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Questioning Litigation's Role—Courts and Class Actions in Canada†

W.A. BOGART*

INTRODUCTION

Imagine a society in which there is no generic document guaranteeing basic rights, where the notion of parliamentary supremacy is firmly entrenched and where courts adhere to the classic paradigm of litigation—lawsuits controlled by a limited number of parties, heard by a passive judge dealing with isolated questions—and where there is a strong expectation that courts will not cause substantial and sudden shifts in the law, staying clear of overtly political decisions, interpreting the law consistent with established norms. Imagine too that this society's expectation for social and political change is focused upon the legislature where there is an established left wing party which forms governments in various political units from time to time and is a strong force in the various legislatures pushing for social welfare schemes and other equalization programs. What would happen to such a society and to judges if sudden jolts were delivered with substantial potential for transforming the role and image of courts? What if one of these shocks were class actions? Would they be absorbed into the emerging consciousness of courts and reflected in their image or would they be rejected as antithetical to their traditions?

This is Canada. A country where the judicial role has seemed dwarfed in comparison with American courts' part in giving expression to public values but where, by contrast, the legislatures have seemed more active and progressive as the primary vehicle for social and economic change spurred on by a politics heavily influenced by a resilient left wing party.¹ Whatever the

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* Professor, Faculty of Law, University of Windsor. Thanks to Linda Bertoldi and Jeff Berryman for their many helpful comments. Special thanks to Brian Etherington, particularly concerning the introduction and conclusion of the paper which he read, discussed (and disagreed with) in many helpful ways.

1. There are three major parties in Canada which operate at both the federal and provincial levels: Progressive Conservatives, Liberals and the New Democratic Party (NDP). American observers would recognize elements of the Republican and Democratic parties in the Liberals and Progressive Conservatives. Determining which of the two are closer to which of the other two will not be attempted here. The New Democratic Party has been consistently identified with progressive-leftish policies. While it has never formed the government at the federal level, it has in several provinces and it is a strong opposition both federally and provincially. Let me provide two current examples. First, in Ontario last year the Liberals managed to turn out

reality based on close and careful analysis and whatever the future may hold, a broad comparison of the two legal cultures since roughly the end of the Second World War seems to provide pronounced contrast on the part of judges and legislatures. Social change, protection of frail interest groups—women, racial minorities, welfare recipients, environmentalists—and even limited wealth redistribution are areas where American courts appear to have provided leadership² to the praise of supporters and scorn of critics alike.³ The opposite seems true in Canada. In Canada erection of income security programs, protection of minority rights, recognition of the changing role of women, the importance of the environment and the provision of good and universally available medical care, to list only some examples, have been, by and large, the work of legislatures.⁴ This is not to provide a precise, evaluative statement for comparison to those who find such change attractive. It is to suggest broad patterns of differences in terms of judicial and parliamentary activity for such change in the two societies. Adding to the diversity is the clamor in some quarters in America for curtailment of courts, perhaps driven as much by dissatisfaction with the way such authority has been employed as anything else. By contrast, the potential for marked expansion of the judicial role and the function of litigation in Canada is imminent, though how that role will develop and whether it can reflect the nature and structure of Canadian society is very much in question.

the Conservatives after a lengthy rule only by forming an alliance with the NDP which included an agreement to implement many of the NDP's policies in exchange for their support in the legislature. Second, in a recent survey of *business* leaders concerning their views of federal politics and of the heads of the three parties, the leader of the NDP was ranked first (C+) followed by the Prime Minister, a Progressive Conservative (C-) and then the leader of the opposition, a Liberal (D+). See Reid, *No Honours For Ottawa*, *The Globe and Mail*, Nov. 1986, (Report on Business Magazine), at 15.

2. Books, of varying quality, have been written trying to understand why courts have followed the paths which they have. See, e.g., D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); J. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981); J. LUKAS, *COMMON GROUND* (1985); M. MARKS, *THE SUIING OF AMERICA: WHY AND HOW WE TAKE EACH OTHER TO COURT* (1981); D. MONTI, *A SEMBLANCE OF JUSTICE: SCHOOL DESEGREGATION AND THE PURSUIT OF ORDER IN URBAN AMERICA* (1985).

3. Consider the amount of serious attention and careful reporting which is paid to the United States Supreme Court in the press. Take, for example, one item: the recent interview with Justice Brennan concerning his views of the Court, his role, the ascendancy of Justice Rehnquist to the Chief Justice position, and the charges by William Bradford Reynolds, the Assistant Attorney General for civil rights who has attacked Justice Brennan's "radical egalitarianism." See Leeds, *A Life on the Court*, *N.Y. Times*, Oct. 15, 1986 (Magazine), at 25. I venture to suggest that a similar article would not appear in the Canadian press particularly in terms of a judge assessing his own views and those of the other members of the Court in "left" and "right" terms.

4. See ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA (1985) [hereinafter MACDONALD REPORT] (informally known as the Macdonald Report, named after its Chair). In commenting about interest groups' lack of use of courts to achieve reform, the *Report* observes: "This lack is no doubt explained by . . . the Canadian legal community's widely held perception that policy making was not the proper business of the courts." III MACDONALD REPORT at 303.

The common law model of the lawsuit in Canada, as in other societies sharing that tradition, viewed litigation as a method of dispute resolution focused upon the determination of rights and remedies on an individual basis and confined to isolated questions based upon private and autonomous ordering.⁵ A civil action contained a plaintiff's claim to entitlement answered by the defendant and heard by a passive, distant judge (or jury) establishing the facts and applying the relevant rule. For the successful plaintiff the remedy was simple and straightforward—most often monetary compensation or sometimes a directive to return something or to perform a clearly defined act—while the defeated plaintiff was to be heard from no more. A court's role was constricted and the litigation was an isolated, contained event.

This image of the civil action constrained and limited to private arrangement is deeply imbedded within the Canadian legal imagination. We will see that it strongly influenced the Supreme Court in its rejection of any significant liberalization of class actions by the courts. And its hold on the judicial mind can be demonstrated in other areas which potentially challenge this traditional model. For example, although some courts, including provincial appellate courts, have been much more liberal,⁶ the Supreme Court on the whole has taken a severe approach to intervention and its potential for diluting control of the litigation by the immediate parties.⁷

But there are other indications of how rapidly courts can relinquish this established vision of litigation. Since 1975, the Supreme Court has visited the issue of standing four times⁸ and has, on each occasion, loosened the reins on the requirement that ability to sue must be based on a traditional legal interest—a pecuniary, proprietary or economic claim or one to personal liberty.⁹ In doing so, the Court abandoned one of the central tenets of the

5. See Brooks, *The Judge and the Adversary System*, in *THE CANADIAN JUDICIARY* 90 (A. Linden ed. 1976); Wildsmith, *An American Enforcement Model of Civil Process in a Canadian Landscape*, 6 *DALHOUSIE L.J.* 71 (1980-81).

6. *E.g.*, *Canadian Labour Congress v. Bhindi & London*, 61 *B.C.L.R.* 85 (C.A. 1985); *Societe des Acadiens du Nouveau Brunswick Inc. v. Minority Language School Bd. No. 50 & Ass'n of Parents for Fairness in Educ.*, 54 *N.B.R.2d* 198 (C.A. 1984) (Gord Falls District 50 Branch (intervenor); affirmed on the intervention point by the Supreme Court of Canada, May 1986, unreported); *Bank of Montreal v. Hatheway Realty*, 47 *N.B.R.2d* 81 (C.A. 1983); *Wotherspoon v. Canadian Pac.*, 20 *O.R.* 72 (C.A. 1981).

7. Intervention in the Supreme Court of Canada is documented and discussed in Welch, *No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada*, 43 *U. TORONTO FAC. L. REV.* 204 (1985). It is difficult to discuss the Supreme Court's decisions on intervention since it virtually never gives reasons. But Welch shows, through an analysis of the results of intervenor applications, that the Court has been very inconsistent in its treatment of such applications. She argues, pointing to other developments in the Court, that this could and should change towards a more consistently liberal attitude towards intervention.

8. See *Minister of Justice of Can. v. Borowski*, 2 *S.C.R.* 575 (1981); *Nova Scotia Bd. of Censors v. McNeil*, 2 *S.C.R.* 265 (1976); *Thorson v. Attorney Gen. of Can.*, 1 *S.C.R.* 138 (1975); *Minister of Finance of Canada v. Finlay* (1986) (unreported case).

9. See, *e.g.*, Bogart, *Standing and the Charter: Rights and Identity*, in *CHARTER LITIGATION* (Sharpe ed. 1987) (forthcoming).

classical adversarial system, venturing into terrain to an extent charted by possibly no other common law court. The Court devised a requirement that the plaintiff have a "genuine interest"—a vague test instructive only in its insistence that a traditional legal interest is no longer to be the boundary between those who are and those who are not entitled to litigate. On none of the four occasions did the Court really attempt to square its loosening of standing strictures with the traditional adversarial model. It seemed convinced that the need to ensure some means to test the question in issue was reason enough. Reason enough it may be, but what is significant here is how the Court relinquished the classic paradigm in the context of standing in a manner that might amaze many American observers while adhering to it so tenaciously in other contexts, particularly as we shall see, in class actions.

Since 1982 Canadian courts have been empowered to review legislation and governmental action, both provincial and federal, on the basis that they invade certain fundamental rights enshrined in the Charter of Rights and Freedoms.¹⁰ Despite their tradition of incremental change, if any, and a clear avoidance of overtly political decisions which challenged the image of judicial neutrality, the courts have by and large embraced their enhanced role under the Charter. A number of commentators, particularly of various leftist stripes, have condemned such a shift of power to the courts, arguing that the chances are better for reform in the legislatures and that programs of equality and redistribution are likely to be hobbled when second guessed by a tenured, elite judiciary.¹¹ Moreover, there is a disturbing tendency on the part of the Supreme Court of Canada in appearing to describe the Charter as dedicated to an individualism which enjoys its greatest freedom and potential when the government is kept at bay.¹²

But those willing to judge the Charter and the courts in terms of what actually occurs have generally awarded the courts, and, particularly the Supreme Court, at least satisfactory grades for sensitivity to their enhanced

10. CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Constitution Act, 1982, as enacted by Canada Act 1982 (U.K.), 1982, ch.11).

11. E.g., Hutchinson, *Charter Litigation and Social Change: Legal Battles and Social Wars*, in *CHARTER LITIGATION* (Sharpe ed. 1987); Ison, *The Sovereignty of the Judiciary*, *ADEL. L. REV.* 1 (1985); Glasbeek & Mandel, *The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms*, 2 *SOCIALIST STUD.* 84 (1984). For a less partisan view by a political scientist, see Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 *CAN. BAR REV.* 30 (1983).

12. For example, in one of the initial cases, the Supreme Court of Canada said the function of the Charter "is to provide . . . for the unremitting protection of individual rights and liberties." *Hunter v. Southam Inc.*, 2 S.C.R. 145, 155 (1984); "An emphasis on individual conscience and individual judgment . . . lies at the heart of our democratic political tradition." *R. v. Big M Drug Mart*, 1 S.C.R. 295, 346 (1985).

status.¹³ Of course their decisions have been criticized¹⁴ but there is no evidence of a right wing rampage to eradicate the elaborate social welfare schemes and other equality programs which have been among Canada's proudest achievements in the last fifty years.¹⁵ More particularly, the courts seem to understand that, at times, there is need to conduct Charter litigation and related issues differently from the way the classical model of the lawsuit might indicate. For example, the Supreme Court recently struck down Manitoba's English-only statutes as violating the constitutional requirement of bilingualism in that province.¹⁶ What is of importance here is the Court's novel assertion that it would retain jurisdiction of the case and supervise the remedial phase over a stipulated period of time to ensure that the provincial legislature brings its laws into constitutional conformity.¹⁷

Moreover, it has been argued that the Charter, while enlarging the courts' role, has woven a complicated relationship between judges and legislators which belies a simple abdication of power to the courts. Whatever the difficulties of interpretation, section 1 contemplates limits upon the rights and freedoms embodied in the Charter¹⁸ and there is a capacity for legislative override of judicial decisions concerning the Charter, in some instances.¹⁹ Further, while the Charter clearly reflects protection of individual rights from the state,²⁰ as traditionally conceived it also contains provisions reflecting the goals and values to be nurtured by government: authorization of affirmative action programs,²¹ the guarantee of minority language rights,²²

13. See, e.g., Fairly, *Developments in Constitutional Law: The 1984-85 Term*, 8 SUP. CT. L. REV. 53 (1986); Fairly, *Developments in Constitutional Law: The 1983-84 Term*, 7 SUP. CT. L. REV. 63 (1985).

14. E.g., Reference Re Section 94(2) of the Motor Vehicle Act (B.C.), 48 C.R.3d 289 (S.C.C. 1986). Also see the criticism in Cameron, *The Motor Vehicle Reference and Relevance of American Doctrine in Charter Adjudication*, in CHARTER LITIGATION, *supra* note 9.

15. "Government income security programs are a fundamental part of the social consensus by which Canadians live. They express, perhaps better than any other collective activity, our commitment to equity, security and sharing." II MACDONALD REPORT, *supra* note 4, at 771-72.

16. Reference Re Language Rights Under the Manitoba Act, 1870, 19 D.L.R.4th 1 (1985). This case did not involve the *Charter* but presented issues concerning language rights very similar to those which could be decided under the *Charter*.

17. Kerr, *The Remedial Power of the Courts After the Manitoba Language Rights Case*, 6 WINDSOR Y.B. ACCESS JUST. (1987)(forthcoming).

18. Section 1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

19. This provision is in § 33 of the *Charter*.

20. For example, the *Charter* provides for: freedom of expression (§ 2), right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (§ 7), legal rights—rights against unreasonable search and seizure, right not to be arbitrarily detained, etc. (§§ 8-14), and the equal protection and equal benefit provisions (§ 15).

21. *Id.* at §§ 6(4), 15(2).

22. *Id.* at § 23.

the provision for aboriginal rights,²³ the dictate to interpret the Charter consistent with multiculturalism²⁴ and the absence of protection of property rights.²⁵

Still one view of this increased judicial activity under the Charter is insightful in light of the historical relationship between Canadian courts and legislatures. The worry is less that judges will impose their views on a democratic majority than that critical social and political questions will be translated into legal issues and fall to the workings of judges and lawyers instead of being left with the citizenry to work out acceptable and supportable solutions.²⁶ So the coming of the Charter has been significant not only in terms of what the rights and freedoms it recognizes will mean but also in terms of the light which has been focused on courts, the judicial role and the courts' place in the political structure of society.

But in the saga of class actions, to be told shortly, the Supreme Court has recently reaffirmed the classical model of litigation, reflecting a belief that class actions are an assault upon the essence of the judicial role. The sanctioning of collective action in courts, the Court has warned, must come from specific and express statutory guidance and there have, indeed, been detailed legislative initiatives proposed and enacted. How and why class actions have proved so controversial, particularly in relation to courts and the judicial role in litigation, is the question explored here. The paper begins by examining the evolution of class actions in Canada away from the strictures imposed by the English courts at the beginning of the twentieth century and then proceeds to analyze the Supreme Court's decision which arrested such development. Then two recent legislative developments are analyzed: one enacted in Quebec and another proposed in Ontario. These provide alternative images of how courts can accommodate collective action growing out of the tradition of litigation in Canada. Finally, the paper draws conclusions concerning the significance of class actions for the judicial role, returning to some of the points made in the opening paragraphs of the paper.

23. *Id.* at §§ 25, 35.

24. *Id.* at § 27.

25. For works discussing these other rights and freedoms and the consequence of their presence in the *Charter*, see Magnet, *The Supreme Court of Canada and the Charter of Rights* (paper presented to the Conference on the Supreme Court of Canada, Oct. 2-4, 1985); Gold, *A Principled Approach to Equality Rights: A Preliminary Inquiry*, 4 SUP. CR. L. REV. 181 (1982); III MACDONALD REPORT, *supra* note 4, at 306; Bogart, *supra* note 9. For an emotional plea for the protection of collective bargaining in (or from) the *Charter* from a leader of the labour movement, see S. Carr, *Speech Presented to George M. Duck Lecture, University of Windsor* (Nov. 1985).

26. Russell, *supra* note 11, at 52; Russell, *The Effect of a Charter of Rights in the Policy Making Role of Canadian Courts*, 25 CAN. PUB. ADMIN. 1 (1982).

I. CLASS ACTIONS AND THE JUDICIARY: EVOLUTION AND REJECTION

A. *The English Origins of Class Actions*

Historically the English common law has strongly influenced many developments in Canadian law, including class actions. So a brief treatment of the evolution of class actions—and the arresting of that evolution—is necessary background. Class actions had their origins in equity where all parties affected by a suit were required to be joined.²⁷ But this requirement resulted in problems since it could be very difficult or even impossible to join all affected parties. The desire to bind all parties without imposing unreachable standards for joinder was the source of the representative suit—the class action's predecessor.²⁸ Through such litigation many individuals could be represented and, because these individuals were bound, multiple proceedings were avoided. Equity courts were liberal in their acceptance of the need for representative suits to meet the emerging reality of collective and group action.²⁹

The Supreme Court of Judicature Act, 1873,³⁰ fused law and equity, making class actions available for the pursuit of common law remedies, most importantly, damages. Rule 10 of the Rules of Procedure enacted under the 1873 Act³¹ was the extent of legislative guidance and it continues, with minor alterations in most Canadian jurisdictions,³² to be the bare text to the courts for class actions in England and Canada.³³ The exception is Quebec

27. For the history of class actions, see Kazanjian, *Class Actions in Canada*, 11 OSGOODE HALL L.J. 397 (1973); Williams, *Consumer Class Actions in Canada—Some Proposals for Reform*, 13 OSGOODE HALL L.J. 1; ONTARIO LAW REFORM COMMISSION, REPORT ON CLASS ACTIONS [hereinafter OLRC REPORT] (volume I, chapter 2 and volume II, chapter 14 provide historical background of class actions).

28. I OLRC REPORT, *supra* note 27, at chs. 2, 5.

29. II OLRC REPORT, *supra* note 27, at ch. 14, p. 520.

30. Supreme Court of Judicature Act, 1873, ch. 66 (U.K.). In Ontario the fusion took place by virtue of the Ontario Judicature Act, 1881, ch. 5.

31. Rule 10 stated: "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 or for the benefit of all parties so interested."

32. In fact English class actions are governed by O. 15, Rule 12, 1965 Rules of the Supreme Court, which is somewhat longer than the original Rule 10 but provides very little further guidance. Canadian jurisdictions with a rule based on O. 15, Rule 12 are Federal Court Rules, C.R.C., 1978, ch. 663, Rule 1711; British Columbia Supreme Court Rules, O.C. 1627/76, B.C. Reg. 310/76 as amended, Rule 5(11), (12), and (13); Nova Scotia Civil Procedure Rules and Related Rules, Rule 5.09; Prince Edward Island Rules of Court, Rule 5.09.

33. Manitoba Queen's Bench Rules, Man. Reg. 26/45 as amended, Rule 58; Supreme Court Rules, Alta. Reg. 390/68 as amended, Rule 42; Saskatchewan Queen's Bench Rules 1967 as amended and consolidated, Rule 70; New Brunswick Rules of the Supreme Court, Reg. 82-73, Rule 5; Newfoundland, The Rules of the Supreme Court, scheduled to the Judicature Act,

which in the late 1970's enacted detailed class action legislation.³⁴ The initial years of the twentieth century found the English courts continuing a liberal approach to class actions. Two decisions of the House of Lords³⁵ were particularly clear in emphasizing that the courts were to be flexible and adaptable in accommodating group and collective interests: "The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. [It] . . . ought to be applied to the exigencies of modern life as occasion requires."³⁶

But all this changed because of one case decided in 1910 whose shadow fell across class actions in England and Canada for the next seventy-five years. In *Markt & Co. v. Knight Steamship Co.*³⁷ the plaintiff brought a class action to recover damages for cargo lost as a result of war. Each member of the three judge panel gave reasons and, though the suit was rejected as a class action, two of the judges indicated no retreat from the liberal approach previously established towards class actions.³⁸ But, inexplicably, history seemed to lose these two judgments and instead highlighted that of Fletcher Moulton, L.J., who rejected the suit in a sweeping denunciation of this form of litigation.

Fletcher Moulton, L.J., unqualifiedly rejected class actions, when damages were in issue, on the grounds that they were personal to the plaintiff,³⁹ and when the members of the class had separate contracts with the defendant.⁴⁰

C.S. Nfld. 1916, ch. 83, O. 15, Rule 9.

In the case of Ontario the former rule was Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, Rule 75. The rules of court and the enabling legislation were overhauled in 1984. See *Courts of Justice Act, 1984*, S.O. 1984, ch. 11 and the Rules of Civil Procedure enacted under the authority of that Act. Rule 12 is the present rule governing class actions but it makes no changes of substance, as the drafters of the rule contemplated that substantial changes would come about in response to the overhaul recommended in the Ontario Law Reform Commission's *Report on Class Actions*.

34. See R.S.Q. 1977, ch. C-25, arts. 999-1051, as enacted by S.Q. 1978, ch. 8, s. 3 [hereinafter C.C.P.]. The legislation was passed on June 8, 1978, and went into effect shortly thereafter.

35. *Duke of Bedford v. Ellis*, 1901 App. Cas. 1; *Taff Vale Ry. v. Amalgamated Soc'y of Ry. Servants*, 1901 App. Cas. 426.

36. *Taff Vale*, 1901 App. Cas. at 443. "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." *Ellis*, 1901 App. Cas. at 8.

37. 2 K.B. 1021 (1910).

38. The concurring judge was Vaughan Williams, L.J., who concluded that the class action failed because of a lack of "common purpose" or "common interest" because the contracts might differ and because there was an absence of legal connection among individuals. Had there been a common purpose he judged there could have been a class action where individual members would come forward to prove their claims. *Id.* at 1030-32. The dissenting Judge Buckley, L.J., rejected the suggestion that separate contracts or the lack of a common fund were barriers to class actions. In addition he contemplated proceedings where the representative plaintiff would obtain a declaration of liability and there would then be separate proceedings to determine the individual claims. *Id.* at 1044-48.

39. *Id.* at 1035.

40. *Id.* at 1040.

It is difficult to imagine that such a position could take such strong hold, but hold it did. What did he mean when he suggested that damages were "personal" to each member and why should separate contracts by themselves disqualify these procedures? What seemed to horrify the judge the most was that some separate contracts and damages issues would necessitate individual proceedings if the common questions were resolved in favor of the class. It is the possibility of two parts to the suit, one dealing with common issues and the other with individual ones, which, since *Markt*, has been most troublesome for the courts.

B. *The Embrace of Markt and the Struggle to Take Hold*

There were aspects of the dual procedures concerning resolution of common questions and individual issues which were problematic and were articulated in the cases, including *Markt*: for example, upon what basis should discovery of individual claims proceed and how should cost rules apply? But these issues could have been solved by resort to the rules of procedure and by minimal judicial inventiveness. What the two-part procedures did do was set class actions apart from the traditional model of litigation. The resolution of individual issues vividly demonstrated that, although class actions were group proceedings with many individuals bound together by certain common issues, those individuals were separate just the same, with many views about how the litigation should be conducted, about what the group's interests were and about who was in the group. Indeed, some individuals might be completely indifferent to the action taken in their name. This marked departure from classical concepts of litigation as the product of autonomous ordering, presided over by the aloof judge and based on fixed and determined rules, was something which needed to be curbed.

It has also been suggested that there were two other factors present in Anglo-Canadian judicial attitudes during the first part of the twentieth century which resulted in such severe strictures on class actions.⁴¹ One was the triumph of formalism, the attitude that courts should relinquish their claim to creativity and adaptability and instead defer to precedents and to the supremacy of parliament by a literal interpretation and application of legislation.⁴² Formalism dictated that the meager legislative guide in the

41. See Bankier, *Class Actions for Monetary Relief in Canada: Formalism or Function*, 4 WINDSOR Y.B. ACCESS JUST. 229, 245-48 (1984).

42. Formalism, according to Atiyah, represents the following:

Formalism really represents an attitude of mind rather than anything else; the attitude is that of the judge who believes that all law is based on legal doctrine and principles which can be deduced from precedents; that there is only one 'correct' way of deciding a case; that it is not the function of the judge to invoke policy considerations, or even arguments about the relative justice of the parties'

codified rule concerning class actions represented the outer limit rather than a basic guide for further judicial embroidery.⁴³ We will see that such a disposition proved to be the dominant attitude in the Supreme Court of Canada in the 1980's when the Court was called upon to revisit a hundred years of class actions and attempts to break away from the dead hand of *Markt*.

A second and related factor was the social and political context in which claims to an expansive class action were made.⁴⁴ Anglo-Canadian courts by the early twentieth century were developing an antipathy towards the group and collective interests which class actions, by definition, were to represent. In addition, the rise of left wing political parties suggested that any movement towards social goals at odds with nineteenth century laissez-faire individualism would be the work of legislatures with no need for aid from courts who viewed themselves as the preserve of an individualism that now seemed threatened. Thus actions by such groups as consumers, environmentalists and civil rights activists—often wanting to use class actions to fortify small or weak individualized claims—were unlikely to find favor with courts developing biases against such interests and in favor of interests they viewed as being more consistent with nineteenth century individualism.⁴⁵

claims; that the reasons behind principles and rules are irrelevant; that the role of the judge is purely passive and interpretive; that law is a science of principles, and so on.

P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 338, 660-61 (1979), *quoted in Bankier*, *supra* note 41, at 234 n.21.

43. Atiyah describes the shift to formalism as follows:

[U]ntil the middle of the nineteenth century English law and lawyers were receptive to influences from outside the law. . . . [B]y the middle of the century, the influence of new external ideas was coming to an end, at least in the sense that judges were less willing to discuss such policy issues openly in their judgments. From 1850 or thereabouts, the phenomenon of formalism took an increasing hold upon English legal thought. . . . [Formalism] involved rejection of the lawmaking power of the judge, rejection of the relevance of policy issues to legal questions, belief that the law was a deductive science of principles, and that the one 'true' answer to legal questions could be found by a strictly logical process. There is some evidence to suggest that the full flowering of formalism did not take place until after the First World War. For though judges and lawyers had for at least half a century before then been confining their attention more narrowly to the law proper, and ignoring outside ideas in economics or political thought, it is also true that these judges had been less fearful of appeals to policy, fairness, and the sense of justice.

Id. at 660-61, *quoted in Bankier*, *supra* note 41, at 245 n.65.

44. *Bankier*, *supra* note 41, at 246-47.

45. Atiyah suggests that there was judicial bias against the very interests class actions were likely to foster:

[T]he refusal to discuss policy issues is itself almost always a decision which consciously or unconsciously forwards certain policies. . . . [T]here were . . . biases which became especially noticeable in the inter-war period, for example, an anti-consumer bias, a bias favouring those who used written forms for their contracts, a bias in favour of institutions like companies and against individuals, like share-

So there were any number of Canadian cases up to, and in some instances during, the 1970's which rejected class actions either because class members had contracted separately with the defendant, had claimed damages, or both. For example, the Ontario Court of Appeal in *Shields v. Mayor*⁴⁶ boldly asserted that since each class member had a separate contract, the class action should not be permitted. Similarly, a class action for damages for nuisance—an initial attempt at environmental protection—was dismissed on the grounds that the claim of the plaintiff was “personal and must differ from the claims of his neighbours, which may be more or less.”⁴⁷

Beginning in the 1970's the Canadian courts, haltingly and unsurely, began to re-examine the strictures on class actions and to loosen their grip. They did this because the groups and associations—environmentalists, civil rights activists, and consumer representatives—had become much better organized and had achieved substantive rights which they wanted enforced by the courts. In addition, there was the influence of United States Federal Rule 23 and the class actions being brought under it.⁴⁸ Canadian law and institutions may be leery of the pressures exerted by American legal developments but they are influential nevertheless.⁴⁹ Whatever the reality, the perception that the Americans had fashioned a powerful device for judicial remedy of mass wrongs increased the movement for liberalization of class actions in Canada.⁵⁰

The evolution that took place in the 1970's and 1980's focused upon loosening the restrictions imposed by *Markt*. The courts had to recognize that individual contracts, by themselves, would not bar a class action but

holders. . . . In all these respects the 1960's and still more the 1970's have seen a marked swing away from the trends of the inter-war period.

P. ATIYAH, *supra* note 42, at 665-66, *quoted in* Bankier, *supra* note 41, at 247 n.72.

46. 1 D.L.R. 776 (1953); *see also* Agnew v. Sault Marie Bd. of Educ., 2 C.P.C. 243 (1976) (Ont. H.C.J. in Chambers); Preston v. Hilton, 48 O.L.R. 172, 55 D.L.R. 647 (1920) (H.C. Dir.); Johnston v. Consumers' Gas Co. of Toronto, 23 O.A.R. 566 (1896), *aff'd*, 67 L.J.P.C. 33 (1898). *But cf.* Bowen v. MacMillan, 21 O.W.N. 23 (1921) (H.C. Dir.) (claim on behalf of members of a trade union against members of another trade union to recover lost wages and damages for conspiracy).

47. Turtle v. City of Toronto, 56 O.L.R. 252, 267 (1924) (S.C. App. Dir.). *But cf.* Bowen, 21 O.W.N. 23.

48. Indeed, the initial articles and proposals for statutory change adopted Rule 23 with very little change. *See, e.g.*, Williams, *Consumer Class Actions in Canada—Some Proposals for Reform*, 13 OSGOODE HALL L.J. 1 (1975); 1 NEW BRUNSWICK DEP'T OF JUSTICE, LAW REFORM DIVISION, THIRD REPORT OF THE CONSUMER PROTECTION PROJECT (1976).

49. *See, e.g.*, Fairley, *Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review*, 4 SUP. CT. L. REV. 218, 238 (1982) (“American examples have never been particularly popular candidates for adoption in Canada: after all, our history is in large part a reaction to the continued omnipresence of the United States.”).

50. The then Chairman of the Ontario Law Reform Commission expressed a number of “reservations” concerning the Commission's *Report on Class Actions*. At one point he observed: “Indeed, in assessing the Ontario position, I am concerned that we should be unduly guided by the American experience, so richly documented in the literature to which the Report refers.” 3 OLRC REPORT, *supra* note 27, at 851.

this recognition was not difficult since no rational explanation had ever been produced for such a bar. More difficult was isolation of the circumstances under which a class action could proceed even when separate proceedings would be necessary. As soon as courts began to acknowledge that two stage class actions were legitimate, they were faced with a range of related issues which had been suppressed by the obsession with *Markt*: the appointment of the representative plaintiff and ensuring his or her capacity to represent the class, notice to class members, the conduct of the action, discovery, and settlement. Given the complexity of class actions, the restrictive legacy of *Markt* and all the rhetoric surrounding class actions in the United States in this period, the progress made by some Canadian courts was impressive.

Two cases from the British Columbia courts first questioned the narrowness of *Markt*. The British Columbia Court of Appeal in *Shaw v. Real Estate Board of Greater Vancouver*⁵¹ addressed a claim for an accounting to recover levies alleged to have been wrongly assessed against Vancouver real estate salesmen who constituted the class. The Court permitted the class to proceed despite the fact that assessments on an individual basis would be necessary if the class were successful on the common questions. As a matter of technical reasoning, there was consistency between the judgment of the Court and the earlier cases because, since the remedy was characterized as equitable, the suit did not contravene *Markt's* rule that damages, especially individualized ones, could not be sought in a class action. Further, the Court characterized the money said to have been wrongly assessed as a "common fund," something the older cases had also said should be present.⁵² More importantly, the Court clearly supported class actions as a legitimate way to try to vindicate the alleged wrongs. It acknowledged that there might be extensive proceedings to establish the amounts due to class members. But it perceived a class action as the fairer and more efficient means when compared with the difficulties involved in a series of separate lawsuits:

It is quite clear that if the action were to reach the stage of determination of remedies . . . there would have to be long, detailed and difficult accountings. . . . If such a stage is so reached, I cannot but think that the representative action is the only fair and convenient way that the remaining troublesome matters could be efficiently resolved.⁵³

The second British Columbia case, *Chastain v. British Columbia Hydro & Power Authority*,⁵⁴ involved a claim for a declaration that the defendant utility lacked authority to take the security deposits it was demanding, a return of the monies already taken and an injunction to restrain further

51. 36 D.L.R.3d 250, 4 W.W.R. 391 (B.C.C.A. 1973). The action was dismissed at trial. 5 W.W.R. 193 (B.C.S.C. 1974).

52. *Id.* at 255, 4 W.W.R. at 396.

53. *Id.*

54. 32 D.L.R.3d 443, 2 W.W.R. 481 (B.C.S.C. 1972).

claims for such deposits.⁵⁵ The class action proceeded and the defendant was enjoined from demanding, collecting or keeping security deposits. The Court showed its ingenuity by ordering the defendant to return deposits taken by crediting them to the customers' next bills.⁵⁶

In Ontario a number of cases challenged the restrictiveness of *Markt* but none contained a thorough examination of class actions and the basis for formulating how, if at all, class actions were to develop. Instead, consistent with their more modest and conservative role in other areas, the Ontario courts permitted incremental dilution of the strength of *Markt*. Nevertheless, there was enough there to hope that class actions would, indeed, be reformulated if only over an extended period of time.

For example, *Farnham v. Fingold*⁵⁷ involved an agreement for sale of a company where a premium had been paid to controlling shareholders but had not been offered to the others. As a result, suit was initiated on behalf of the shareholders who were not part of the control group seeking damages, a declaration, and an accounting. The Court rejected any suggestion that because the relief, at least in some aspects, involved damages, that in itself was enough to disentitle the suit as a class action. But the Court, again echoing *Markt*, was troubled because individual proceedings might be necessary and it was uncertain how various aspects such as discovery and costs should be dealt with.⁵⁸ However, the Court did not have to decide these issues because it was satisfied that no individual proceedings would be necessary. The damages claimed were the "gross premium" over the market price received by the controlling group and the Court was satisfied that such damages could be ascertained as a common question and that the individual entitlements of class members could be determined without the participation of the defendants.⁵⁹ In a subsequent case involving a disgruntled class of subscribers to a magazine,⁶⁰ the Court also accepted arguments that separate contracts were not a bar to class actions. The Court did not have to face the individual damages/separate proceedings issue because it also held that damages to class members could be determined by applying an arithmetical formula.

But it was in the 1978 case of *Naken v. General Motors of Canada*⁶¹ that the Ontario courts had to undertake their most extensive examination of

55. *Id.* at 452, 2 W.W.R. at 490.

56. Unpublished Order of McIntyre, J., (December 28, 1972) quoted in I OLRC REPORT, *supra* note 27, at 27.

57. 33 D.L.R.3d 156, 2 O.R. 132 (C.A. 1973).

58. *Id.* at 160, 2 O.R. at 136.

59. *Id.* at 161, 2 O.R. at 137.

60. *Cobbold v. TIME Can. Ltd.*, 71 D.L.R.3d 629, 13 O.R.2d 567 (H.C.J. 1976). The action was dismissed at trial. See 109 D.L.R.3d 611, 28 O.R.2d 326 (H.C.J. 1980); see also *Alberta Pork Producers' Mktg. Bd. v. Swift Can. Co.*, 129 D.L.R.3d 411, 33 A.R. 541 (Q.B. 1981), *aff'd*, 9 D.L.R.4th 71 (C.A. 1981).

61. 92 D.L.R.3d 100, 21 O.R.2d 780 (1978).

class actions to that point. There the plaintiff sued to represent individuals who purchased new models of a car manufactured or distributed by the defendant in 1971 and 1972. The plaintiffs argued that the sale of the cars breached a collateral warranty of the defendant resulting in each class member sustaining \$1,000 in damages because of the reduced resale value of the cars.

Because the same damages were claimed for each individual, a separate stage for ascertaining damages would not have been necessary and thus the claim for damages presented no obstacle. However, it was argued by the defendant that, as a matter of substantive law, each member of the class would have to prove reliance on the warranty in order to recover any damages resulting from its breach. The Court accepted that such proceedings might be necessary but, subject to some modifications, was willing to allow the action to continue,⁶² even while urging that class actions be examined carefully by the Ontario Law Reform Commission (then studying the question) to ascertain whether comprehensive legislative reform was warranted.⁶³ What is striking is the willingness of the Court to take some risks rather than deny the claimants an opportunity to assert their claim:

Undoubtedly the plaintiffs face many procedural and evidentiary difficulties if this action is allowed to proceed. If we are to have consumer class actions in Ontario it would be highly desirable that there be enacted legislation or rules of practice or both, pursuant to which such actions could be conducted. I am not persuaded that it is impossible to carry such an action to completion even now, although the reference following judgment would certainly require all of the innovation [of some American courts].⁶⁴

This openness towards the evolving class suit and adopting it as a vehicle for mass actions was indeed frail and halting and there were signs of backsliding by other courts.⁶⁵ Yet such an attitude did demonstrate the willingness of some Canadian judges to at least begin an inquiry into the proper methods for courts to handle the widespread problems that are inevitable in the industrialized and regulated twentieth century. But all this came to an abrupt halt when *Naken* reached the Supreme Court of Canada.

62. *Id.* at 115-16, 21 O.R. at 794-96.

63. *Id.* at 104-05, 21 O.R. at 785-86.

64. *Id.* at 113, 21 O.R. at 793-94.

65. *See, e.g.*, *Loader v. Rose Park Wellesley Invs.*, 114 D.L.R.3d 105, 29 O.R.2d 381 (H.C.J. 1980); *Stephenson v. Air Can.*, 103 D.L.R.3d 148, 26 O.R.2d 369 (H.C.J. 1979), *aff'd* unreported, Feb. 10, 1981, Ont. C.A.; *Seafarers Int'l Union of Can. v. Lawrence*, 97 D.L.R.3d 324, 24 O.R.2d 257 (C.A. 1979); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. & Can., Local 488 v. Canadian Broadcasting Corp.*, 97 D.L.R.3d 56, 17 A.R. 396 (Alta. S.C.T.D. 1979); *Goodfellow v. Knight*, 5 A.R. 573, 2 C.P.C. 209 (Alta. S.C.T.D. 1977).

C. *Naken and the Supreme Court: Evolution Denied*

The decision of the Supreme Court in *Naken*⁶⁶ has been excoriated.⁶⁷ Articles have been devoted to demonstrating how bad the unanimous decision written by Mr. Justice Estey is simply from a technical standpoint and how misstatements concerning the antecedent English and Canadian case law and American class action provisions and decisions call into question the basic premise upon which the decision rests.⁶⁸ Yet, in my view, there are even more fundamental problems which need to be discussed, so one example of these errors will suffice here.

The Court judged that individual proceedings were necessary and that since the rule applying to class actions did not expressly address separate procedures the class action must, on that account, be prohibited. To buttress his views, Mr. Justice Estey pointed to, among other things, Rule 328 of the California Code of Civil Procedure and its interpretation by that state's Supreme Court.⁶⁹ He concluded that the Court "appears reluctant to go much beyond the law as we read it in *Markt*."⁷⁰

In fact California courts, at least in the decisions Mr. Justice Estey cites, have been very innovative in dealing with procedural issues of the sort faced by the Court in *Naken*. The well-known case of *Vasquez v. Superior Court of San Joaquin County*⁷¹ is referred to in aid of establishing that a class action which would require individual proceedings to determine specific members' rights is illegitimate. But this is a distortion. What *Vasquez* did do was rule that "numerous and substantial questions to determine [each member's] right to recover"⁷² could prevent a class action from proceeding but this is very different from suggesting that individual issues must always prohibit class litigation.

There is even more irony in the Court citing *Vasquez* since there was a direct parallel between the issues in the two cases which is ignored by *Naken*.⁷³

66. 144 D.L.R.3d 385, 1 S.C.R. 72, 46 N.R. 139 (1983) (subsequent references are to 144 D.L.R.3d 385).

67. See Bankier, *supra* note 41; Bogart, *Naken, The Supreme Court and What Are Our Courts For*, 9 C.B.L.J. 280 (1984); Fox, *Naken v. General Motors of Canada: Class Actions Deferred*, 6 SUP. CT. L. REV. 335 (1984); Prichard, *Class Actions Reform: Some General Comments*, 9 C.B.L.J. 309, 311 (1984) ("Naken is a bad decision in every sense of the word: bad as a matter of interpreting Rule 75; bad as a matter of understanding the case law of the past decade concerning class actions, bad as a matter of judicial craftsmanship; bad as a matter of being a further example of judicial formalism and conservatism; bad as a matter of an appreciation of the judicial role; and bad as a matter of public policy.").

68. See Fox, *supra* note 67, at 352-67; Bankier, *supra* note 41, at 284-96 (detailing the various mistakes and errors in the judgment).

69. See Fox, *supra* note 67, at 359-67 (dealing with the Court's misinterpretation in detail).

70. *Naken*, 144 D.L.R.3d at 400.

71. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

72. *Id.* at 809, 484 P.2d at 969, 94 Cal. Rptr. at 801.

73. See Fox, *supra* note 67, at 361.

In *Vasquez* the class was purchasers of food freezers who, it was alleged, were victims of the defendant vendor's fraudulent misrepresentation. The defendant, as in *Naken*, sought to have the class action stopped because each class member would have to prove reliance on the misrepresentation. The California court not only held that the class action was proper, but it went further and suggested that if it could be established that the misrepresentation had been directed to the class, the court could infer reliance, thus eliminating separate proceedings to establish it for each claim. In mangling the cases of a state whose approach has been described as showing the "utmost liberality,"⁷⁴ Mr. Justice Estey seriously undercut his attempts to establish the impropriety of class actions in similar circumstances.

Most disturbing is the fact that the Court ignored the changing attitude of lower courts toward class actions in the 1970's and 1980's and shrouded its own analysis in unrepentant formalism: "The sole duty of the court is to ascertain the proper interpretation by the application of the canons of construction to the words adopted by the maker of the rule and its application to these proceedings."⁷⁵ It is understandable that the text of the Rule⁷⁶ should guide determination of the appropriateness of any class action. But the error is to decide that since various procedures are not explicitly addressed by the Rule those procedures must be straight-jacketed.⁷⁷ The Court says nothing about the fact that the Rule was drafted over 100 years ago and that there is plenty of evidence to suggest that courts before and after did not regard it as an exhaustive code but simply a general statement concerning procedures which were to be flexible and evolving.⁷⁸

74. Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 617 (1971).

75. *Naken*, 144 D.L.R.3d at 408. Earlier, Mr. Justice Estey observed:

The virtue and benefit of the institution of the class action is not here on trial; only the availability of that kind of proceeding in the circumstances of this case. Neither is this issue to be resolved on the basis of weighing the advantages of the representative action for the plaintiff and the disadvantages of such an action for the defendant (although a study of these factors may assist in the process) but rather on the basis of the correct interpretation of this rule of court and its application to the circumstances of the parties to this action.

Id. at 387. *

76. The Ontario Rule governing class actions when *Naken* was decided was Rule 75. In 1984 the Ontario rules of court were reformed (*see supra* note 33) but aside from being assigned a new number (12) the rule relating to class actions was not significantly altered.

77. Mr. Justice Estey wrote:

It seems clear to me that the purpose of Rule 75 was not to impose upon the general pattern of procedure established by all the Rules of Court a new and distinct method of proceeding which does not fit into the provisions already made for the conduct of actions in the Supreme Court. If such were the case, we would expect to find in the rules extensive provisions supporting the conduct of such a novel claim now said to have been created by Rule 75.

Naken, 144 D.L.R.3d at 409.

78. *See Fox, supra* note 67, at 357-58 (documenting the Court's failure to distinguish earlier English cases which suggested the English rule should be treated flexibly and interpreted in light of the liberal rules that preceded it).

At bottom Mr. Justice Estey's critique zeroes in on the need for separate proceedings to resolve issues of reliance by individual members on the defendant's warranty and on two objections to such procedures. Firstly, although he acknowledges it would be possible to do so, he believes that allowing masters (court officials who assist judges by hearing various pre- and post-trial motions) to resolve the individual questions would be inappropriate. Secondly, returning to the objection articulated in older cases, he focuses on the absence in the Rule of explicit provisions to deal with aspects of the individual proceedings such as discovery and the responsibility of class members for costs.

There are specific replies to the Court's insistence that the meager text of the Rule necessitated its hobbling such litigation. Firstly, the Court indicated that, since proceedings for resolving individual issues have been addressed in detail in the United States, this demonstrates that courts should not go about constructing means for dealing with these issues.⁷⁹ It is certainly true that the American legislative provisions mentioned by the Court in Federal Rule 23 and the Uniform Class Actions Act are much more detailed than Rule 75, addressing many issues which Rule 75 ignored. However, one issue which the American rules do not address, other than indicating such procedures are legitimate,⁸⁰ is the means of resolving questions relating to individual class members. Thus any development of such procedures has been the result of judicial initiative, the very point Mr. Justice Estey was seeking to resist.

Secondly, the Supreme Court suggested that referring the procedures for resolving individual questions to a master would be wrong because, under the established practice, a judge would only review the master's report of any procedures which he or she had conducted and, therefore, would not have the opportunity to see "the witnesses examined under examination and cross-examination."⁸¹ This is a strange remark because such a reference is a means for the court to delegate the hearing of issues to someone else and therefore, by definition, it means that the delegating court itself is not meant to conduct the detailed hearing. Moreover, the rules regarding references contemplate flexibility in framing the process needed to deal with any particular issue—including *viva voce* examination if required.⁸² The kinds of

79. *Naken*, 144 D.L.R.3d at 397-98.

80. Federal Rule 23, for example, provides only that "an action may be brought or maintained as a class action with respect to particular issues." FED. R. CIV. P. 23(c)(4)(a).

81. *Naken*, 144 D.L.R.3d at 406.

82. Rule 425 of the Ontario rules, in effect when *Naken* was decided, stated:

In giving directions and in regulating the manner of proceeding before him, the Master shall devise and adopt the simplest, most speedy and least expensive method of prosecuting the reference, and with that view may dispense with any proceeding ordinarily taken which he conceives to be unnecessary or substitute a different course of proceeding for that ordinarily taken.

R.R.O. 1980, Reg. 540.

issues in *Naken* and many class actions will raise repetitive questions and will involve comparatively small amounts of money for the individual plaintiff and, therefore, seem to be an example of the very kind of problem that the rules anticipate will be handled by references.⁸³ And even if we agreed that masters should not deal with individual proceedings, that would simply lead to the suggestion that judges should hear the specific issues. This might, at times, be a drain on judicial resources but it is not a reason, by itself, to deny these kinds of class actions.

Thirdly, the Court overstated its suggestion that the Rules of Court made no provision for procedures for discovery and costs regarding absentee class members. The Rules do, in the main, deal with the rights and duties of parties to a lawsuit. But even a technical reading of the Rules could allow them to deal with the position of absentee class members by treating those members as parties since there is nothing in the Rules which would forbid this.⁸⁴ In addition, Rule 1 of the Rules, then, in effect indicated that analogous reasoning was to be used to cover matters not explicitly addressed.⁸⁵ Further, the Court could have drawn on its own basic notions of procedural fairness to deal with outstanding issues like discovery and costs.⁸⁶ Had it concluded, for example, that some form of discovery was necessary against specific members when dealing with individual questions and that they should be exposed to some liability for costs if they lost, it would not be a significant departure to treat them as parties for the purpose of individual proceedings and to make them liable to discovery and for payment of costs should they be unsuccessful in the resolution of their specific individual questions.

But the Court seemed completely unwilling to engage in any analysis which directly faced the reasons why this litigation ought to be accommodated or why it should be shunned. Only once did Mr. Justice Estey recognize the need for class actions and the consequences of not allowing the action to proceed. Yet even here the Court claimed that these needs had to be answered not by judicial but rather by legislative reform:

[T]he cost of demonstration of the violation of the alleged unilateral contract by engineering, market and other evidence with reference to damages suffered, would be extensive and expensive. . . . If the court were now to find that these claims may not be processed under Rule 75

83. See Bogart, *supra* note 67, at 298-99.

84. The then *Judicature Act*, empowering the rules of court to be made, stated in § 1(0) that party "includes a person served with notice of or attending a proceeding, although not named on the record." R.S.O. 1980, ch. 223 (emphasis added).

85. R.R.O. 1980, Reg. 540, Rule 1 stated, "[a]s to all matters not provided for in these rules, the practice shall be regulated by analogy thereto."

86. Indeed, the courts, including the Supreme Court of Canada, have repeatedly drawn on their version of what constitutes basic procedural fairness to supervise proceedings conducted by administrative agencies and actors. See, e.g., Macdonald, *Judicial Review and Procedural Fairness in Administrative Law*, 25 *MCGILL L.J.* 520 (1979-80); Macdonald, *Judicial Review and Procedural Fairness in Administrative Law: II*, 26 *MCGILL L.J.* 1 (1981).

it may mean, in practical terms, the end to many claims which, mathematically at least, may amount to about five million dollars. Furthermore, having regard to the practices in the modern market-place particularly, in national merchandizing of products such as automobiles, it is not an unreasonable risk that the vendor undertakes if he is now found to be exposed to class actions by dissatisfied purchasers. . . . These, of course, are matters of policy more fittingly the subject of scrutiny in the legislative rather than the judicial chamber.⁸⁷

Thus, Canada's highest court turned away from an opportunity to continue the development of class actions which had been going on in the courts of the provinces in the 1970's and 1980's, a process of incremental change which even conservative legal commentators acknowledge as a legitimate role for Canadian courts.⁸⁸

A number of subsequent decisions from lower courts indicate a willingness to follow *Naken* without struggle.⁸⁹ Interestingly, however, others have not been enthusiastic in reacting to Mr. Justice Estey's decision. Some have been able to characterize the issues in the actions before them as involving no individual issues, thus escaping the otherwise broad sweep of *Naken*.⁹⁰ In one instance, the court read the applicable statute as authorizing a class action brought by a public official even if individual issues would surface.⁹¹ And in another⁹² the judge clung tenaciously to slight differences in wording of the applicable rule⁹³ to distinguish *Naken* and to permit an action for defamation of a group even though assessment of individual damages seemed a distinct possibility.⁹⁴

87. *Naken*, 144 D.L.R.3d at 408.

88. See, e.g., Devlin, *Judges and Lawmakers*, 1976 MOD. L. REV. 1, 8-11.

89. See, e.g., *Morgan v. Superintendent of the Winnipeg Remand Centre*, 36 C.P.C. 266 (Man. Q.B. 1983); *Canning v. Governing Council of the Univ. of Toronto*, 46 C.P.C. 165 (Ont. H.C. 1984).

90. See, e.g., *Alberta Pork Producers Mktg. Bd. v. Swift Can. Co.*, 53 A.R. 284 (Alta. C.A. 1984); *Bradley & Forsyth v. Saskatchewan Wheat Pool*, 31 Sask. R. 254 (Q.B. 1984).

91. *Sparling v. Royal Trustco Ltd.*, 45 O.R.2d 484 (C.A. 1984). Here the Director appointed pursuant to the *Canada Business Corporations Act 1974-75-76* (Can.), ch. 33, § 253, commenced an action alleging that the defendant directors and company were in breach of the requirements of the Act with respect to takeover bids and claimed a declaration of liability and a reference to the Master to determine the entitlement of the individual shareholders. In allowing the action the Court's attitude was in marked contrast to that of Mr. Justice Estey in *Naken*:

Where a statute provides a remedy, its scope should not be unduly restricted. Rather, the Courts should seek to provide the means to effect that remedy

. . . .

In this action, the class is reasonably clearly defined. It will be open to the presiding judge to give all the necessary directions to make such further inquiries he may deem just and appropriate at the conclusion of the action assuming that the plaintiff is successful.

Id. at 497.

92. *Lumney v. Agostini*, 47 A.R. 385 (1983).

93. The difference which the Court focused upon was that the applicable rule, Rule 42 of the Alberta Rules of Court, refers to "a common interest" as opposed to the Ontario wording of "[p]ersons having the same interest." *Lumney*, 47 A.R. at 388.

94. *Id.*

Finally, the Manitoba Court of Appeal in *Ranjoy Sales and Leasing v. Deloitte Haskins & Sells*,⁹⁵ interpreting a rule identical to the one that was the subject of the *Naken* decision,⁹⁶ allowed a class action in the face of what it acknowledged could be a wide array of issues that would not be common to the class including ones involving reliance, the very issue in *Naken*. There the plaintiffs brought a class action on behalf of creditors of bankrupt companies claiming the defendants negligently prepared audited financial statements which were relied upon by the plaintiffs, inducing them to loan money to the companies which subsequently went bankrupt. The Court acknowledged there would be issues involving reliance, for example, whether at least some class members could be deemed to have relied on the financial statements, particularly since different deficiencies were alleged in the statements over four years which might very well not be common to all the class. The Court, nevertheless, was prepared to allow the action to proceed. What the Court did do was impose a kind of reverse onus, allowing the action to go ahead as a class suit and providing an opportunity "to redefine the class to exclude any person where there is evidence, either at trial or before, that indicates that such a person may be prejudiced if included in the class."⁹⁷ This is all vague since the Court never indicates what will constitute "prejudice." What the Court's maneuverings did do was finesse individual issues as a bar to class actions—an approach open to criticism for lack of candor but understandable perhaps given the range of reasons in *Naken*.

Thus, several courts of the provinces seem prepared to distinguish *Naken* whenever possible in acknowledgment of the need for class actions. But such sidestepping can only do so much and *Naken* remains a formidable obstacle not only for what it says but also because it deflects attention away from other important questions such as financing class litigation, fairness to absentee members, and important procedural matters such as discovery and the appropriate means to assess and distribute monetary relief. So the stage is indeed set for legislative overhaul.

II. LEGISLATIVE INITIATIVES

Although there have been other attempts to achieve legislative reform of class actions,⁹⁸ the experiences in Quebec and Ontario call for careful ex-

95. 31 Man. R.2d 87 (1984).

96. Manitoba Queen's Bench Rule 58.

97. *Ranjoy*, 31 Man. R.2d at 93.

98. See I NEW BRUNSWICK DEPARTMENT OF JUSTICE, LAW REFORM DIVISION, THIRD REPORT OF THE CONSUMER PROTECTION PROJECT (1976). There were various attempts to include provisions for class actions in the federal legislation overhauling competition law. See An Act to Amend the Combines Investigation Act, Bill C-42 (30th Parl., 2d Sess. 1977); An Act to Amend the

amination. Quebec passed detailed legislation some eight years ago and in 1982 the influential Ontario Law Reform Commission issued a lengthy report and draft act calling for substantial overhaul of class actions. Both the Quebec Act and the Ontario Law Reform Commission's proposals have been the subject of active commentary by supporters and detractors alike.

A. Quebec

Quebec is Canada's French speaking province and its law has been influenced very much by the civil law system. Nevertheless, the Quebec legal culture has also been exposed to pressures for enhanced access to the courts and for righting the imbalance between individuals and aggregates. When class action legislation was enacted by the reformist (and potentially separatist) Parti Québécois government in 1978 it was said to be a substantial step for social change.⁹⁹ The two aspects of the Quebec procedures¹⁰⁰ which are most prominent are the provision for a broadened scope for class actions heavily influenced by United States Federal Rule 23 and the use of public funding in an attempt to remove cost disincentives to this kind of litigation.¹⁰¹

The Quebec Act requires court authorization for litigation to proceed as a class action and such approval is given based on a number of criteria,¹⁰² exhibiting an obvious parallel with United States Federal Rule 23. The factors are: the presence of "identical, similar or related" questions of law or fact;¹⁰³ "the facts alleged appear to justify the conclusions sought"¹⁰⁴—intended to be a mild merits test and to that extent departing from Rule 23 provisions; other methods of proceedings are difficult or impractical;¹⁰⁵ and, the class representative will adequately represent its members.¹⁰⁶

Combines Investigation Act, Bill C-13 (30th Parl., 3d Sess. 1977); N. WILLIAMS & J. WHYBROW, A PROPOSAL FOR CLASS ACTIONS UNDER COMPETITION POLICY LEGISLATION (1976). Legislation was finally passed in 1986 without a provision for class actions. See An Act to Establish the Competition Tribunal and to Amend the Combines Investigation Act and the Bank Act and Other Acts in Consequence Thereof (33rd Parl., 1st Sess. 1986) (33-34-35 Eliz. II, 1984-85-86, passed June 5, 1986).

99. Debats de l'Assemblée nationale, 3ième session, 3ième legislature, vol. 20, 2064, 2066.

100. Act respecting the class action, Que. Stat. ch. 8 (1978). The class action provisions are now part of the CODE OF CIVIL PROCEDURE.

101. The summary of the provisions relies heavily on Glenn, *Class Actions in Ontario and Quebec*, 62 CAN. BAR. REV. 247, 253 (1984) and I OLRC REPORT, *supra* note 27, at 70.

102. CODE OF CIVIL PROCEDURE, arts. 1002, 1003.

103. *Id.* at art. 1003(a).

104. *Id.* at art. 1003(b). The Supreme Court of Canada has confirmed that article 1003(b) may be used for minimal scrutiny of the merits of the action. See *Le Comité Régional des Usagers des Transports en Commun de Québec c. La Commission des Transports de la Communauté Urbaine de Québec*, 37 N.R. 608 (S.C.C. 1981). See also Bogart, *Class Actions, The Court and Commentators*, 3 SUP. CT. L. REV. 426 (1982).

105. CODE OF CIVIL PROCEDURE, art. 1003(c).

106. *Id.* at art. 1003(d).

The court, like its American counterpart, is given wide managerial powers throughout the litigation to take measures to hasten the progress of the action, to simplify proof and to give notice to members of the class when to do so will preserve their rights.¹⁰⁷ Members of the class who do not wish to be bound may opt out as of right.¹⁰⁸ If the action is successful on the common questions, the court is able to order a number of forms of monetary relief including payments to class members based on an aggregate assessment of damages,¹⁰⁹ *cy-près* distribution if distribution to individual members is impracticable or onerous,¹¹⁰ awards based on individual assessment of damages¹¹¹ and other kinds of remedies.¹¹² Initially the Act conferred appeal rights on both sides from orders made at the authorization stage and from final judgment.¹¹³ And to clarify at least some of the issues concerning who might be an appropriate representative, non-profit corporations and employee associations were given explicit but qualified rights to act as class representatives.¹¹⁴

Any plaintiff contemplating a class action must face two problems in respect to costs: first, under Canadian costs rules she will have to pay the defendant's costs if she loses; and, second, she will have to arrange payment of her own lawyer's costs. The Quebec Act retained the rule that the unsuccessful party should generally pay the winner's costs.¹¹⁵ However, the other disincentive to class actions, the funding of the litigation and payment of the class lawyer, was addressed through public funding and by creating an administrative agency charged with assessing and funding class initiatives, the Fonds d'aide aux recours collectifs.¹¹⁶ The application to the Fonds may request payment of lawyer's fees, experts' fees, and court costs including the costs of notice and other expenses. The Fonds decides whether to grant aid based on whether the action may be brought or continued if such aid is not forthcoming. If a class action has not been authorized at the time of the application, the Fonds also decides whether it is probable that there is a valid cause of action and the probability that the class action will be allowed. If the class representative or her lawyer receive amounts as fees, costs, or expenses from a third party, those amounts are to be reimbursed to the Fonds to the extent financial assistance was provided. If the Fonds

107. *Id.* at art. 1045.

108. *Id.* at art. 1007.

109. *Id.* at arts. 1031-33.

110. *Id.* at art. 1034.

111. *Id.* at arts. 1037-40.

112. *Id.* at art. 1032.

113. *Id.* at art. 1010.

114. *Id.* at art. 1048.

115. *Id.* at art. 477.

116. An Act respecting the class action, QUE. REV. STAT. ch. R-2.1, art. 545, as amended by Que. Stat., ch. 37, art. 25 (1982).

refuses an application for assistance there are provisions for an appeal to a court.¹¹⁷

In 1982, amendments were passed to address certain problems which had arisen.¹¹⁸ As a result, cooperatives can be class representatives and the requirement that at least one member of the represented class had to be a member of the organization at the time the cause of action arose was repealed. Therefore, a non-profit corporation—for example, a consumer protection association—can sue representing a class whose members have joined the association after the circumstances giving rise to the litigation.¹¹⁹ Because there was dissatisfaction concerning the length of time consumed in processing class actions, the appeals from orders dealing with class authorization were changed. Immediate appeals as of right by defendants from orders authorizing class actions were ended; only orders refusing authorization are now susceptible to an immediate right of appeal.¹²⁰

Though the issue of funding of class actions was addressed in the original legislation through the creation of the Fonds d'aide aux recours collectifs, the exposure of the plaintiff to pay the defendant's costs was retained, thus leaving a significant disincentive in place, since a class representative could still be responsible to the defendant for very substantial amounts in the event of an unsuccessful suit. However, the amendments of 1982, while retaining the two-way costs rule, greatly reduced the potential exposure for plaintiffs. A generally applicable rule in Quebec which charged the loser with paying one percent of the amount in question for cases exceeding \$100,000 was made inapplicable to class actions.¹²¹ Further, costs in class actions are now determined by reference to the tariff of costs which applies to actions involving amounts of \$1,000 to \$3,000 regardless of the amount actually in issue.¹²² Finally, the Fonds was empowered to authorize funding not only on a year-to-year basis, as in the original Act, but to grant funds on a continuing basis throughout the litigation.¹²³

Statistics compiled to 1983¹²⁴ show that the number of class actions filed annually was about .04% of all civil cases (20 out of

117. *Id.* at art. 35.

118. *Supra* note 116.

119. 1982 Que. Stat. ch. 37, art. 23, *amending* art. 1048, CODE OF CIVIL PROCEDURE.

120. 1982 Que. Stat. ch. 37, art. 22, *amending* art. 1010, CODE OF CIVIL PROCEDURE.

121. 1982 Que. Stat. ch. 37, art. 24, *enacting* art. 1050.1, CODE OF CIVIL PROCEDURE.

122. *Id.*

123. 1982 Que. Stat. ch. 37, art. 25, *amending* arts. 43 and 44 of An Act respecting the class action, *supra* note 100.

124. In fact I have obtained, through the assistance of M. Yves Lauzon, Director General of the Fonds, statistics current to September 24, 1986. They reflect a pattern very similar to those established in 1983. In order to facilitate comparison with the points made by Glenn and Lauzon in this section, the 1983 statistics will be referred to. The statistics to September 24, 1986 are on file with the author at the University of Windsor.

55,000),¹²⁵ much less than the 1% of civil cases which had been predicted at the time of the passing of the legislation.¹²⁶ Of the cases which had been filed for authorization by the Superior Court, 28 were granted, 39 were denied, 19 resulted in withdrawal, 4 never proceeded, 5 were settled out of court, 2 requests were waiting judgment from the Court, 1 was being negotiated and 12 were proceeding to be heard. Of the 8 cases which had been litigated on the merits, 7 decisions were in favor of the class.¹²⁷

Different explanations for and conclusions about these statistics emerge, depending on a larger view of the desirability of class actions. For example, proponents tend to point to the complexity of the authorization process and a cautious judiciary to explain what might be seen as an unsatisfactory level of authorizations.¹²⁸ Critics, on the other hand, point to the discrepancy between the number of class actions predicted and the number filed, the percentage which have been refused authorization, and the number which have been withdrawn (although the reason for withdrawal is not clear) as an indication that class actions are not likely to prove the agent of social reform that they were expected to be.¹²⁹

However, one commentator's criticism of class actions in Quebec—and their prospects in Canada generally—is tied to what he thinks is, and should be, a systemic hostility towards this form of litigation. Professor Glenn believes that class actions as a vehicle for collective litigation must fail because they run afoul of the essence of the judicial function in the adversarial system.¹³⁰ He seems particularly concerned by the burdens he perceives class actions will impose¹³¹ and that, in resolving issues for the class on the common questions, courts will somehow confer judgment on the class without taking account of the issues individual to class members which may be critical to deciding whether or not any particular member ought to recover:

The judiciary thus is requested to act on behalf of people who have not requested judicial intervention, to give judgment in the absence of proof of the requisite elements of each class member's claim, to thereby *presume* commonality in the sense of general though unproved charac-

125. Glenn, *supra* note 101, at 255 nn.60-61, draws on statistics provided in the Fonds d'aide aux recours collectifs Rapports Annuels and the Gouvernement du Quebec, Ministère de la Justice, Rapports Annuels.

126. Andre Sirois, Un fonds d'aide de 100,000 dollars (1979), 1 (no. 2) Justice 22. Cases brought under the Act to 1985 are collected and discussed in Ducharme & Lauzon, *Le Recours Collectif*, (Barreau du Quebec, Formation Permanente, no date).

127. Lauzon, *Le Recours Collectif Quebecois: Description et Bilan*, 9 C.B.L.J. 324, 336-37 (1984).

128. *Id.* at 345-46.

129. Glenn, *supra* note 101, at 255.

130. *Id.* at 264. ("The judiciary (particularly the elitist one of the common law tradition) is thus not a force of police, and the entire corpus of civil or private law is revealed, through the nature of its enforcement mechanism, as an optional device for acute conflict resolution."); see also Glenn, *The Dilemma of Class Action Reform*, 6 OXFORD J. LEG. STUD. 262 (1986).

131. Glenn, *supra* note 101, at 265-67.

teristics, and to issue orders necessarily requiring further adjudication for purposes of implementation. This is of course a description not of judicial decision-making in the traditional sense, but of legislation, the creation, often at some interested party's initiative, of general norms applicable to generically described groups of varying dimension and necessitating further structures of implementation or adjudication.¹³²

Such a celebration of the classical paradigm of litigation can be responded to at several levels. First, the charge that class actions are unduly burdensome is very complex and Professor Glenn makes it without due attention to the studies which have attempted to assess the relevant questions. Careful comparisons of class with non-class actions suggest that in some contexts and for some substantive areas class actions may indeed be more burdensome.¹³³ However, other studies suggest that there is no significant difference in judicial time employed to hear class and non-class cases¹³⁴ and that there is a basis for suggesting that any additional judicial time class actions may consume is outweighed by their capacity to generate more substantial amounts of relief.¹³⁵ The point here is to emphasize that any view of class actions which fails to sift through the many relevant studies is open to serious question.

Second, the lower level of filing than predicted in Quebec is a strange criticism since class actions initially had to fight allegations that they would flood the courts.¹³⁶ Class actions have also declined in the United States during this period but several explanations have been offered which call into question the supposition that this form of litigation is unsuited to our court system. Prominent among these is the suggestion that class actions often are filed as a response to some government litigation or investigation which unearths the cause of action and the evidence to establish it.¹³⁷ When such activity declines, so too can class actions.¹³⁸ A similar explanation could account for a lower rate of class actions in Quebec. There is no indication of the extent to which any of these class actions have had the benefit of prior government investigation or the extent to which original predictions concerning the volume of class actions contemplated were related to government investigation or litigation.

132. *Id.* at 270-71 (emphasis in original).

133. See DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Study Revisited*, 1979 ABF Res. J. 449, discussed in DuVal, *Review (1983)*, 3 WINDSOR Y.B. ACCESS JUST. 411, 427 n.35.

134. See DuVal, *Review, supra* note 133, at 426 (discussing Flanders, *The 1979 Federal District Court Time Study* (Federal Judicial Center, 1980)).

135. Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349 (1978).

136. I OLR REPORT, *supra* note 27, at 169.

137. See Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497 (1987); source cited *id.* at 501, n.16.

138. *Id.*

Third, when Professor Glenn worries that courts will collapse individual questions and common questions, thus giving judgment to plaintiffs when they would not otherwise have succeeded, he points to no cases either in Quebec or the United States in which this has actually occurred. Indeed, he has pointed to a certain judicial hostility in America towards class actions for mass torts.¹³⁹ That courts should reject such claims as candidates for class actions is open to serious question¹⁴⁰ but it hardly suggests that courts are embracing the problem he fears.

Finally, his arguments that the essence of the judicial function demands rejection of class actions seem wrong-headed in two ways. First, research into what courts have historically done suggests that they have been much more intrusive and active than accords with the paradigm he has described.¹⁴¹ Such common matters as default judgments, long-arm provisions, prejudgment remedies and levy and execution all have involved the courts in persisting in forcing obstinate litigants to obey.¹⁴² Again, common procedures in probate cases or bankruptcy and receivership matters show how courts can be involved in extensive, sometimes complex, and prolonged tasks which involve their ongoing involvement and supervision.¹⁴³ Second, his description takes no account of the radical transformation which has occurred in society in this century. The social structure has been transformed by the growth of aggregates of power such as corporations, government, and unions.¹⁴⁴ It is these aggregates and the consequences of their actions which are the root of the need for change in decision making forms over time. What will call courts' legitimacy into question is an insistence upon immutable forms of dispute resolution shaped by very different social forces and needs many years ago.

B. *The Ontario Law Reform Commission: Report on Class Actions*

Individualism, the belief in the free and independent action of individuals, is a concept that has deep roots in Western Society.

....

139. Glenn, *Class Actions and the Theory of Tort and Delict*, 35 U. TORONTO L.J. 287 (1985).

140. See Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987).

141. See Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Bogart, "Appropriate and Just": Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy, 10 DALHOUSIE L.J. 81 (1986).

142. Eisenberg & Yeazell, *supra* note 141, at 481.

143. *Id.* at 481.

144. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 36 (1979).

In the past, we generally have accepted as fair and reasonable the often heavy burden of ultimately vindicating our rights by the commencement of individual legal proceedings.

Not surprisingly, it is the development of a highly complex, interdependent society that has impeded the capacity of each person to vindicate his legal rights. . . . Inevitably, dramatic changes in production, promotion and consumption have given rise to what may be called "mass wrongs"—that is, injury or damage to many persons caused by the same or very similar sets of circumstances.

. . . . And in the wake of such misconduct, the individual is very often unable or unwilling to stand alone in meaningful opposition.¹⁴⁵

So begins the Ontario Law Reform Commission's 1982 *Report on Class Actions*.¹⁴⁶ Praised for in comprehensiveness and insightful treatment¹⁴⁷ but criticized for its alleged radicalism,¹⁴⁸ the nine-hundred page document investigates the problems which class actions address, assesses the case for reform to implement this litigation and makes detailed recommendations for reform, including a lengthy draft act. It is a principal point of departure for those interested in these lawsuits and the issues surrounding them.

In constructing its recommendations the Commission endorsed three effects of class actions. The first effect is the relatively uncontroversial one of judicial economy; that is, class actions can avoid duplicative and expensive procedures where a number of similar claims would be brought, in any event, because they are economically rational on an individual basis.¹⁴⁹ Second, they can address certain barriers—social, psychological and economic—which otherwise prevents claims from being brought. This is somewhat more of an issue since, by definition, some defendants will be exposed to actions that they would otherwise have avoided.¹⁵⁰ Third, and most controversially, the Commission accepted behavior modification, that is, "the potential of class actions to provide the incentives for increased compliance with the law,

145. I OLCRC REPORT, *supra* note 27, at 2-3. I was a consultant to the Commission for its *Report*. While I am clearly supportive of the *Report* generally, the Commission's recommendations and my views of class actions are obviously separate matters.

146. *Id.*

147. DuVal, *Class Actions*, *supra* note 133, at 411: "The Ontario Law Reform Commission's *Report on Class Actions* is an important contribution to the literature on class actions. It belongs on the bookshelf of anyone with a serious interest in the topic whether they reside to the north or to the south of the Canadian border." See also Prichard, *supra* note 67; Cromwell, *An Examination of the Ontario Law Reform Commission Report on Class Actions*, 15 OTTAWA L. REV. 587 (1983).

148. See Macdonald & Rowley, *Ontario Class Action Reform: Business and Justice System Impacts—A Comment*, 9 C.B.L.J. 351 (1984); see also REPORT ON CLASS ACTIONS—SUBMISSION TO THE HON. R. ROY MCMURTRY, Q.C. ATTORNEY GENERAL OF ONTARIO BY THE CANADIAN BAR ASSOCIATION (ONTARIO) AND THE PUBLIC INTEREST RESEARCH CENTRE (1983).

149. I OLCRC REPORT, *supra* note 27, at 118-19.

150. *Id.* at 119-39.

through the prevention of unjust enrichment or cost internalization"¹⁵¹

Five areas of the *Report* and its conclusions illustrate how it tackled issues surrounding this kind of litigation and in what ways it resembles and differs from provisions under Federal Rule 23.¹⁵² First the Commission, in a provision parallel to Rule 23, recommended a certification process by which the court would rule on the appropriateness of the class action procedure early in the action. The Commission did approve some tests which came directly from the American Rule: numerosity, adequacy of representation, the existence of common issues of fact or law, and superiority of the class action to other means of affording relief. However, some important differences exist in the tests. For example, the issue of whether common questions predominate over those which are specific to individual members of the class is not a separate test, but is instead one of the factors employed to gauge whether the class action is superior.¹⁵³

Further, American courts have often treated "superiority" and "predominance" as interchangeable bases for rejecting class actions judged to be unmanageable even if to do so would mean that no redress would be possible.¹⁵⁴ But the Commission recommended a two-level means of approaching such issues. First, the court is to compare the class action with "other available methods for the fair and efficient resolution of the controversy" by weighing comparative advantages and disadvantages.¹⁵⁵ Here the court may decline to certify only if there exists "truly available" alternative, superior procedures. Second, the court conducts a cost-benefit analysis.¹⁵⁶ The judge may reject a class action even when there is no alternative for redress if she concludes that the benefits of the action are outweighed by the adverse impacts upon the class, court or public; the burden of establishing this is on those seeking to have the class action rejected.¹⁵⁷

An otherwise enthusiastic supporter of the Commission's conclusions takes issue with the cost-benefit test, terming it ill-conceived because it requires the measuring and weighing of matters that are impossible to compare, while inviting lengthy and unproductive inquiries at initial stages of the action.¹⁵⁸ Moreover, it is argued that the test is unnecessary, since if an action is manifestly inappropriate, it will be rejected under some test, as has been

151. *Id.* at 145-46.

152. The first four areas are drawn from a discussion in DuVal, *Review, supra* note 133, at 411-19. The fifth is drawn from Prichard, *supra* note 67, at 320-22.

153. See II OLRC REPORT, *supra* note 27, at 343-47. See also DuVal, *Review, supra* note 133, at 412-14, for a discussion of the differences in the Commission's treatment of typicality, adequacy of representation, and a preliminary merits test.

154. See, e.g., *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Holland v. Goodyear Tire & Rubber Co.*, 75 F.R.D. 743 (N.D. Ohio 1975).

155. II OLRC REPORT, *supra* note 27, at 401-11, 416.

156. *Id.* at 411.

157. *Id.* at 411-17.

158. Prichard, *supra* note 67, at 316.

the experience in the United States, even if this distorts some other criteria.¹⁵⁹ Those who approve of the test agree that American courts have rejected inappropriate class actions under other criteria such as predominance, superiority or manageability. But they believe it is important that such a controversial basis for declining to certify should not be hidden in the cracks of other tests but should be openly faced, particularly since the Commission's approach encourages an explicit recognition that to reject a class action means that no redress will be available, and that there are specific guides to the court in assessing costs and benefits.¹⁶⁰

Second, the *Report* approaches the questions of opting out and notice differently. Rule 23 gives absentees in a damage class action, subject to limited exceptions, the right to remove themselves from the action. To be able to so exclude themselves, the Rule stipulates that they be given the best practicable notice, and individual notice must be given to those members identifiable "through reasonable effort."¹⁶¹ After this, any members who do not take measures to exclude themselves are included in the litigation. However, the Commission requires the court to judge whether members should be allowed to exclude themselves.¹⁶² Regarding notice, the *Report* sees individual notice as not usually necessary at certification;¹⁶³ notice of certification is to be given only if the costs of any such notice are outweighed by the benefits, and here, as a part of the costs-benefits test, the court takes into account whether members have been allowed to exclude themselves.¹⁶⁴

This recommendation has been criticized by the same commentator who took issue with the costs-benefits provisions.¹⁶⁵ Asserting that there is a fundamental right not to be a plaintiff if an individual so chooses, he believes a right of exclusion must exist. He agrees that there must not be a mandatory notice requirement because of the cost it would impose, but suggests there is no logical connection between the notice requirement and the unfettered right to opt out. The right to be excluded should exist for those who happen to learn about the action by notice or otherwise.¹⁶⁶

While there may be no connection between opting out and notice as a matter of abstract logic, there is a substantial connection in terms of notice providing an opportunity to exercise the right to opt out. How can one argue that opting out is a fundamental right and, in the same breath, admit that, without a notice requirement, the opportunity to exercise it depends solely on the chance discovery by the class member of the existence of the

159. *Id.*

160. DuVal, *Review*, *supra* note 133, at 413.

161. FED. R. CIV. P. 23(c)(2).

162. II OLRC REPORT, *supra* note 27, at 485-91.

163. *Id.* at 511.

164. *Id.* at 510-13.

165. Prichard, *supra* note 67, at 319-20.

166. *Id.*

class and of the right to opt out? If it is asserted that opting out is so basic a right, although the Commission carefully discusses why this is not so,¹⁶⁷ we are led ineluctably to the conclusion that steps must be taken to allow everyone involved an opportunity to exercise it: the pressure to order costly individual notice could be irresistible. Thus, the cost of celebrating the individualism that unqualified opting out is supposed to enhance would be a barrier to procedures which, in many circumstances, may be the only way any individual or group will have access to relief.¹⁶⁸

Third, the *Report's* recommendations for the determination and distribution of monetary relief are much more specific and extensive than the American Rule and, in some respects, go beyond provisions sanctioned by United States courts. Issues surrounding proof and distribution of monetary relief in class actions can be grouped under three different rubrics: (1) the appropriateness of determining the monetary harm suffered by the class as a whole; (2) the procedures to be used to determine monetary harm to individual class members when that kind of assessment is appropriate; and (3) how to employ the monetary relief that is recovered, and specifically, can any monetary relief which has not been distributed to class members be used in other ways and thus not returned to the defendant.¹⁶⁹ In American courts, the assessment and distribution of monetary relief has been driven by a focus on individual members of the class.¹⁷⁰ In contrast, assessment on a class-wide basis is the bedrock of the Ontario proposal, an approach which, not surprisingly, has been excoriated by the established bar dedicated to notions of individualism equated with prosecution of claims on a one-by-one basis.¹⁷¹ It is only when aggregate assessment is not feasible or the amount to which the class members are entitled cannot be established by common evidence that individual proceedings would be required.¹⁷² The *Report* does recommend that members of the class be allowed to recover their provable damages but substantially relaxes the normal Canadian proof requirements through procedures similar to those used in the United States.¹⁷³ It would, however, allow average damage awards in appropriate cases.¹⁷⁴ Further, if all of the aggregate award cannot be distributed to class members, the *Report* recommends that courts should be able to distribute the remainder so as to benefit some or all members of the class; this resembles the so called *cy-près* distribution ordered in the United States.¹⁷⁵ Finally, the Com-

167. II OLRC REPORT, *supra* note 27, at 485-91.

168. DuVal, *Review*, *supra* note 133, at 415.

169. *Id.* at 416.

170. II OLRC REPORT, *supra* note 27, at 528-30, 538-43.

171. Macdonald & Rowley, *supra* note 148, at 354.

172. II OLRC REPORT, *supra* note 27, at 597.

173. *Id.* at 562-67.

174. *Id.* at 567-72.

175. *Id.* at 574-82, 602.

mission concluded that if the aggregate award were not applied to directly benefit members of the class, then, in order to achieve deterrence and the prevention of unjust enrichment, the court could authorize that the unclaimed residue be forfeited to the Crown.¹⁷⁶

DuVal, while strongly praising the *Report*, has questioned the neat division which the Commission tried to draw between cy-près and forfeiture distributions.¹⁷⁷ He suggests that the connection between individuals injured and not otherwise compensated and the individuals who are benefitted by cy-près may be tenuous. Thus; cy-près can result in a substantial component of the award achieving only what forfeiture does: deterrence and unjust enrichment. Moreover, DuVal has urged that such methods of dealing with monetary relief can only be assessed by paying close attention to the underlying policies behind particular causes of action to ascertain whether they include deterrence and unjust enrichment. However, he approves including such distribution in the recommendations since the courts would be unlikely to recognize such innovative relief without explicit authorization. Yet, it is also appropriate that such distributions are matters for the court's discretion since this allows for decisions attuned to the underlying policies of any particular substantive area.¹⁷⁸

Fourth, the Commission's recommendations for changes in costs rules, described as "[i]n some respects . . . the most noteworthy achievement of the Commission's report,"¹⁷⁹ substantially alter the present rules in Ontario. Under existing law in Ontario, contingent fees are prohibited and lawyers may not advance expenses incidental to litigation.¹⁸⁰ The two-way costs rule provides for an indemnification of a substantial part of lawyers' fees and expenses for the class plaintiff if she wins. If the action fails, that plaintiff is responsible not only for her own costs but also a substantial portion of the defendant's lawyer's fees and expenses. Class members have no responsibility either to make up the difference between successful plaintiff's total costs and the less-than-total indemnity payable by the loser or to contribute to the costs award payable to the defendant should he be successful. Thus, under the present costs regime, the plaintiff is never advantaged by bringing a class action. The surprise then is not that there have been so few class actions, but that there have been any, given the severe economic disincentive for such litigation.¹⁸¹

176. *Id.* at 582-96.

177. DuVal, *Review*, *supra* note 133, at 432-36.

178. *Id.* at 436.

179. *Id.* at 418.

180. III OLRC REPORT, *supra* note 27, at 721. Ontario is the exception in this regard, though the extent to which contingency fees are actually used in other provinces is unclear. *See id.* at 723.

181. Prichard, *supra* note 67, at 312.

Although it recognized the potential of public funding as a means of relieving these disincentives,¹⁸² the Commission preferred adjustments in the costs rules themselves. First, it recommended a “no way” costs rule so that each side would bear its own costs regardless of the outcome, thus removing the inhibiting impact of a “costs against” order upon an unsuccessful class plaintiff.¹⁸³ Second, it provided for the class plaintiff’s costs to be a first charge, on a proportional basis, on any monetary relief recovered on behalf of the class, thus providing a means for indemnifying the representative plaintiff and ensuring that costs are shared by all members of a successful class.¹⁸⁴ Third, the lawyer for the class can accept the litigation on the basis that she will be paid only if the class is successful, thus relieving the representative plaintiff of the burden of paying her lawyer if the action is not successful.¹⁸⁵ The court would stipulate what the lawyer for a successful action should receive, based on the hours and quality of work, with an additional sum for having assumed the risk of litigation by agreeing to be paid only if successful.¹⁸⁶

The weakness of these recommendations is that they are premised on the class recovering monetary relief so that the class lawyer can be paid. In situations where only non-monetary relief is claimed, the disincentives surrounding the plaintiff financing the suit will persist. One solution is to provide for a one-way costs rule favoring plaintiffs. However, the Commission rejected a one-way rule, for any purpose, retreating behind the need for any rule to apply equally to plaintiffs and defendants in order to insure fairness.¹⁸⁷ Doubtless any rule should be fair, but it should also take into account the disproportionate abilities of the aggregates who are targets of class actions to absorb or pass on costs of litigation.¹⁸⁸ In an otherwise searching *Report* the Commission simply refused to grapple with some hard realities circling this question.

Finally, the *Report* made recommendations concerning the Attorney General, “perhaps the most unusual and provocative provision in the proposed Act.”¹⁸⁹ The Commission would have the Attorney General: (1) be given notice of all applications for certification;¹⁹⁰ (2) be able to intervene in any class action at any time;¹⁹¹ and (3) be permitted to apply to the court at any

182. III OLRC REPORT, *supra* note 27, at 711-13.

183. *Id.* at 704-09.

184. *Id.* at 713-14.

185. *Id.* at 714-31.

186. *Id.*

187. *Id.* at 706-07.

188. For treatment of these questions in the context of derivative litigation, see Wilson, *Attorney Fees and the Decision to Commence Litigation: Analysis, Comparison and an Application to the Shareholders' Derivative Action*, 5 WENDSOR Y.B. ACCESS JUST. 142 (1985).

189. Prichard, *supra* note 67, at 320.

190. I OLRC REPORT, *supra* note 27, at 302-04.

191. *Id.*

stage to remove the class plaintiff and become the class plaintiff with responsibility for the action including its settlement, subject to court approval.¹⁹² These provisions were meant to reflect the view that class actions serve not only the needs of private individuals and groups for access to the courts, but also provide a vehicle for enforcement of public policies. Whether or not class actions or any other procedure can divide the world into “private” and “public” is a separate question that I will not attempt to answer here,¹⁹³ but housing “public” needs in the office of the Attorney General is suspect, given that office’s historical record as a protector of the public interest.

In the Anglo-Canadian tradition, the Attorney General has been the public official charged with litigating the issues affecting the “public interest” when others lacked standing to bring litigation raising such issues. The record does not reveal vigorous action here. Indeed, the Attorney General’s resources have most often been deployed in challenging standing claims—claims which often involved or challenged the government that the Attorney General represented or some emanation of it.¹⁹⁴ In class actions the potential for conflict between the Attorney General and the class will often be present since the theory of liability may often implicate the government in terms of its action or inaction in preventing or asserting the activity causing the mass wrong.¹⁹⁵ This is not to argue that the Attorney General should have no role in class actions. It is to suggest that courts must be careful to scrutinize that official’s proposed role in any specific action to reveal any potential conflict of interest or any advocacy based on governmental self-interest disguised as service to the public.

CONCLUSION

The significance of class actions does not lie in the frequency with which they are brought, for they have been, and will be, a small percentage of the total of civil claims filed. Numerically, they have little to say about the universe of disputes and the issues and questions surrounding them. Rather, class actions claim our attention because they raise questions concerning how society is structured and run—the manner in which the nation struggles with the problems that a highly industrialized and regulated country must face at the close of the twentieth century.

In all of this there is no argument that litigation—at least in Canada—should be the dominant form of discourse for how we shape society.

192. *Id.* at 299.

193. See generally *The Possible Unity of Public and Private Law: Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

194. See, e.g., Bogart, *supra* note 9.

195. Prichard, *supra* note 67, at 321.

Canadians in the past have looked to the legislature to make the critical decisions concerning how we would become and continue as a nation. Canadians may have often become tired or angry at their government, but they have never come to hate it, or to think it should be bounded and corralled at every turn.¹⁹⁶ Indeed much of the history of Canada is an account of continuous government involvement in forging and shaping a nation from forbidding and sprawling geography.¹⁹⁷ This is not to suggest that the legislative record in terms of responsiveness or effectiveness or even protection has always been fine.¹⁹⁸ It is to argue that historically, legislative action in Canada has taken into account interests other than those wrapped in notions of nineteenth-century individualism and has, however imperfectly, implemented measures based on ideas of fairness and equality not only in opportunity but in result.

But no matter how strong the role of the legislature is, or should be, in any society, this branch of government is unlikely to be able to address with sufficient specificity the myriad issues surrounding particular actions taken by other aggregates or its own agencies and emanations. Allegations against such powerful groups concerning mass wrongs need to be addressed by a body which is able to carefully sift through the evidence and arguments relating to the argued injury and to forge a solution responsive to the particulars which have been demonstrated in an open, public and scrutinizable way. This is the function of a court.

196. The role of government in nation-building is a well-developed theme in the literature on Canadian government and particularly in contrast to American attitudes. Consider, for example, the following:

Canadian scholars too have been concerned with both the extent and cause of the growth of government, but, when compared to that of our American neighbours, our debate has had some rather marked differences. On the whole, American thought on this subject is dominated by a highly critical or suspicious attitude to any form of (much less increase in) bureaucratic powers. . . . However, these ideas have been generally characterized by a much more sympathetic attitude towards governmental intrusions in [Canadian] society. . . . No Delphic phrases and fundamental philosophies about government occupy our thoughts on the nature of governmental institutions.

Wilson & Dwivedi, *Introduction to THE ADMINISTRATIVE STATE IN CANADA* 3, 4-5 (Dwivedi ed. 1982).

197. Wilson and Dwivedi write:

In summary then, Canadian historical experience shows bureaucracy as an instrument of overriding political purpose. The particularistic and localistic nature of Canadian democracy required a bureaucracy, which has expanded under explicit political directions and which has been subject to democratic political discretion. The instrumental and indeed beneficial role of bureaucracy as the core of modern government is a theme which is well developed in the literature of public policy and administration.

Id. at 10.

198. Examples of the darker side of the legislative record, particularly in protection of human rights, is provided in III MACDONALD REPORT, *supra* note 4, at 284-85, and Russell, *supra* note 11, at 34-35.

Class actions allow litigation to be brought in a form responsive to questions concerning the activities of entities whose conduct can scarcely avoid having mass ramifications. And seeing alleged wrongdoing by these aggregates in the light of the consequences for groups is vital in order to assess and to respond to such conduct. To force litigation to be brought on an individual basis is to embrace a vision of the structure of society which—and in many important ways, regrettably—no longer exists. To force it into the traditional mold of litigation in the name of individualism may purport to celebrate formally the value of each one of us but, in reality, it prevents an effective means of confronting such aggregates with their capacity to pose a greater threat to that individuality.

But what of class actions in Canada? Here the terrain is complicated. The Ontario Law Reform Commission's *Report* is now almost five years old and has not yet made it onto the legislative agenda, but the office of the present Attorney General, regarded as very liberal in some quarters, gives assurance that the subject is under "active consideration."¹⁹⁹ Quebec has had a number of years experience with legislative overhaul. The number of class actions initiated has remained below predictions, but those that have been brought have not caused any dramatic or burdensome problems in their administration or in the issues which they have raised.

The courts themselves have manifested substantial ambivalence. They have accepted a more expansive role in other areas: as a matter of first impression, they have embraced their role as arbiter between citizen and state in Charter litigation, a task requiring them to face directly complex social and political questions. However, there is also a troubling tendency to view their mission under the Charter as exclusively one of protection of those individual rights which enjoy their greatest potential with the government kept at bay.²⁰⁰ And in this there is a danger that Charter litigation will dissolve into a discourse concerning a specific set of entitlements reflecting a particular brand of individualism which does not capture the entirety and complexity of Canadian society.²⁰¹

Perhaps it is this emphasis on individualism—and of a limited kind—which can explain the Supreme Court's aversion to class actions mirrored in *Naken*. The notion that judges should accept collective activity and, indeed, adjudicate issues raised by a collective form strikes directly at the image of the law and litigation which courts have created and reflected. Yet, at least some lower courts seem determined to evolve away from this role

199. Letter from M. Cochrane, Counsel, Policy Development Division, Ministry of the Attorney General to W. A. Bogart (Oct. 8, 1986).

200. See *supra* note 12.

201. For an extensive analysis of the array of ideas and movements which have influenced Canadian political and social life, see W. CHRISTIAN & C. CAMPBELL, *POLITICAL PARTIES AND IDEOLOGY IN CANADA* (2d ed. 1983).

and embrace one which takes account of questions which can only be fully comprehended by examining their mass impact.

I do believe that in the end we will see some form of class action in Canada. In this there is no prediction about what the present Supreme Court might do given another opportunity to review class actions, what any politician may do within the next few years, or what the details of this procedure will look like. What I mean to suggest is that the approach of the courts and the law to the organization of contemporary society, which class actions capture, is what will ultimately find expression.²⁰² I think Canada will have class actions, because they reflect a reality that sooner or later must be mirrored in litigation that affects so significantly the issues people bring to courts. Canada is a highly industrialized and regulated society which will repeatedly generate policies, issues, and consequences that the courts can only respond to adequately by approaching them with an understanding of how powerful entities function and affect, and at times injure, groups and individuals. And this is why, if we did not have class actions, we would have to go out and invent them.

202. A parallel point is found in the American literature: see in particular Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) and Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 56-60 (1982).