274 at 280, Megarry, J., set out Lord Macnaghten's analysis of the Chancery decisions in *Bedford* v. *Ellis* (see *supra*, note 74) and commented at 283:

> "This seems to make it plain that the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice."

For a similar approach in Ontario, see the opinion of Jessup, J.A., in *Farnham* v. *Fingold et al.*, [1973] 2 O.R. 132 at 136, where after quoting Lindley L.J. in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426 at 443 as to the flexibility of the rule, he states: "Rule 75 should be applied to particular cases to produce an expeditious but just result."

[78] *Supra*, note 74.

[79] *Supra*, note 75.

[80] (1828), Act 9 George 4, C. cxiii.

yet the House of Lords found that the requisite similarity of interest ought to be derived from the Act and therefore allowed the action to proceed.[81]

In *Markt,* the cause of action arose in 1904 when the Russian Navy sank a cargo vessel for carrying contraband during the Russo-Japanese War. The plaintiffs claimed to be the owners of non-contraband materials lost by the sinking, and as compensation did not appear to be forthcoming from the Russian Government, they sued the ship's owners for damages in contract and tort, and in the alternative, for a declaration of liability.[82] The writ was issued on the very eve of the limitation period[83] and was styled on behalf of the plaintiff "and other owners of cargo lately laden on board the S.S. *Knight Commander*".[84] The conduct or grievance which gave rise to the suit was in effect one single act injuring all shippers of goods, very much like the Duke of Bedford's conduct affecting all Covent Market growers. The source of the violated rights, however, was not in any way similar for each shipper's cause of action depended on the individual contract he had made with the vessel's owners and not upon one general statutory or customary right. As there were forty-three separate bills of lading made out by different shippers, some of whom had shipped contraband and others who had not, the majority of the Court of Appeal found that the plaintiffs were a mere collection of individuals rather than a properly composed class because the sources of their interests were "personal" rather than "common".[85] The majority felt that in such situations actual joinder was the more appropriate course for the plaintiffs to take, and Lord Justice Vaughan Williams treated joinder and representation as mutually exclusive, choosing here to broaden the scope of the former.[86]

Buckley, L.J., in his dissenting opinion, was prepared, unlike the majority,[87] to permit an action for a declaration of liability, on the grounds that it was a form of relief in which every shipper had a common interest.[88] By relying on the pre-Judicature Act cases of *Meux* v. *Maltby*,[89] *Beeching*

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[81] At the trial level Romer, J., acceded to the defendant's arguments concerning class composition and followed *Temperton* v. *Russell,* [1893] 1 Q.B. 435 (C.A.), in requiring that class claims be based upon beneficial proprietary rights (see *infra,* note 107). The decision of Romer, J., is set out at [1899] 1 Ch. 494 at 503. The Court of Appeal, however reversed the trial judge, the majority distinguishing *Temperton* v. *Russell* and finding the proper class composition at [1899] 1 Ch. 494 at 510. Of particular interest is the opinion of Lindley, M.R., a learned Equity judge, who summarized the development of representative suits and gave a most liberal interpretation to the scope of their application.

[82] The plaintiffs claimed that by their seeking a declaration on the issue of liability, the quantum of damage or the issue of separate defences could be dealt with in subsequent proceedings. In one sense, this was like the fishery case of *Mayor of York* v. *Pilkington* (*supra,* note 28) where the issue of separate defences was left for subsequent proceedings at law, while the general issue was decided. That case, in Equity however, involved a general or customary right and not several contractual claims. A closer analogy might be the case of creditors or bankrupts where the issue of indebtedness or insolvency is decided initially and the method of distribution later.

[83] As per Vaughan Williams, L.J., at [1910]2 K.B. 1030, "I do not believe that recourse would have been had to any such form of action had it not been for diffi-

culties arising in respect of the Statute of Limitations if any other form of action had been adopted." As the cause of action was about to be terminated by the expiration of the limitation period, the plaintiffs issued their writ in a representative capacity apparently hoping to keep alive the claims of all owners, as many of them were resident in other jurisdictions. The worst that could happen to Markt & Co. would be to have their representation struck out, in which case they would have still preserved their personal cause of action from the effect of the limitation period.

[84] *Supra,* note 75 at 1022 K.B.

[85] The characterization of these contractual or tortious rights as "personal", was to have a profound impact on the availability of damage remedies in class actions (see text at note 174 *infra*). The Court focussed on the source of each claimant's rights and not on the event which simultaneously gave rise to so many causes of action. The plaintiffs then tried to argue around the problem of privity by maintaining that the separate contracts were in fact similar, but Fletcher Moulton, L.J., at [1910] 2 K.B. 1040, stated:

> "The defendants have made separate contracts which may or may not be identical in form with different persons. And that is all. To my mind, it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of r. 9. It is entirely contrary to the spirit of our judicial procedure to allow one person to interfere with another man's contract where he has no common interest. And to hold that by any procedure a third person can create an estoppel in respect of a contract to which he is not a party merely because he is desirous of litigating his own rights under a contract similar in form, but having no relation whatever to the subject-matter of the other contract, is in my opinion at variance with the whole system of procedure and is certainly not within the language of r. 9."

[86] Vaughan Williams, L.J., at [1910] 2 K.B. 1030 stated: ". . . and I do not think that the Judicature Act Orders and Rules intended that r. 9 of Order XVI (representative action) should be available whenever those on whose behalf the plaintiff affected to sue could shew [sic] that the right to relief arose in respect of or arising out of the same transaction or series of transactions alleged to exist, whether jointly, severally, or in the alternative where, if such persons brought separate actions, any common question of law or fact would arise such as to allow a joinder of plaintiffs under Order XVI, r. 1."

See Ontario Rule 66 for the current requirements of actual joinder. *Quare* whether the actual joinder of parties was available under these circumstances, for one could assert that there was not one transaction or occurrence but 43 separate contracts and therefore 43 separate transactions? See note 85 *supra.*

[87] Per Lord Justice Fletcher Moulton at [1910] 2 K.B. 1042:

> "To the best of my knowledge no declaration of this type has ever been made by English Courts, and it appears to me to be contrary to their practice. They do not permit a plain claim for damages to be split up by isolating out of it an abstract proposition of this kind. Each plaintiff has to prove the whole of his case."

[88] At [1910] 2 K.B. 1047, His Lordship stated:

> "In this case the purpose or object of each and all of the shippers was to consign their goods by a vessel which should observe the duty of not shipping also goods which were contraband of war — a duty which her owners owed to all shippers alike. Cargo owners on a general ship are not partners, but they have a common interest in the ship on which their goods are carried. In respect of that interest they are in a position to claim relief which is common to all of them. They can claim a declaration that the defendants are liable to the plaintiffs . . . To enable the represented firms to recover the damages which upon the footing of the declaration may be recoverable by them requires, no doubt, further steps, such as are always necessary in a representative action to give to the represented parties the particular relief to which each is entitled in respect of the common relief which is for the benefit of all."

[89] *Supra,* note 48.

v. *Lloyd*[90] and *The Commissioners of Sewers* v. *Gellatly*,[91] he maintained that the rule ought to be flexibly applied to suit the changing circumstances of modern life, and through analogy with the cases of creditors, where representative actions were allowed even though each right arose under a separate contract, he attempted to dispell the "separate source" objections of the majority.[92]

Class Composition

According to the language of the codified rule, the only major requirements for proper class composition are that the persons be numerous and that the same interest exists among class members. The problem of numbers is straightforward.[93] Difficulty, however, arises, when one attempts to determine the scope and meaning of the phrase "same interest", and here the rule itself is of no assistance for it fails to explain which aspects of a particular group's interests are to be considered.[94] Is it sufficient for all to be equally concerned in the result, or must the constituent interests also originate at the same time? Must all be identically interested in the subject matter of the litigation, or is a common interest in its object required as well? As the answers to such questions are not contemplated by the wording of the rule, courts have been left to interpret the nebulous and extremely general phrase "same interest" without legislative direction. Reliance has been placed upon

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[90] *Supra,* note 66.

[91] (1876), 3 Ch. D. 610.

[92] As per Buckley, L.J., at 2 K.B. 1044:

> "It is, of course, no objection to a representative action that the rights as between each of the represented parties and the defendants arise under a separate contract made by one party with the defendants to which no other of them is a party. This is so in most if not in every representative action. When one creditor sues on behalf of himself and all other creditors for administration, the debt of each represented creditor arose of course under a contract to which no other of his represented co-plaintiffs was a party. The question is not whether there are numerous separate contracts".

In fairness to the views of the majority it could be argued, as set out earlier in the work (see text at note 60 *supra*), that the creditors suits, like those of testators, were unique in concerning classes already "defined by law". The creditors analogy can be traced to a few lines of Lord Macnaghten's judgment in *Bedford*, but Buckley, L.J., in *Markt* treats it in a manner wholly pervasive of his decision. A similar analogy was drawn by the Saskatchewan Court of Appeal in *Smart* v. *Livett*, [1951] 2 D.L.R. 47. On the whole, little consideration has been given to this approach and most subsequent observers have failed to accord much consideration to Buckley L.J.'s dissenting opinion.

[93] Relatively little attention has been given the question of numbers. See generally the 1973 English Supreme Court Practice at 179 and the observations in *Re Braybrook* (1916) W.N. 74, and *Shaw* v. *Real Estate Board of Greater Vancouver* (1972) 29 D.L.R. (3d) 774 (S.C. of B.C.).

[94] The phrase "same interest", like other vague statutory wordings such as "public interest" or "public convenience and necessity" actually defies clear and specific meaning. It originated as an Equitable jack-of-all trades, and its broad and general character made it well suited for a court which preferred flexibility, yet once codified as a rule of civil procedure, its indefinite character caused difficulty and invited arbitrary treatment. On the other hand, it is interesting to note that the English rules and those of the Federal Court of Canada have been amended to become more comprehensive (see note 5 *supra*) without anything being done to change, or elaborate upon the "same interest" requirement of proper class composition.

certain passages in *Bedford* and *Markt,* so often recited, and so uncritically applied, that they have almost assumed a statutory force of their own. One such excerpt can be traced to Lord Macnaghten's attempt to present an overview of the Chancery practice in *Bedford*, where he stated:

> 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.[95]

This passage, which appeared merely to set out the old representative suit requirements of Equity, was relied upon in the *Markt* case by Fletcher Moulton, L.J., who oddly enough considered it to be an "authoritative interpretation"[96] not of the Chancery practice but of the codified rule. It was frequently referred to in both England and Canada during the early decades of the twentieth century, and in 1954, when the English Court of Appeal, in *Smith* v. *Cardiff Corporation*[97] refused a class action, not specifically because of a lack of common interest, but on the grounds that the plaintiffs were not advancing a common grievance nor seeking relief which would benefit all members of the class, Lord Macnaghten's historical three part analysis of Chancery proceedings attained the status of a three part test of proper class composition. In *Smith* v. *Cardiff Corporation* a large number of tenants sought a declaration that a rental increase scheme of the defendant municipal corporation was *ultra vires* the Housing Act of 1936. As the increase discriminated against the more affluent tenants, but did not affect the poorer ones (the richer in effect subsidizing them) a successful action would not have benefitted all, but only some, of the plaintiff class members. For the same reasons of inter-class disparity, a common grievance could not have been found. Evershed, M.R., speaking for the majority, was fully aware of the context in which Lord Macnaghten's words were initially used[98] yet he nonetheless chose to employ them as if they were exhaustive requirements of the law, when he remarked:

> That latter sentence was spoken in fact of the old Chancery practice before Ord. 16, r. 9, came into operation. But I am content to take it . . . that the necessary qualifications in that sentence are applicable here and must here be shown to be satisfied. It must be shown first that all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all.[99]

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[95] *Supra,* note 74 at 8.

[96] *Supra,* note 75 at 1039 2 K.B.

[97] *Smith* v. *Cardiff Corporation,* [1954] 1 Q.B. 210. For a more complete discussion of this case see Stoljar, *The Representative Action: The Modern Position* (1957), 4 U. of West. Aust. Ann. L. Rev. 58 at 62-64, where the author noted that as the action was amended to a single suit by the named plaintiffs in their personal capacity, the issue would still be tried though, albeit not as a representative action.

[98] Interestingly enough, Lord Macnaghten also made a more liimted statement at [1901] A.C. 9: "There are plenty of other cases which shew [sic] that, in order to justify a person suing in a representative capacity, it is quite enough that he has a common interest with those whom he claims to represent". It would appear that His Lordship never expected his three part historical explanation to become a test for class composition under the codified rule although one could argue that on the basis of his willingness to equate the requirements of the statute and Chancery, he did.

[99] *Supra,* note 97 at 220-21.

This approach appears to be growing in popularity, for within the last few years Canadian courts in New Brunswick,[100] British Columbia,[101] and Ontario,[102] have employed this three, or in some cases, two part test as if it were incorporated within their respective rules of civil procedure. The position may be an unfortunate one, however, for it could give rise to too many additional questions which could compound the present difficulties of interpretation, rather than eliminate them. If, for instance, "same interest" and "common interest" mean one and the same thing, as Equity would have had us believe, how then does a court, absent the baldest of judicial legislation, find its authority to go beyond the words of the rule and inquire into common grievances or examine whether everyone will benefit by the action? If on the other hand, "same interest" and "common interest" are not identical; that is to say, if the three part test can somehow be considered as being implicit within the words "same interest", then one runs contrary to the historical weight of authority which most often was only concerned with common interest. In addition, courts in jurisdictions such as Alberta, where the rule is worded to read "common interest" rather than "same interest", would then appear to require a different test of class composition than those in Ontario.[103] A way out of this apparent dilemma would be through the avoidance of strict literalism, but for the present purposes it is sufficient to note the existing difficulties and then proceed to analyze class composition using the three part test as a framework for the attempted clarification of an extremely confused area of law. At any point in time, the failure to satisfy one or more parts of this test may or may not have been sufficient to defeat a class claim. All that can be said with reasonable certainty, is that there are cases such as the above mentioned *Smith* v. *Cardiff Corporation*[104] where the absence of a common grievance, or the existence of a claim not beneficial to all class members has been held to go to the essence of the requisite interest and place the action outside the scope of the rule.

(i) *Common Interest*

Turning then to the first requirement, common interest, one finds that the relevant interest is one which pertains to the object or purpose of the action. As Ridell, J., stated in *May* v. *Wheaton*:

> . . . the representation contemplated by Rule 75 is a representation of a class "having the same interest": it has reference not to relationship, etc., but solely to interest in the result of the action.[105]

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[100] *Delong* v. *The New Brunswick Teachers' Federation* (1970), 3 N.B.R. (2d) 149 (N.B.S.C.).

[101] *Alden* v. *Gaglardi* (1970), 15 D.L.R. (3d) 380 (B.C.S.C.); Aff'd on other grounds (1971), D.L.R. (3d) 355 (B.C.C.A.); (1973), 30 D.L.R. (3d) 760 (S.C.C.).

[102] *Farnham* v. *Fingold*, [1972] 3 O.R. 688 (H.C.); [1973] 2 O.R. 132 (C.A.).

[103] Alberta Rules of Civil Procedure.

[104] *Supra*, note 97.

[105] [1917] 41 O.L.R. 369 at 371. The case involved an attempt to set aside bequests in a will, and as there were others besides the plaintiff who were next of kin and in a position to take under the will, a representative action was ordered to ensure the presence of all interests. For more recent expressions of this point see *Drohan* v. *Sangamo Co. Ltd.*, [1972] 3 O.R. 399 (H.C.); *Shack* v. *Mathews Construction Co. Ltd.*, [1962] O.R. 556 (C.A.).

This position finds further support in the earlier judgment of *Markt,* where Vaughan Williams, L.J., goes so far as to use "common interest" and "common purpose" interchangeably.[106]

As for the subject matter of this concern, limitations are insignificant, for after 1901 the requisite interest, no longer had to involve a beneficial proprietary right, as Lindley, M.R., had thought in *Temperton* v. *Russell.*[107] Lord Macnaghten, first in *Bedford* v. *Ellis,*[108] and later in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,*[109] found such a requirement to "be opposed to precedent" and not "in accordance with common sense".[110] As Lord Shand stated:

> There is no such word as "proprietary" in the rule, and no good reason in my opinion for holding that word by implication to be a part of the rule.[111]

In fact, Lord Lindley, who was responsible for the position in *Temperton* v. *Russell,* acknowledged that the "unfortunate observations" had been "happily corrected" in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants.*[112]

Recently, however, the Ontario position with respect to the substance of class claims has undergone an extremely peculiar twist. In *Watch Tower Bible and Tract Society* v. *A.G. Canada,*[113] an unincorporated association of Jehovah's Witnesses instituted a class action for a declaration that certain Federal Orders in Council had abridged their freedom of religion. The Attorney General succeeded in having the representation struck out on the grounds that spiritual interests were not included within Rule 75. The Master, in coming to this decision appeared unmindful of the fact that the first representative actions involved parsons and parishioners in the Court of Chancery for he stated:

> . . . in every case where one or more persons have been authorized to sue for the benefit of all having the same interest, the interest has been material or financial, or has derived from a statute, regulation or order passed by a competent authority. It is evident from the prayer in the statement of claim above quoted that if the class of persons whom Percy Chapman seeks to represent in

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[106] *Supra,* note 75, where at 1030 K.B., His Lordship states ". . . I see no common right, or common purpose, in the case of these shippers who are not alleged to have shipped to the same destinations", and further, at 1032: "In the present case, as I have already said, I do not find the common interest or purpose".

[107] *Supra,* note 81.

[108] *Supra,* note 74.

[109] *Supra,* note 77.

[110] *Supra,* note 74 at 8.

[111] *Id.,* at 18.

[112] *Supra,* note 77 at 443 A.C. The elimination of this requirement was confirmed in Canada in *Small* v. *Hyttenranch* (1903), 6 O.L.R. 388 (Div. Ct.) and in *Metallic Roofing Co.* v. *Local Union 30* (1905), 9 O.L.R. 171 (C.A.). See however; *Robinson* v. *Adams* (1924), 56 O.L.R. 217 (C.A.). For an American observation on *Barrett* v. *Harris* (1921), 21 O.W.N. 293; (1922), 69 D.L.R. 503 (Ont. H.C.), an Ontario case which canvassed these proprietary notions, see the Note at 36 Harv. L. Rev. 89.

[113] [1945] O.W.N. 537.

> this action have any interest, it is a spiritual or religious interest, and not a material or financial interest, and does not derive from any statute, regulation or order.[114]

In principle, there can not be any reason for so restricting the subject matter of the interest, and this case, like *Temperton* v. *Russell,* seems to invite an allegation of being not "in accordance with common sense". Apart from this one qualification, however there are no restrictions as to what may comprise the subject matter of a particular interest.

The character of the requisite interest, or more specifically the question of commonality has received a distorted and narrow interpretation. This initially was not the case, for Lord Macnaghten had recommended that a liberal construction be given to the question of commonality and in *Bedford* he remarked:

> 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.[115]

Fletcher Moulton, L.J., however, was not of the same mind in *Markt,* and in fact, he devoted the better part of his judgment to a consideration of the differences which existed between class members' interests. In so doing, he attached qualifications to the rule which had not previously existed and gave "common interest" a meaning more akin to a notion of "communal interest". Implicit in his judgment was the belief that there should be some relationship, or bond, of shared rights, for he stated:

> It may be that the claims are alike in nature, and that the litigation in respect of them will have much in common. But they are in no way connected; there is no common interest.[116]

and later:

> The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject matter.[117]

In a great many instances, this distinction is insignificant, for a test which employs either "common interest" (in the sense of identical) or "communal interest" (in the sense of shared) should, in a majority of situations, achieve the same results. Nevertheless this is not always the case, nor is it consistent with principle. In theory, the rule is worded to take into account,

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[114] *Id.*, at 540. The decision was recently cited by Holland, J., in *Judge* v. *Muslim Society of Toronto Inc.*, [1973] 2 O.R. 45 (Ont. H.C.), as authority for the proposition that "A religious interest is, by itself, not sufficient". The case involved two groups who were disputing each others right to the control of the Jami Mosque in Toronto. The plaintiffs sought an accounting of all receipts by the defendants "for the acquisition, operation and support" of the mosque, plus a declaration that the defendants hold the lands and building in trust for the congregation. The plaintiffs however were not members of the society and the trial judge dismissed the action. The wording of the judgment is somewhat ambiguous but it could be argued that one of the grounds of Holland, J.'s holding was the question of spiritual interest.

[115] *Supra,* note 74 at 7.

[116] *Supra,* note 75 at [1910] 2 K.B. 1021, at 1040.

[117] *Id.*

and avoid, the possibility of prejudice to absent parties, and to that end it matters not whether a bond or relationship of shared or communal rights exists between class members. A represented plaintiff can only be prejudiced if his interests are not the same as those of his representative. Conversely, where those interests are one and the same,[118] there can be no prejudice, and any question of relationship or "communality", as opposed to "commonality", becomes irrelevant.

(ii) *Common Grievance*

In practice, very little judicial attention has been directed to the definition of common grievance, and no decision can be found where a class action has been refused exclusively on this ground. In *Markt* where the three part test for class composition received substantial attention, and in *Smith* v. *Cardiff Corporation*[119] where it gained prominence, the bases of the decision included the lack of a common grievance but also extended beyond it to encompass the scope of beneficial relief. In one respect, the plain meaning of common grievance seems to be notionally included within one or both of these other two requirements. For example, the tenants in *Smith* v. *Cardiff Corporation* couldn't fulfill the common grievance requirement because the suit would benefit the affluent class members, but not their poorer brethren. Similarly, in *De Long* v. *The New Brunswick Teachers' Federation*,[120] where some members of a teachers' organization sued to declare invalid an application by the directorate for union certification, Dickson, J. denied the representation because six thousand of the proposed class members had signed a petition in direct opposition to the plaintiff's claim. As all class members did not subscribe to the same side of the grievance, no common interest could be found.[121]

If the idea of common grievance therefore appears to be contained within either of the other two requirements, why then should it here be set out as part of the class composition test? Recently in such cases as *Drohan* v.

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[118] In *Preston* v. *Hilton* (1920), 48 O.L.R. 172 (Ont. H.C.), Orde, J., at 179, stated that same interest did not mean "merely a like or similar interest", and thought that point "very clearly brought out" in *Markt*. Note however the words of Grant, J., in *Drohan* v. *Sangamo, supra,* note 105 at 402, who, after citing the above decision, went on to find that the class members had "a sufficient like interest as to permit action to be brought in the manner provided by Rule 75".

[119] *Supra,* note 97.

[120] *Supra,* note 100.

[121] It may be important at this point to notice a difference in language between the various rules. Ord. XVI, r. 9 of the English Supreme Court Practice, at the time of *Markt* and *Smith* v. *Cardiff Corporation,* and the New Brunswick rule in 1970 at the time of *Delong* v. *The New Brunswick Teachers' Federation,* like the original codification, spoke of "same interest in one cause or matter", unlike the Ontario rule which has required merely the "same interest". It is suggested that reference to the phrase "one cause or matter", while clearly directed to the singularity of a proceeding, might well have influenced courts in the establishment of the grievance requirement.

Sangamo Co. Ltd.,[122] *Judge* v. *Muslim Society of Toronto, Inc.*[123] and *Alden* v. *Gaglardi*,[124] some Canadian courts have omitted any reference to the common grievance question and have expounded a two part, as opposed to a three part test. Yet, the grievance question is important, for in some instances it can serve to crystallize principle and simplify inquiry into the propriety of a given claim. This function becomes more readily apparent when one examines the reasons for judicial caution in dealing with plaintiff class actions — a caution expressed by Dickson, J., in *DeLong* v. *New Brunswick Teachers' Federation* when he considered the rationale behind the grievance requirement, and class composition qualifications in general, and stated:

> It would quite obviously lead to the most gross abuse of the process of the Courts if anyone wishing to bring an action or to attack the actions of another party were to be able arbitrarily to set himself up in the face of the facts as speaking for myriads beyond himself who may have no desire whatever that he speak for them, and I can not conceive that the granting of the right to bring a representative action was ever intended to bestow such a right.[125]

Similarly in *Markt*, Fletcher Moulton, L.J., explained his reticence by maintaining:

> But that which to my mind most strikingly indicates the fundamental error of the suggestion that the circumstances of these cases justify a representative action is that I can conceive no excuse for allowing any one shipper to conduct litigation on behalf of another without his leave, and yet so as to bind him.[126]

The concern with due process is indicative of the fact that in Canada anyone wishing to bring a class action can do so without the consent, or even the knowledge of those whom he represents, and thereupon the judgment in such case is final and binding upon everyone who comes within the class description.[127] Unlike the suit against a defendant class, where the selection of representatives is under the close supervision of the court,[128] the self appointed representative plaintiff is relatively free from such scrutiny and control.[129] Though, in theory subject to the courts' inherent power to prevent an abuse of process, his description of the class is generally not questioned, unless put into issue by a defendant's motion to strike out the representation.[130] As a result, the right of the represented, but unnotified plaintiff, to contest his inclusion within a class is entrusted strangely enough to the defendant. Furthermore, the absence of close judicial supervision makes the

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[122] *Supra*, note 105.

[123] *Supra*, note 114. On its facts, the case is somewhat similar to *Delong* v. *The New Brunswick Teachers' Federation, supra*, note 100 in that there were two clearly delineated opposing factions within one group. In *Judge* v. *Muslim Society of Toronto, Inc.*, however, Holland, J., nowhere adverts to the question of common grievance.

[124] *Supra*, note 101.

[125] *Supra*, note 100 at 155.

[126] *Supra*, note 75 at 1040 K.B. As to the binding effect of the representative claim on other class members see *Bamber* v. *Bank of Nova Scotia*, [1943] 2 W.W.R. 529

(Alta. C.A.); *Watson* v. *Cave* (1881), 17 Ch.D. 19; *Commissioners of Sewers* v. *Gellatly* (1876), 3 Ch.D. 610; *Barker* v. *Allanson*, [1937] 1 K.B. 463 (C.A.). The very notion of representation seems to indicate that all class members are, in effect, present, and therefore bound by the decision. Problems however have arisen with discontinuance, collusion and dissentient membership, but see text at note 131 *infra* and Holmestead and Gale, 1973 *Rules of Practice* R. 75, ss. 7-9. In England, O. 15, r. 12 (3) specifically states that "A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court". *Quare* however, whether or not it is *ultra vires* the English Rules Committee to pass on the binding effect of a judgment?

[127] In Canada it is conceivable that barring judicial intervention, or the objections of defendants, the rights of represented parties could be decided before the existence of a *res* ever came to their attention. One wonders whether all the real estate salesmen in *Shaw* v. *Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774 or hydro users in *Chastain* v. *British Columbia Hydro and Power Authority* (1973), 32 D.L.R. (3d) 443, (class action against public utility for return of service security deposits, see *infra,* note 140), were ever aware of the actions brought on their behalf. The problem has long confounded the American courts, for due process requirements and the wording of F.R.C.P. 23(c)(2) demand that notice be given to all class members, yet often the costs are prohibitive. Under that rule a plaintiff must attempt to give the best notice practicable under the circumstances, including actual written notice to those who can be identified. The notified class member is then given an opportunity to elect to have his name removed from the class and thereby be excluded from the scope of the judgment. See Wright and Miller, *Federal Practice and Procedure*: Civil ss. 1786 to ss. 1788; Maraist and Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action* (1970), 49:1 Tex. L. Rev. 1 and cases cited therein.

[128] Rule 75 states that ". . . one or more . . . may be authorized by the court to defend on behalf of, or for the benefit of, all." In *Barrett* v. *Harris* (1921), 51 O.L.R. 484, Middleton, J., remarked at 491: "I should add that an order authorising the defendants to represent the class is, by the Rule, equally essential". The order is in the discretion of the Master. See generally, Holmestead and Gale; 1972 Ontario Rules of Practice R. 75, ss. 32 to 36.

[129] A plaintiff class does not have to be "authorized" under R. 75, but recall how the Court of Equity refused to proceed until it was assured that all parties were present, either personally or through representation. A similar end was sought in *May* v. *Wheaton* (1917), *supra,* note 10, where, in a case to determine the distribution of an estate, Riddell, J., at trial gained the representation of the absent next of kin by requesting the plaintiff to make an application to amend his claim to a representative one. At 370 the Court recounts having stated: "I suppose, on application, I can make the present plaintiff represent all those in the same interest, if that is asked; but I shall not do so unless it is asked". The court here expresses its readiness to intervene and ensure the presence of all interests through an amendment, yet note its reluctance to act on its own motion, and the insistence that the plaintiff initiate the change. The request was thereupon made and the defendants consented.

[130] This statement only pertains to the un-notified and absent class member who may not find out until after judgment that his rights have been determined. On the other hand, if the matter does come to the attention of a class member and he wishes to be excluded from the scope of the decree, it appears that he could apply to be removed from the class and be added as a named defendant (see text at notes 143-45 *infra*), and should he then choose, a motion could be brought to strike out the representation. Doubts were expressed as to the fairness of this position however, by Evershed, M.R., in *Smith* v. *Cardiff Corporation, supra,* note 97, where at 222 he considered the position of a class member who desires not to be bound, and who is thereby compelled to request inclusion as a defendant: "It seems to me that such a result involves a serious inroad upon the ordinary individual's liberty to make his own terms with some other party with whom he is under no obligation to make any contract at all, if he does not want to". Unlike the U.S. Federal class suit, there are no notice and reply procedures permitting represented plaintiffs to fill out a form which would remove them from the class without incurring legal expense (see note 127 *supra*).

entire procedure susceptible to allegations of such unsavory ploys as defendant inspired collusion or discontinuance.[131]

As a result of these potential encroachments upon fairness and due process principles, the task of proper class definition assumes a role of paramount importance in the minds of the judiciary. On the one hand, they must ensure that the scope of the class description is sufficiently narrow to avoid the prejudicial effects of binding those whose interests are incapable of being adequately advanced by the named representatives,[132] while on the other hand, there must be enough definitional latitude to make certain that the very purpose of the representation is not defeated.[133] It is in this context that the common grievance notion can assume its crystallization function, for too often the examination of constituent interests leads into an assessment of minute detail, obscuring principle and ignoring Lord Macnaghten's instruction to focus not upon the individual differences between class members, but upon those things which they have in common.[134] By considering the elements of the dispute, one can more readily discern spheres of interest that are sufficiently similar to satisfy the purpose of the rule and protect absent party rights. The grievance formulation is no panacea, but it can in certain instances, place the situation in such a perspective as to invite a glance at the forest instead of the trees.[135]

(iii) *A Relief Beneficial to All*

The third part of the same interest test requires that the relief sought on behalf of the class should "in its nature be beneficial to all whom the plaintiff proposes to represent,"[136] and it is this formulation, more than the grievance question which has currently attracted the attention of Canadian courts.[137] While it is quite clear from such cases as *DeLong* v. *The New Brunswick Teachers' Federation*[138] that the scope of relief must encompass all members of the class, it is not necessary that everyone benefit equally, for as Grant, J., said in *Drohan* v. *Sangamo Co. Ltd.*:

> That interest is more than merely a like or similar interest, and must be a common interest in the sense that all persons represented will gain some relief though possibly in different proportions and perhaps in different degrees:[139]

This qualification achieves its primary significance where a claim for money is involved, for it would be virtually impossible to ever sue as a class for such relief if each represented plaintiff was required to seek an identical sum. In the above case, five retired employees of the defendant Sangamo Co. Ltd. sued in a representative capacity for a declaration that a pension plan agreement between the union and the company was still valid and bind-

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[131] In a great many situations, it would be extremely difficult for a court to inquire into the possibility of whether or not a representative plaintiff was encouraged by the defendant to compromise or discontinue a suit, for such tactics may take extremely subtle forms. There are as well such second order prejudicial complaints as the named plaintiff's retention of inexperienced or inept counsel, or his failure to press the case with all due dispatch and diligence. *Quare* the possible scope of tortious liability incurred by the representative in these situations? Once a suit is discontinued by the representative, there remains the problem of substitution or replacement from among

the represented multitude. The question is not without attendant complexity, and unfortunately there is an absence of modern Canadian authority. See however, *Macdonald* v. *Toronto* (1897), 18 P.R. 17 (Ont. C.A.); *Watson* v. *Cave (No. 1)* (1881), 17 Ch. D. 22; and generally 1973 Holmestead and Gale R. 75, ss. 7-10. The practice in England has recently been clarified by Lord Denning in *Moon* v. *Atherton*, [1972] 3 All E.R. 145 (C.A.). At 146-47 he states: "In a representative action, the one person who is named as plaintiff is, of course, a full party to the action. The others, who are not named, but whom she represents are also parties to the action. They are all bound by the eventual decision in the case. They are not full parties because they are not liable individually for the costs. That was held by Eve, J., in *Price* v. *Rhondda Urban District Council* (1923), 130 L.T. 156, [1923] All E.R. Rep. 679). But they are parties because they are bound by the result. What then is to happen when the named plaintiff decides to withdraw? It seems to me that then it is open to any one of those whom she represents to come forward and take the place of the named plaintiff". His Lordship at 147 continued: "This is necessary in order to do justice. If it were not so, the named plaintiff might discontinue, or the defendant might settle with the named plaintiff, and then leave the other unnamed plaintiffs out in the cold. It might be too late for them to issue a new writ because of the statute of limitations. That cannot be right. It seems to me that if, in a representative action, the named party falls out for any reason, the court has ample power to substitute one of the unnamed parties as the plaintiff, and to bring him in as at the date of the original writ".

[132] The fundamental policy question is clearly and simply expressed by the editors of the Harvard Law Review in the Note on the Ontario case of *Barrett* v. *Harris* at 36 Harv. L. Rev. 89 at 90 where they suggest: "The real question is, assuming that the court has jurisdiction, considering all the circumstances, to what extent is it reasonable to bind parties not actually before the court".

[133] On the majority of occasions when representations have been struck out, the plaintiffs have erred on the side of defining the class too broadly, but it is equally consistent, though less likely, that a court would intervene to demand a more expansive definition. For instance, in a situation involving the absence of necessary parties, an Ontario court requested that an individual plaintiff amend his claim to a representative one. See *May* v. *Wheaton, supra,* note 105. A more common cause of difficulty arises not where the plaintiff clearly defines his class too broadly or narrowly, but where his description is vague. See the opinion of Fletcher Moulton, C.J., in *Markt* (*supra,* note 75), where he states at 1034: "In the first place it is essential in the case of representative actions that the class on behalf of which the relief is sought should be defined in the writ. It is impossible for the Court to give any judgment as to the rights of parties by virtue of their being members of a class without its being defined what constitutes membership of the class. A mere list tells the Court nothing, more especially when that list does not appear on the record".

[134] *Bedford* v. *Ellis* see text at note 115, *supra.*

[135] One could regard R. 75 as pertaining not to one, but to several different categories of representative actions, for different considerations arise depending upon such factors as the relief sought and whether or not the defendant comes from within the class or is a stranger to it. The grievance formulation is here put forward as being best suited to the explication of such broad disputes as arose in *Bedford* v. *Ellis, supra,* note 74, where large numbers challenge the conduct of someone outside their group. In such cases, the trial of the majority's complaint must prevail over the possibility that some of those coming within the class description might be of different minds.

[136] *Bedford* v. *Ellis, supra,* note 74 at 8.

[137] Text *supra* at notes 122-24.

[138] *Supra,* note 100.

[139] *Supra,* note 105 at 402. The language comes from the decision of Orde, J.A., in *A.E. Osler & Co.* v. *Solman,* [1926] 59 O.L.R. 368, where speaking of *Preston* v. *Hilton* (1920), 48 O.L.R. 172 (Wkly. Ct.) he uses much the same phrase. This interpretation is quite easily reached when one considers that the phrase coined by Lord Macnaghten in *Bedford* v. *Ellis,* and later adopted by the Court of Appeal in *Markt,* and *Smith* v. *Cardiff Corporation* referred only to the "nature" of relief (see text *supra,* at note 95).

ing. They further sought a mandatory injunction requiring the payment of retirement pensions which the plaintiffs alleged had not been paid to them and damages for breach of contract. Mr. Justice Grant remarked that the represented plaintiffs' interests might vary according to their individual entitlements which were dependent upon such criteria as length of service, age, and other factors. Yet insofar as they would all benefit from a declaration that the agreement was binding and in this respect had a common interest, he refused to strike out the representation. Similarly, in *Chastain* v. *British Columbia Hydro and Power Authority*[140] a group of ratepayers brought suit against a public utility on behalf of themselves and all other power users who had been required to pay, or had already paid security deposits to the defendant. McIntyre, J., found the claim to be similar to *Alden* v. *Gaglardi*,[141] and not only granted a declaration that the defendant lacked valid authority to retain such funds, but permanently enjoined it from "demanding, or collecting, or keeping security deposits".[142] The amounts of the respective deposits had varied, yet that was a difference not in the nature of relief, but in the degree, and so was not allowed to vitiate the commonality of interest.[143]

The most obvious example of representations failing to accord with this test occurs where the remedy sought not only fails to benefit, but is actually detrimental to the interests of some class members. In such cases an amendment may be allowed redefining the class and making those with inimical interests defendants; or, the representation could be struck out and the named plaintiff left to proceed alone.[144] This latter course was followed in *Smith* v. *Cardiff Corporation* where the plan of graduated rental increases based upon ability to pay divided the alleged class of tenants, seeking to impeach it, for as Evershed, M.R., said:

> . . . the main characteristic of this scheme is that the more affluent will, so to say, subsidize the less affluent, it is at once apparent that there are two classes whose interests are not only identical but are in conflict, namely, the subsidizers and the subsidized.[145]

Success in attacking the plan would certainly have been injurious to the less affluent class members, yet if the scheme was *ultra vires*, a means to impugn it ought clearly to exist. The poorer tenants however could not be added as defendants, for as Megarry, J., said of this aspect of the case in *John* v. *Rees*, the declaration and injunction sought against the Corporation would have been "patently inappropriate remedies" to seek against the tenants.[146] The named plaintiffs were thereupon permitted to continue but only in a personal capacity.[147] There are also cases where the nature of the representative plaintiff's claims are purely "personal", and while not inimical to the interests of absent class members, neither are they of benefit to them.[148] Such circumstances have assumed their greatest relevance in questions involving the availability of class damage actions and will therefore be considered in a later section on Remedies. For present purposes, it is sufficient to realize that the relief sought on behalf of a class must be in nature, though not in degree, beneficial to everyone who comes within the class description.

Standing

Closely related to a consideration of class composition is the problem of legal status or standing.[149] If a plaintiff in his own behalf does not have the

proper capacity to sue, then it matters not how many others he purports to represent, for he can not acquire any better standing by suing on behalf of a class. For example, in *Cowan* v. *Canadian Broadcasting Corporation*,[150] Schroeder, J.A., found that the plaintiff lacked the necessary *locus standi* to declare invalid and enjoin the C.B.C.'s policy to transform Toronto radio station C.J.B.C. to a wholly French language broadcaster. That status could

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[140] *Supra*, note 127.

[141] *Supra*, note 101. The same result was reached in *Shaw* v. *Real Estate Board of Greater Vancouver, supra*, note 127, where the return of different amounts by way of real estate commissions were claimed and the B.C. Supreme Court allowed the action to proceed as a representative one.

[142] *Supra*, note 127 at 449.

[143] It should be noted however, that the representative issue did not appear to be strongly contested by the defendant for McIntyre, J., remarked that the defendant did not object strenuously to the form of action and that in fact, "little authority was referred to" in this part of the case.

[144] It is important to place in perspective the range of possible dispositions of a defendant's motion to strike out. One must keep in mind that only an interlocutory question of procedure is being entertained, quite apart from any determination upon the actual merits of the case. The first possible disposition would be to deny the motion and let the action proceed to be heard as a representative claim. Secondly, the court might allow the motion and delete the representation, with the named plaintiff thereby left in control only of his own destinies. On this point, reference should be had to Stoljar, *The Representative Action: The Modern Position* (1957) *supra*, note 97 for comments on the relatively little difference between class and single suits in a great many situations. For a recent Canadian view to the opposite effect, see the Note on *Alden* v. *Gaglardi* in Bulletin of Canadian Welfare Law 1973, Vol. 2, No. 1. There is also a possibility that the plaintiff would be permitted to amend a defective class description and apply to add the excluded members as defendants. The authority for this proposition can be traced to Chancery, and to a line of English cases immediately following codification. (*Wilson* v. *Church* (1878), 9 Ch.D. 552; *Watson* v. *Cave* (1881), 17 Ch.D. 19; *Fraser* v. *Cooper, Hall & Co.* (1882) 21 Ch.D. 718). Recently, Megarry, J., went even further in *John v. Rees, supra*, note 77 and stated at 283: "But if the named parties to the action together put forward every view that is seriously advanced, I cannot see that any real harm is done to a person whose part in the action is merely that he is represented by the plaintiff, even if the plaintiff is supporting a different cause, provided that there is a defendant who does stand for the cause espoused by the person being represented: actions are decided by reference to justice according to law, and not by counting heads." A fourth possible disposition involves the dismissal of the suit and arises when the defendant's motion to strike out the representation is joined as an alternative claim to a motion to set aside the pleadings as disclosing no reasonable cause of action (see *Farnham* v. *Fingold, infra*, note 176). There is however judicial antipathy towards the disposition of a suit before it can be heard on its merits, and perhaps the best time for an assessment of the propriety of a class claim might be at trial as in *Judge* v. *Muslim Society of Toronto Inc.* discussed *supra*, at note 114.

[145] *Supra*, note 97 at 221-22.

[146] *John* v. *Rees, supra*, note 77 at 286.

[147] [1955] 1 All E.R. 113. Resolved in favour of defendant Cardiff Corporation.

[148] See the quotation from *Markt* in note 85, *supra*.

[149] Recall Lord Eldon's concern in Chancery (*supra*, note 37) that a group of persons without any legal standing *qua* group should be allowed to treat themselves as if they had such status. For an interesting American comment on the standing question, see Louis L. Jaffe, *Standing Again*, 84 Harv. L. Rev. 633.

[150] [1966] 2 O.R. 309 (C.A.).

only have been acquired had Mr. Cowan incurred special damage or demonstrated an interest beyond that of the general public. When leave was sought to amend the action to a representative one on behalf of "all other English speaking taxpayers of Metropolitan Toronto who habitually listened to broadcasting station C.J.B.C. in the English Language," the court refused:

> The only persons who would be identified in interest with the plaintiff would be individual members of the public who desired the same relief as he is seeking. If the plaintiff has no right as an individual to bring and maintain an action to redress an alleged public wrong, then his claim as a representative of other individuals, however numerous, who have no higher rights than he possesses cannot enhance his position.[151]

Only the Attorney General could sue to enforce such broad public rights, unless of course, some members of the public were able to demonstrate a peculiar or special injurious affection.[152] In *Bedford* v. *Ellis*,[153] *Alden* v. *Gaglardi*[154] and *Chastain* v. *British Columbia Power and Hydro Authority*,[155] public rights were enforced by the class device because the plaintiffs and the class which they represented possessed the requisite interest of having suffered damages beyond that of the public at large. As the plaintiffs contended in *Chastain*, they had, in a sense, been selected from the general public by the acts of the defendant.[156] In such cases the special interest which gives the plaintiffs standing also provides the necessary unifying interest for class composition purposes.

Given the increasing attention which the class action has received as a

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[151] *Id.*, at 315.

[152] In theory, the public interest is vested in the Crown, and the Attorney General has for centuries been considered the custodian of that interest. *Smith* v. *A. G. Ontario*, [1924] S.C.R. 331; *Grant* v. *St. Lawrence Seaway Authority*, [1960] O.R. 298; *Burnham* v. *A. G. Canada* (1970), 74 W.W.R. 427 (B.C. Sup. Ct. Chambers). In *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109, Buckley, J., at 114 mentioned two occasions when an individual could sue to enforce a public right without the Attorney General: "first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g. where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway), and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right".

[153] *Supra*, note 74. The Court of Appeal at [1899] 1 Ch. 494 had insisted upon the addition of the Attorney General, but as Lord Macnaghten stated at [1901] A.C. 12 "From that part of the order there is no appeal. Speaking, however, for myself, I cannot see what the Attorney General has to do with the matter. The plaintiffs do not want him; still less does the defendant". His Lordship thought this to be a strictly private matter which did not affect public rights.

[154] *Supra*, note 101.

[155] *Supra*, note 127.

[156] *Id.*, at 447.

potential vehicle for the enforcement of broad public rights,[157] the most significant standing questions of the coming decade might well involve the desirability of giving self appointed representatives the right to invest themselves with the status of public defender.[158]

Remedies

It is one thing to quite liberally construe the phrase "same interest" in order that larger numbers might be afforded a convenient and efficient means of airing their grievances, but it is quite another matter to invest those group members with the full panoply of remedies otherwise available to individual litigants. During the initial two hundred years of class suit development, the only available remedies were, of course, equitable ones, such as declarations, injunctions, and bills to account but not damages, which could only be sought in actions at law. Consequently, when the Judicature Act of 1873 brought about the merger of the two Courts and a codification of the class action, it was left to the judiciary to determine the remedies which would be made available to class plaintiffs. Today, one hundred years after the passing of that Act, the utilization of representative procedures in actions for other than equitable relief has been infrequent, and although that situation has been modified somewhat in the last year or two, one should consider the present situation as it relates to equitable claims before proceeding on to the more contentious issue of legal remedies or damages.

(i) Equity

A declaratory judgment is simply a judicial pronouncement on the

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[157] The problem of the plaintiffs status also affects strictly private right class actions and claims will be disallowed where the plaintiff doesn't have the personal status to sue. See *Dillon* v. *Township of Raleigh* (1886), 13 O.A.R. 53; *Rochford* v. *Brown* (1912), 25 O.L.R. 206 (Div. Ct.); *Harris Maxwell Larder Lake Mining Co.* v. *Gold Fields Ltd.* (1911), 23 O.L.R. 625 (H.C.). *Quare* whether the powers of substitution as set out in *Moon* v. *Atherton, supra,* note 131 would have any effect upon this position?

[158] In the United States, the class action has become the adopted child of the consumer and environmental movements, and has attracted a great deal of attention in American legal publications. For example, see R.F. Dole, Jr., *Consumer Class Actions under Recent Consumer Credit Legislation* (1969), 44 N.Y.U.L. Rev. 80; E.O. Kegan, *Consumer Class Suits — Righting the Wrongs to Consumers* (1971), 26 Food Drug Cosm. L.J. 130. The *Chastain* and *Alden* cases in B.C., and the recent increases in reported class claims in Ontario are perhaps reflective of the influence of the American experience, but one must carefully consider whether the private enforcement of public rights on so broad a scale is properly within the texture of Canadian legal traditions. For a Canadian proponent of the above approach in the consumer field see M.J. Trebilcock, *Private Law Remedies for Misleading Advertising* (1972), 22 U. of T. L.J. 1, and the U.S. literature cited therein. In the area of welfare law, regard should be had to the comment on *Alden* v. *Gaglardi* referred to *supra,* at note 144. As for environmental concerns, see J.P.S. McLaren, *The Common Law Nuisance Actions and the Environmental Battle — Well Tempered Swords or Broken Reeds* (1972), 10 Osgoode Hall Law Journal 505 and W. Estey, *Public Nuisance and Standing to Sue* (1972), 10 Osgoode Hall Law Journal 563.

parties' respective rights and liabilities.[159] Consequently, it doesn't entail any immediate interference with personal freedoms, for unlike the injunction and the damage award, the declaration can not be used to directly restrain conduct or to redistribute property and money. As such, it is the least contentious of all class remedies, and the one most frequently sanctioned by the judiciary. In *Bamber* v. *Bank of Nova Scotia,* Ford, J.A., of the Alberta Court of Appeal went so far as to maintain that a class suit "is peculiarly applicable to cases where a declaration of a right common to the plaintiff and those represented is sought."[160] Unfortunately, this popularity quite often occurs when it is needed least, for in a majority of the situations where class plaintiffs obtained declaratory relief, it was clear that the same results could have been achieved had the individual representative chosen, instead, to sue only in his personal capacity, and not on behalf of a class. For instance, in *Alden* v. *Gaglardi*[161] the plaintiff sought to call into question a policy of the provincial government which denied social assistance to those unemployed as a result of a strike or lockout. Had Mr. Alden not elected to bring a representative action, the Court's final decision technically would not have bound everyone who might have been injuriously affected by the policy, but in practice, his success would clearly have been as beneficial to them as if they had been a part of his class. By instituting a representative action, he bound all others to his losing cause and exhausted the rights of the other class members to raise the same issue in their own behalf. The benefits of such actions, beyond their publicity value, are indeed dubious, although some have contended that they ensure the airing of important social issues which would otherwise have been lost to abandonment by a plaintiff whose situation subsequently became so changed as to disentitle him from the carriage of the suit.[162]

The injunction is a remedy which has been used in representative suits since their inception. There is some difficulty with its use against defendant

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[159] At one time it was necessary to join a claim for consequential relief with one for a declaratory judgment but according to s. 18(2) of the Judicature Act, R.S.O. 1970 c. 228 this is no longer necessary:

> 18(2) No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether or not any consequential relief is or could be claimed.

The remedy is discretionary and courts display a certain reticence in exercising that discretion in a manner which might result in a declaration being made in a vacuum, and in practice, the claim is rarely left to stand on its own. Recall the discussion on the sufficiency of a declaration of liability in a damage action and the controversy between the majority opinion and the dissent of Buckley, L.J., in *Markt* set out *supra,* note 82 to 88.

[160] *Supra,* note 126 at 537.

[161] *Supra,* note 101.

[162] See the Comment on *Alden* v. *Gaglardi* in Bulletin of Canadian Welfare Law referred to *supra,* note 144. The editors there state that Mr. Alden had returned to work by the time the suit was heard and had it not been for the representation, the case would have become "moot" and therefore not heard. Reference should here be made to that part of the work dealing with the substitution of representatives at note 131 *supra.*

classes,[163] for an individually uncontested restraint upon conduct might constitute too obvious an encroachment upon principles of due process. Yet, insofar as plaintiff classes are concerned, the situation is relatively straightforward. Given proper class composition and standing the injunction will only be denied where the nature of the claim is in some way "personal" to each respective class member, as in the case of many landowners attempting to collectively enjoin a private nuisance.[164] Just as with the declaration, however, there is a certain air of multiplicity to a great many of the injunctive class suits, for the remedy is no more effective in most instances if it is obtained by one or one hundred. Curiously enough, it is at those times when the need for the remedy is not redundant, and where each class member's interest must be protected that one becomes embroiled in the problem of the relief being so "personal" as to vitiate the commonality of interest which had identified the class.

According to the rather peculiar wording of the trial judgment in *Chastain* v. *B.C. Hydro and Power Authority*,[165] it appears conceivable that a new use for the injunction may have been found — namely in matters concerning the distribution of money. In the words of McIntyre, J., a permanent injunction was issued "restraining the Defendant, its servants, agents, representatives and persons acting on its behalf 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 to the continuation of the supply of gas and electrical power to any of the Plaintiffs or any member of the class represented in this action."[166] The use of the injunction to restrain someone from "keeping" money is indeed unconventional, if not irregular, and perhaps might be open to criticism for unduly subjecting the Defendant to the peril of contempt proceedings for non-compliance with the order. In any event, at the time of writing, the judgment stood as an interesting use of the injunctive power in class actions, though one which clearly required further analysis.

A more tested and customary method of equitable monetary distribution can be found in the action for an accounting, which essentially requires that an assessment be made of the respective debits and credits considered by

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[163] See generally, D.J. Sherbaniuk, *Actions By and Against Trade Unions in Contract and Tort, supra,* note 2.

[164] In *Preston* v. *Hilton* (1920), 48 O.L.R. 172 (Ont. Wkly. Ct.), where homeowners sued as a class to, *inter alia,* enjoin the nuisance caused by a local horse stable and waggon shed. Orde, J., refused their claim on the grounds that each person had a separate and distinct cause of action peculiar to himself. It was only by reason of special injury that the individual plaintiff had status to sue at all. Contrast this to the position on standing taken by McIntyre, J., in *Chastain* v. *British Columbia Hydro* and *Power Authority,* text, *supra,* notes 154-57.

[165] *Supra,* note 127.

[166] *Id.,* at 447.

the parties to be owing one to the other.[167] Common examples would include a principal seeking an account of his agent's secret profits or the members of a partnership accounting to each other upon dissolution. Recently, plaintiff classes have resorted to this remedy in situations where it would otherwise have been neither customary nor appropriate. The reason for this may be attributable to the traditionally restrictive approach taken towards class damage claims, which in turn has placed pressures on representative claimants to regard the accounting as an alternate method for the recovery of money. The advocates of this position rely most heavily upon the fact that representative actions for accountings were allowed in Equity, but fail to conceptually appreciate the reasons why.[168] In so doing they commit the same error as those who strictly adhere to the dicta of *Markt* in professing all class damage awards to be *per se* bad. Both fail to adequately consider the contextual balancing of due process principles with convenience and the binding scope of the judgment. In *Chastain,* for example, the plaintiff's claim for an account and return of service security deposits was indirectly permitted through the peculiar use of the injunction referred to earlier,[169] while on remarkably similar facts an action by Ontario gas users to recoup a rate overpayment was disallowed because of the "personal" character of the class members' respective interests.[170] Given the billing and recording systems of public utilities and the readily determinable amounts involved, little administrative difficulty would have arisen in directing repayment to the consumers in both cases, nor does it appear that the rights of absent class members likely would have suffered any substantial detriment. In theory, such circumstances would seem well suited to a class money claim, yet in the Ontario case, the appropriate form of relief was directly sought and refused. The injunction *qua* account in *Chastain* was indirect, if not inappropriate, but succeeded. In a similar vein, consider the following case. Matters of agency have customarily fallen within the realm of accounting actions, and one of the most striking examples of the remedy in this context can be seen in *Shaw* v. *Real Estate Board of Greater Vancouver*[171] where Andrews, J., granted the plaintiff real estate salesmen leave to amend their action for an accounting to one on behalf of "all other persons who, from the date of inception of the Multiple Listing Service of the Defendant to the date of the issue of the Writ herein, were salesmen with a right to commission on one or more contracts of sale upon which an assessment was paid to the Defendant by their employer under the rules of the Defendant relating to its

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[167] The action for account developed both at Law and in Equity, but eventually the jurisdiction of Chancery prevailed. Traditionally these actions were heard on reference to the Master and not in Court. Care however, should be taken not to confuse this remedy with the claim at Law of money had and received, which the English C.A., in *Hardie & Lane Ltd.* v. *Chiltern,* [1928] 1 K.B. 663, considered to fall within the "personal" qualification of *Markt.*

[168] Recall discussion in text *supra,* notes 65-72.

[169] *Supra,* note 165.

[170] *Johnston* v. *Consumers' Gas Co.* (1896), 23 O.A.R. 566. See also *Shields* v. *Mayor* [1953] O.W.N. 5 (C.A.), where an action for the return of rental overpayments on behalf of a group of apartment tenants was not allowed.

[171] *Supra,* note 93.

Multiple Listing Service".[172] The plaintiffs claimed that the Service was *ultra vires* the powers of the Greater Vancouver Real Estate Board and therefore requested the assessment and return of that portion of their commissions which had been submitted by the agents for the maintenance of the Service. Unlike *Chastain,* the form of relief which the plaintiffs had chosen in this case was traditionally appropriate. Nevertheless, the administrative difficulty and potential prejudice likely to be encountered in the assessment and return of contributions to so fluctuating a class which Andrews, J., described as "one of the largest groups of persons ever to be represented,"[173] can only present serious questions concerning the soundness and practicality of the decision. If the propriety of a class suit is made at all dependent upon the formalities of remedy selection, then the distortions of *Shaw* and *Chastain* are likely to result. In practical terms all class actions which involve the distribution of money, whether titled as actions for accounts, or for damages present essentially similar conceptual issues and should therefore in so far as possible be accorded a uniform treatment.

(ii) Damages

Apart from a general reluctance to supervise potentially complicated monetary distributions, the reason why Anglo-Canadian Courts have, until now, rejected class actions for damages[174] can be found in Fletcher Moulton L.J.'s succinct and oft repeated passage in *Markt* where His Lordship attempted to tie the issue of remedy selection into the requirements of class composition:

> Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.[175]

This now classic position is premised upon the theory that in computing damages each man's compensible loss is unique to himself and therefore the interests of potential class members are not sufficiently similar to warrant

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[172] *Id.*, at 774. The Multiple Listing Service referred to in the amended style of cause is an arrangement whereby real estate agents pool the listings of houses for sale, and thereby make each property available to all prospective purchasers and their agents in a given area.

[173] *Id.*, at 777.

[174] On the question of damages in class suits see D.J. Sherbaniuk, *Actions By and Against Trade Unions in Contract and Tort, supra,* note 2 at 161-88; Keeler, *Contractual Actions for Damages Against Unincorporated Bodies* (1971), 34 Mod. L. Rev. 615. In the United States, the damage claim has been advanced well beyond the Canadian position, though one must not overlook the difference between the wording of American F.R.C.P. 23 *supra* and R. 75. For an explanation of how the damage suit is handled in that country and of some problems which are still encountered see F.L. Maraist and T. Page Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action* (1970), 49 Tex. L. Rev. 1; Wright & Miller, *Federal Practice and Procedure*: Civil ss. 1765-1784; and M.J. Trebilcock, *supra,* note 158. The Australian courts have recently considered the problem in a series of cases dealing with the status of various cricket clubs to sue in a representative capacity. See *Banfield* v. *Wells-Eicke,* [1970] V.R. 481; and *Carlton Cricket & Football Social Club* v. *Joseph,* [1970] V.R. 487 (Vict. S.C.).

[175] *Supra,* note 75 at 1040.

representation. In the sixty years since *Markt,* few significant departures have been made from the above position. Moreover, very little consideration has ever been given to the rationale behind the damage proscription, for as Jessup, J.A., recently commented in *Farnham* v. *Fingold,*[176] "subsequent authorities and authors who have stated such a rule as the law have simply quoted Fletcher Moulton, L.J."[177] There have been isolated occasions where Canadian courts expressed reservations about *Markt* — for example, in *Bowen* v. *Macmillan,*[178] Ferguson, J., was reported as being unable to say, without doubt, that Rule 75 was not applicable in any action for damages. Of more recent note is *Drohan* v. *Sangamo Co. Ltd.,*[179] where a class of factory workers sought a declaration, an injunction and damages in a labour dispute over the defendant company's performance of a pension agreement. The defendant's motion to strike out the representation was founded *inter alia* on the alleged impropriety of bringing so personal a suit as one for contractual damages, but Grant, J., denied the motion without passing judgment on the broader question of whether that form of relief was available to class plaintiffs at all. He reasoned that in such instances the defendant's proper course was to strike, not at the representation, but at those parts of the claim dealing with damages, for otherwise the plaintiffs would be prevented from pursuing other relief to which they were entitled. The significant factor here, is that the court treated the question of damages not as an element vitiating proper class composition as in *Markt,* but more as a wholly separate and additional subsection appended to Rule 75. Once detached in this way from its conceptual basis in "personalness", the damage proscription becomes susceptible to erosion from argument based upon practicality and expedience.

A yet more significant assault on *Markt* was delivered this year by the Ontario Court of Appeal. In *Farnham* v. *Fingold,*[180] the plaintiff class of minority shareholders sought twenty-five million dollars in damages as well as an injunction, a declaration and an accounting against various defendants who were at one time or another either majority shareholders, directors or brokers of Slater Steel Industries Ltd. The cause of action allegedly arose because the defendants failed to inform the plaintiffs of a third party's offer to purchase the Company at share value plus premium and also because of other conduct of the defendants leading up to the eventual sale. The defendants met with success in their appeal to set aside the decision of Morand, J., who had denied their motion to strike out the statement of claim, but

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[176] *Supra,* note 102.

[177] *Id.,* at 136. Jessup, J.A., went on to distinguish the statement as mere *dicta,* properly maintaining that "Vaughan Williams, L.J., did not make such a rule any part of the ratio of his judgment", nor did Buckley, L.J., who dissented.

[178] (1921-22), 21 O.W.N. 23. The case involved a class action for both special and general damages arising out of a labour dispute between two rival unions. Ferguson, J., directed the action to proceed to trial, by denying the defendant's motion to strike out the representative paragraphs of the statement of claim. The case has received remarkably little affirmative judicial consideration. Of comparable repute is the Saskatchewan Court of Appeal decision in *Smart* v. *Livett,* [1951] 2 D.L.R. 47 where a class damage action was actually permitted in a labour case on grounds that the *Markt* damage proscription was drawn too widely.

[179] *Supra,* note 105.

[180] *Supra,* note 102.

Jessup, J.A., granted the plaintiffs leave to file an amended class damage claim. In his reasons, the learned appeal judge accorded recognition to a distinction between different types of damage actions and maintained:

> Thus, where the members of a class have damages that must be separately assessed, it would be unjust to permit them 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. However, in the present case it is clear from both the respondent's argument and factum, although not from the pleading, that the only damages alleged by the plaintiff to have been sustained by the class he represents, including damage for conspiracy, is the gross premium above market price received by the controlling shareholders on the sale of their shares to Stanton Pipes Limited and that the individual entitlement of members of the class is simply to a *pro rata* share of such gross premium.[181]

The decision presents the most liberal interpretation of the damage proscription to date, and is a continuation of the practical approach begun in *Drohan* v. *Sangamo*.[182] As the most recent statement on the status of class actions for damages in Ontario, *Farnham* v. *Fingold* should serve to eliminate some of the distortion imposed upon class suits for accounts and may facilitate representative actions for money had and received and damages where the claim is for a liquidated sum. One can, however, anticipate a degree of difficulty in the application of the distinction which the Court makes between

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[181] *Id.*, at 136-37. One might do well to carefully consider the prejudicial aspects of the class suit as it relates not only to absent class members but to defendants as well. Jessup, J.A. raises the issue of the defendant losing the right to separate discoveries and of being inflicted with unrecoverable costs. Depending on circumstance the first point might be well taken, but as for the second, it appears to overlook the effect of the security for costs provisions of Rule 373(h). The defendants costs are roughly the expenses he undergoes in defending the action and if those are much greater in the case of the defence of a class suit the representative plaintiff ought to be liable to that extent. If he is merely a "straw man", who is put forward by others and is possessed of insufficient property to meet potential costs, the defendant may move for security for costs under the above rule. Another possible objection a defendant might have to a class claim is that it deprives him of his right to establish separate defences against certain members of the class as Fletcher Moulton mentioned in *Markt*. Generally one would expect that where there were separate defences, the necessary uniformity of interest would not be found and the class suit not permitted at all, but it is possible to conceive of situations where a separate defence pertaining to a large percentage of the class could be heard in the main action without too much difficulty. A common fear of defendants in the United States is that the class suit for damages can be used as pressure for settlement because the downside risk in contesting a multi-million dollar damage claim is too high. Yet contrasted against this is Lord Shand's statement in *Bedford* v. *Ellis* to the effect that defendants should be relieved to find all their eggs in one basket. On one hand it appears terribly wasteful and inefficient to have the same set of facts litigated and relitigated, and clearly if the defendant's concern was with costs, he would attempt to avoid multiple single suits. On the other hand, many defendants are often fully aware of the percentage of aggrieved potential class members who would never litigate if left to their own initiative.

A complete and proper discussion of the role of costs in class actions cannot be adequately dealt with in a work of the present size. Yet in passing, one should point out the fact that in most Canadian provinces fees cannot be charged on a contingency basis. As a result, the downside risk factor is much different in this country and the thought of massive damage recoveries presents little added encouragement to either plaintiffs or their solicitors.

[182] *Supra*, note 105.

separately and collectively assessed damage claims. The lines of division between the two categories appear to be shrouded in obscurity and unfortunately the Court of Appeal was able to offer very little by way of guideline or example to ameliorate the situation. For example, it remains to be seen how such contentious claims as those arising from a standard form contract will be handled.

As for unliquidated sums, it is fair to say that although the assessment of *quanta* can be referred to the Master once liability is established. Canadian courts are historically untried and procedurally ill-equipped at present to administer class damage claims. If the American experience is any example, class actions for damages are in their very nature likely to be exceedingly lengthy and complicated. Ontario Rule 75 neither contains any provision for the notification of absent class members, nor does it make any allowance for the disposition of the unclaimed residues of a class damage pool. Consequently until such time as the present rules are amended it is indeed essential that Canadian courts pay heed to the reasons behind the damage proscription, and proceed with reflection and caution in the future consideration of such matters.[183]

CONCLUSION

The nature of law must be regarded, not merely as a collection of substantive rights and obligations, but as a coherent set of procedures — as a process, designed for the resolution of foreseeable conflict and the orderly progression of affairs. When law is seen in this light, we are more apt to discern and formulate a coherence in both purpose and long term policy. In this respect one would view the modern corporate form, not merely as a substantive creature, but as a procedural vehicle or institutionalized process for large groups of people to engage in various kinds of economic behaviour. As far as the legal affairs of such groups were concerned, before the outgrowth of modern company legislation they were forced to rely, not upon a corporate personality, but upon Equity's procedures for class representation. Until labour unions were statutorily invested with some degree of legal personality, the procedure for groups of workers wishing to unite in the enforcement of their legal rights was, and to some extent still is, the class action. The process of statutorily according recognition to the holders of certain communal interests continues in every mature legal system, leaving the representative action to repeatedly encounter the nascent or the unique interest grouping. Because of the many and varied situations in which representation can arise, it is necessary that the wording and application of the rules governing its use remain flexible and related to conceptual purpose and policy. To this end courts must strive to follow the lessons of Equity and attempt in each case to reconcile due process principles with the dictates of convenience and efficiency.

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[183] One can but proffer words of caution to those who advocate the borrowing of various aspects of American procedures. There are substantial differences between the two procedural systems both in their more immediate heritage and in their approach to basic problems, and without long and in depth study, the American influence should not be readily inserted into the applications of Rule 75.