

DEFENDANT CLASS ACTIONS AND THE RIGHT TO OPT OUT: LESSONS FOR CANADA FROM THE UNITED STATES

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The recently introduced class action regime in the Federal Court of Canada which—unlike the class action regimes in Quebec, British Columbia, Manitoba, Saskatchewan, Newfoundland and Labrador and Alberta—authorizes the certification of defendant class actions renders a study of defendant class actions desirable. The aim of this article is to explore the most important issue concerning the operation of defendant class actions, namely, whether any restrictions should be placed upon the ability of members of a defendant class to exclude themselves from the class, that is, to opt out.

I. INTRODUCTION

It seems more than probable that the court, having gone to the trouble and expense of learning the name and address of each potential [defendant class member] and of devising a proper notice and having it sent out, will wind up with no “class” of defendants, but only those who are named as defendants and are served with process in the ordinary way.¹

An unnamed member who feels it cannot be adequately represented by named defendants or by counsel for unnamed defendants will have the opportunity to “opt out” of the suit and not be bound by the judgment or to be represented by a lawyer of his own choice. The opportunity for exclusion is adequate protection for whatever due process rights are not satisfied by actual notice and representation by the named defendant or by counsel for unnamed defendants.²

Most North American lawyers are familiar with class actions brought on behalf of a group of persons who share similar claims against the same defendant or defendants. The potential benefits of plaintiff

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1. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238 (9th Cir. 1974) (Duniway, J., concurring).

2. *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 140 (7th Cir. 1974).

class actions were recently summarized, as follows, by the Supreme Court of Canada:

[C]lass actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis [the judicial economy goal]. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own [the access to justice goal]. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public [the behavior modification goal].³

But similar benefits may be secured through the maintenance of defendant class actions:⁴

A defendant class action is a civil action brought against one or more persons defending on behalf of a group of persons similarly situated. It provides an efficient procedural mechanism for the determination of common issues in a complex proceeding involving multiple parties. It offers a means of binding all interested parties and, therefore, prevents relitigation of the same issues in a multitude of law suits. The advantages of a defending class action include the conservation of judicial resources and private litigation costs, both absolutely, by preventing relitigation of the same issues, and relatively, by spreading expenses and resolving common issues

3. *Hollick v. Toronto (City)*, [2001] 205 D.L.R. (4th) 19, 28–29. See *In re N. Dist. of Cal. “Dalkon Shield” I.U.D. Prods. Liab. Litig.*, 526 F. Supp. 887, 892 (N.D. Cal. 1981) (citations omitted):

In a complex society such as ours, the phenomenon of numerous persons suffering the same or similar injuries as a result of a single pattern of misconduct on the part of a defendant is becoming increasingly frequent.

The judicial system’s response to such repetitive litigation has often been blind adherence to the common law’s traditional notion of civil litigation as necessarily private dispute resolution. In situations where this traditional mode of litigation threatens to leave large numbers of people without a speedy and practical means of redress and simultaneously threatens to expose defendants to continuing punishment for the same wrongful acts, the class action device is a powerful tool to accomplish its proclaimed goals of judicial economy and fairness.

4. See Robert E. Holo, Comment, *Defendant Class Actions: The Failure of Rule 23 and A Proposed Solution*, 38 UCLA L. REV. 223, 225 (1990) (citation omitted):

[D]efendant class actions promote judicial efficiency and conserve judicial resources. . . . The English Chancery Court recognized this principle over 300 years ago when it wrote, in the context of what today would be termed a defendant class action, ‘If the Defendant should not be bound, Suits of this Nature, as in the case of Inclosures, Suit against the Inhabitants for Suit to a Mill, and the like, would be infinite, and impossible to be ended.’

over a large number of defendants. In this sense, greater access to the courts, by plaintiffs and defendants alike, is achieved.⁵

And yet, defendant class actions have been virtually ignored by legal commentators in Canada.⁶ This state of affairs is partly attributable to the fact that, until the introduction in November 2002 of a new comprehensive class action regime in the Federal Court of Canada, Ontario was the only Canadian jurisdiction that had in place a detailed class action regime that authorized courts to certify defendant classes.⁷ The lack of scholarly interest in defendant class actions also stems from the fact that in the eleven years or so that the Ontario regime—governed by the *Class Proceedings Act* (Ontario Act)—has been in operation, very few attempts have been made to seek certification of defendant class actions.⁸

A third reason for this lack of focus on defendant class actions in the Canadian legal literature is that it is generally assumed that de-

5. *Chippewas of Sarnia Band v. Can.*, [1996] 29 O.R.3d 549, 558–59. See *Berry v. Pulley*, [2001] No. 97–CV–135179, Ont. Sup. C.J. LEXIS 499, at *16; Angelo N. Ancheta, Comment, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283, 283 (1985); ALTA. LAW REFORM INST., FINAL REPORT NO. 85: CLASS ACTIONS ¶ 434 (2000), available at <http://www.lawualberta.ca/alri/finalreports.html> (last visited Aug. 14, 2004) [hereinafter ALRI REPORT]; R.A. Max, *Defendant Class Suits as a Means of Legal and Social Reform*, 13 CUMB. L. REV. 453, 453 (1983); Scott D. Miller, Note, *Certification of Defendant Classes under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371, 1378 (1984); Debra J. Gross, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 EMORY L.J. 611, 616–20 (1991); ONT. LAW REFORM COMM’N, REPORT ON CLASS ACTIONS 41 (Report no. 48 1982) [hereinafter OLRC REPORT]; RULES COMM. OF THE FED. COURT OF CAN., CLASS PROCEEDINGS IN THE FEDERAL COURT OF CANADA: A DISCUSSION PAPER 35 (2000) [hereinafter FC COMMITTEE]; ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS 338, 350–51 (4th ed. 2002); Note, 36 HARV. L. REV. 89, 92 (1922) [hereinafter 1922 Note]; A. Peter Parsons & Kenneth W. Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23*, 4 ECOLOGY L.Q. 881, 884 (1975); Barry M. Wolfson, *Defendant Class Actions*, 38 OHIO ST. L.J. 459, 459–60 (1977); Leighton Lee, III, *Federal Rule of Civil Procedure 23—Class Actions in Patent Infringement Litigation*, 7 CREIGHTON L. REV. 50, 53 (1973); Note, *Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative*, 9 VAL. U. L. REV. 357, 361–63 (1975) [hereinafter VALPARAISO Note]; Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 630–31, 657–58 (1978) [hereinafter HARVARD Note]; David H. Taylor, *Defendant Class Actions under Rule 23(b)(2): Resolving the Language Dilemma*, 40 U. KAN. L. REV. 77, 78 (1991).

6. The author was not able to find any articles in Canadian law journals entirely or substantially devoted to a discussion of defendant class actions.

7. See *Chippewas*, 29 O.R.3d at 562; FC COMMITTEE, *supra* note 5, at 34; ALRI REPORT, *supra* note 5, at ¶ 430.

8. *Class Proceedings Act*, SO 1992, c 6 (Ontario Act). See *Chippewas*, 29 O.R.3d at 549; *Woods v. Gilroy*, No. 95-CU-845514, [1997] 1997 CarswellOnt 5329 (Westlaw); *Lupsor Estate v. Middlesex Mutual Ins. Co.*, [2003] O.J. No. 3745, 2003 ON. C. LEXIS 2679. See also Jay Prestage & Gordon McKee, *Class Actions in the Common Law Provinces of Canada*, in MULTI-PARTY ACTIONS 223, 225 n.9 (Christopher Hodges ed., 2001).

defendant class actions raise the same issues and problems that are encountered with respect to plaintiff class actions and, thus, do not warrant separate consideration and analysis.⁹ This assessment of defendant class actions, whilst erroneous,¹⁰ is certainly understandable when one peruses the provisions governing class proceedings in Ontario, in the Federal Court of Canada and in U.S. federal courts. In those jurisdictions, the regimes, procedures and prerequisites that were designed to cater for the needs of, and to address the potential problems generated by, plaintiff class actions are also applied, with no alteration, to regulate proceedings brought against defendant classes.¹¹

But, perhaps, the recent judgment of Justice Haines of the Ontario Superior Court of Justice in *Lupsor Estate v. Middlesex Mutual Insurance Co.*¹²—together with the new regime in the Federal Court—will generate greater interest in defendant class actions on the part of Canadian legal commentators. If endorsed by Ontario's appellate courts, *Lupsor* might also lead to a significant increase in the motions brought under the Ontario Act to seek certification of bilateral class actions, that is, litigation where plaintiff classes sue defendant classes. In *Lupsor*, it was held that a less restrictive approach to the requirements of the standing to sue rules is appropriate in the context of bi-

9. An American court has drawn attention to “our lack of experience with defendant class actions. Ordinarily, we think in terms of a single defendant who allegedly has acted unlawfully on grounds generally applicable to a class of plaintiffs.” *U.S. v. Trucking Employers Inc.*, 75 F.R.D. 682, 692 (D.D.C. 1977). See Wolfson, *supra* note 5, at 460 (“Despite the advantages of the defendant class suit and its availability for several centuries, few have understood or used it until recently.”).

10. See AUSTRALIAN LAW REFORM COMM'N, REPORT NO. 46: GROUPED PROCEEDINGS IN THE FEDERAL COURT ¶ 6 (1988) [hereinafter ALRC REPORT]; OLRC REPORT, *supra* note 5, at 43–44; *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 290 (N.D. Cal. 1978); Lawrence Ball, Note, *Damages in Class Actions: Determination and Allocation*, 10 B.C. INDUS. & COM. L. REV. 615, 619 (1969); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 696–97 n.39 (1941); *BT Australasia Pty Ltd. v. State of New South Wales*, 1997 AUST FEDCT LEXIS 1068, at *80–81 (Sackville, J.).

11. See Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 827 (1946) [hereinafter COLUM. Note]; CONTE & NEWBERG, *supra* note 5, at 336, 339; Ancheta, *supra* note 5, at 287, 317–21; Holo, *supra* note 4, at 223–24; ALRI REPORT, *supra* note 5, at para. 456; R.R. Simpson & C.L. Perra, *Defendant Class Actions*, 32 CONN. L. REV. 1319, 1323 (2000); *Rodriguez v. Township of De Kalb*, No. 80 C 1509, 1984 U.S. Dist. LEXIS 22302, at *18 (N.D. Ill. Oct. 31, 1984); *Vargas v. Calabrese*, 634 F. Supp. 910, 920 (D.N.J. 1986); F.B. Kruger & J.M. Rogers, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 IND. L.J. 841, 844 n.30 (1978); W.B. Fisch, *Notice, Costs, and the Effect of Judgment in Missouri's New Common—Question Class Action*, 38 MO. L. REV. 173, 184 (1973); Gross, *supra* note 5, at 615.

12. [2003] O.J. No. 1038.

lateral class actions than what is needed for plaintiff class actions brought against multiple defendants who are sued individually.¹³

The most significant problem that is created by the regulation of defendant class proceedings, through the employment of mechanisms devised for plaintiff class actions, concerns the conferral upon class members of the right to exclude themselves from the class, that is, to opt out. Opt out regimes represent an important feature of every comprehensive class action regime that is currently in place in Canada and Australia.¹⁴ Pursuant to an opt out regime, a plaintiff class action may be initiated without first seeking the express consent of the persons represented by the named plaintiff, namely, the class members.¹⁵ Once the proceedings are certified¹⁶ as class proceedings, class mem-

13. In *Hughes v. Sunbeam Corp.*, [2002] 61 O.R.3d 433, 441, the Court of Appeal for Ontario held that “[i]n Ontario a statement of claim must disclose a cause of action against each defendant. Thus, in a proposed class action, there must be a representative plaintiff with a claim against each defendant.” In *Lupsor*, O.J. No. 1038, at ¶ 21, it was held that representative plaintiffs need not have personal causes of action against each member of a putative defendant class in order to proceed with a motion for certification and the appointment of a representative defendant. It is interesting to note that one of the reasons relied upon by Justice Haines in *Lupsor* for not applying the *Hughes* principle to bilateral class actions was that:

[A] named defendant in an intended class proceedings is a captive litigant whereas a member of a defendant class is not. If certified, each [class member] that falls within the defined class has a choice. It can participate in the action as a class member, notwithstanding the absence of a representative plaintiff with a cause of action against it, or the [class member] can opt out and defend, as a named defendant, any subsequent action that may be brought by a representative plaintiff who does have the necessary cause of action.

Id. at ¶ 19.

14. Vince Morabito, *Judicial Supervision of Individual Settlements with Class Members in Australia, Canada and the United States*, 38 TEX. INT’L. L.J. 663, 671 (2003).

15. In the United States, Justice Frankel described the opt out scheme as being “patterned after the highly successful procedures of the Book-of-the-Month Club.” J. Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967). Similarly, an Australian politician has drawn an analogy between the opt out model and “a book club which was run in such a way that, unless I sent back the monthly form to indicate a lack of interest in the book of the month, I received the book with a bill forthwith.” Kevin Andrews, Austl. House of Rep. Parliamentary Debates 3292 (Nov. 26, 1991).

16. “Canadian class proceedings regimes require court approval before an action can go forward as a class proceeding. This mandatory prior court approval is given in a ‘certification’ order. Certification is the critical step that converts the proceeding from one between the parties named in the pleadings to a class proceeding.” ALRI REPORT, *supra* note 5, at ¶ 177; *See also* 909787 Ontario Ltd. v. Bulk Barn Foods Limited, [1999] Ont Sup CJ LEXIS 1048, at *13 (Dunnet, J.) (“the certification motion is intended to screen claims that are not appropriate for class action treatment at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation”). For a summary of the perceived benefits of the certification model, see SOUTH AFRICAN LAW COMMISSION, REPORT ON THE RECOGNITION OF CLASS ACTIONS AND PUBLIC INTEREST ACTIONS IN SOUTH AFRICAN LAW ¶ 5.5.5 (1998), available at <http://www.law.wits.ac.za/salc/report/classact.pdf> (last visited Aug. 14, 2004) [hereinafter SALC REPORT]; RUTH ROGERS, UNIFORM LAW CONFERENCE OF CANADA, A

bers are offered an opportunity to opt out of the class. Opt out regimes were created with plaintiff class actions solely in mind but have been applied to defendant class actions with no consideration being given to whether the conferral of an unfettered opt out right to members of defendant classes is appropriate.¹⁷

In the remainder of this article it will be posited that opt out regimes should not be employed in defendant class proceedings as they create serious obstacles to the fulfillment of the policy objectives of the class action device, set out above, and are not necessary to ensure that members of defendant classes are treated fairly. In Part II, the procedures governing the ability of members of defendant classes to exclude themselves from representative proceedings (the predecessors of modern class actions) brought against such classes will be discussed. The regimes governing defendant class actions and the right to opt out of such actions in Ontario, in the Federal Court of Canada and in U.S. federal courts will be canvassed in Part III, as well as the reports of the various committees upon whose recommendations these regimes were based. Part IV discusses the problems caused by the use of opt out regimes in defendant class proceedings and explores the various approaches that have been taken by Canadian and American courts to address these problems.

II. DEFENDANT REPRESENTATIVE PROCEEDINGS

A. The English Court of Chancery

As was indicated by the United States Supreme Court in 1940: The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the

UNIFORM CLASS ACTIONS STATUTE: APPENDIX O TO THE PROCEEDINGS OF THE 1995 MEETING OF THE UNIFORM LAW CONFERENCE OF CANADA 5-6, *available at* <http://www.law.ualberta.ca/alri/ulc/95pro/e95o.htm> (last visited June 28, 2004) (copy on file with the author).

17. See Part III *infra*.

interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.¹⁸

This practice, devised by the Court of Chancery, was not limited to group litigation involving numerous plaintiffs¹⁹ as it also extended to litigation involving numerous defendants.²⁰ Indeed, a number of commentators have noted that in the sixteenth, seventeenth and eighteenth centuries, defendant representative proceedings were as prevalent as plaintiff representative proceedings.²¹ Early proceedings against defendant classes included “suits by a landlord against the tenants of the manor, represented by only a few actual tenants, to re-

18. *Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940). *See also* *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1007–08 (1809); *Wong v. Silkfield Pty. Ltd.*, (1999) 199 C.L.R. 255, 261–63; *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*, [2001] 201 D.L.R. (4) 385, 394–96 (McLachlin, C.J.); *Chippewas*, [1996] 29 O.R.3d at 559; *Adair v. New River Co.*, 11 Ves. 429, 444–45 (1805); *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808–09 (1985); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832–33 (1999); *Montgomery Ward v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948); *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 600 (E.D. Mich. 1985); OLRC REPORT, *supra* note 5, at 5–6; Ancheta, *supra* note 5, at 286 n.18; LAW REFORM COMMITTEE OF SOUTH AUSTRALIA, REPORT RELATING TO CLASS ACTIONS 4–5 (Report no. 36 1977) [hereinafter LRCSA REPORT]; Zechariah Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297 (1932); John A. Kazanjian, *Class Actions in Canada*, 11 OSGOODE HALL L.J. 397, 399–411 (1973); COLUM. Note, *supra* note 11, at 818; Douglas J. Sherbaniuk, *Actions by and Against Trade Unions in Contract and Tort*, 12 U. TORONTO L.J. 151, 154–55 (1958); Keith Uff, *Class, Representative and Shareholders’ Derivative Actions in English Law*, 5 CIV. JUST. Q. 50, 51 (1986).

19. *See Mobil Oil Aus. Pty. Ltd. v. Victoria* (2002) 189 A.L.R. 161, 171 (Gaudron, Gummow & Hayne, JJ.) (“A common example of its use was by one or more creditors of a deceased person seeking an account of the deceased’s estate, ascertainment of the deceased’s debt and an order for their payment. . . .”). *See also Femcare Ltd. v. Bright* (2000) 172 A.L.R. 713, para. 61 (per Black, C.J., Sackville & Emmett JJ.); *Smith*, 57 U.S. at 302–03; *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 947 (E.D. Tex. 2000) (“The modern-day class action is a representative lawsuit born probably some time during the Middle Ages.”); *Schutt Flying Acad. (Aus.) Pty. Ltd. v. Mobil Oil Aus. Pty. Ltd.* (2000) 1 V.R. 545, 560 n.41 (Ormiston, J.) (stating that the first representative suit took place “almost precisely 800 years” before the present rules were made); S.J. Stoljar, *The Representative Action: An Equitable Post-Mortem*, 3 U. W. AUSTL. L. REV. 479 (1954).

20. *See Wood v. McCarthy* [1893] 1 Q.B. 775, 777 (Wills, J.) (“For a very long time past the Court of Chancery has been in the habit of allowing a certain number of a class of defendants to represent the whole body.”); *Bromley v. Williams* (1863) 32 Beav. 177, 188 (Romilly, MR) (“if they are so numerous that they cannot be made parties to the cause . . . , then you may make two or three of a class Defendants to represent the interest of all that class”); *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, 438 (Lord Macnaghten); *Henson v East Lincoln Township*, 108 F.R.D. 107, 111 (C.D. Ill. 1985); *Shaw*, 91 F. Supp. 2d at 946–47; Wolfson, *supra* note 5, at 462–63.

21. *See* Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 880 (1977); Miller, *supra* note 5, at 1380; CONTE & NEWBERG, *supra* note 5, at 339; Kruger & Rogers, *supra* note 11, at 844.

solve common problems of land tenure suits by a creditor against a joint stock enterprise; and suits by a parson against his parishioners to collect tithes.”²²

Bilateral representative proceedings, involving representative plaintiffs and representative defendants, were also allowed,²³ as highlighted by the 1853 decision of the U.S. Supreme Court in *Smith v Swormstedt*.²⁴

B. The Rules Governing Representative Proceedings

This practice was retained in post-Judicature systems of procedure and regulated, at first, by Rule 10 of the English Rules of Procedure.²⁵ This rule, which was scheduled to the *Supreme Court of Judicature Act 1873*, provided that “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.”²⁶

Similar provisions may be found in the rules of procedure that currently govern litigation in all Canadian²⁷ and Australian²⁸ jurisdic-

22. CONTE & NEWBERG, *supra* note 5, at 338.

23. See *Comm’rs of Sewers of the City of London v. Gellatly*, 3 Ch. D. 610, 615 (1876) (Jessel, M.R.): “[W]here one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right . . . some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted.” For a recent attempt to prosecute a bilateral representative proceeding, see *Cauvin v. Philip Morris Ltd.* (2003) N.S.W.S.C. 736, paras. 37–39 (Windeyer, J.).

24. 57 U.S. 288 (1853). “The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice.” *Id.* at 303.

25. See FC COMMITTEE, *supra* note 5, at 6; *Western Canadian*, 201 D.L.R. at 396 (McLachlin, C.J.); Peter P. Mercer, *Group Actions in Civil Procedure in Canada*, in CONTEMPORARY LAW: CANADIAN REPORTS TO THE 1990 INTERNATIONAL CONGRESS OF COMPARATIVE LAW 249, 252 (1990); Kazanjian, *supra* note 18, at 412. In the U.S., “the right to institute a defendant, as well as a plaintiff, class action was first codified in 1912 in the Federal Rule of Equity 38, and was then recodified in the 1939 version of the Federal Rule of Civil Procedure. In 1966, the current version of rule 23 was adopted, once again, explicitly permitting the use of defendant class actions.” Holo, *supra* note 4, at 223. See also MILLER, *supra* note 5, at 1383 n.91; CONTE & NEWBERG, *supra* note 5, at 339; and Ancheta, *supra* note 5, at 286 n.18.

26. Supreme Court of Judicature Act, 1873, 38 & 39 Vict., c. 66.

27. See FC COMMITTEE, *supra* note 5, at 6; David A. Crerar, *The Restitutionary Class Action: Canadian Class Proceedings Legislation as a Vehicle for the Restitution of Unlawfully Demanded Payments, Ultra Vires Taxes, and Other Unjust Enrichments*, 56 U. TORONTO FAC. L. REV. 47, 78 n.147 (1998); *Western Canadian*, 201 D.L.R. at 398.

tions. In Alberta, for instance, Rule 42 provides that “where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorised by the court to defend on behalf of or for the benefit of all.”²⁹

The Supreme Court of Canada has recently held in *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*³⁰ that representative proceedings should be allowed to proceed under Alberta’s Rule 42 (and therefore equivalent provisions) where the following conditions are met:³¹

- (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions

28. See Justice S. Charles, *Class Actions in Australia 2–4* (1996) (unpublished paper presented at the Australian Bar Association Conference, San Francisco, Cal., on file with author); S. Stuart Clark & C. Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 289, 293 (2001); Maggie Doyle, *The Nature of Representative or Class Actions in the Context of Compensation Claims Against Resources and Utilities Companies*, 1999 AUSTL. MINING & PETROLEUM L. ASS’N Y.B. 277, 278 (2000); M. Tilbury, *The Possibilities for Class Actions in Australian Law 4* (1993) (unpublished paper delivered at the 1993 Australian Legal Convention in Hobart, Australia, on file with author); Barry Lipp, *Mass Tort Class Actions under the Federal Court of Australia Act: Justice for All or Justice Denied?*, 28 MONASH U. L. REV. 360, 362–63 (2002). In 1982, a unique representation order was sought, in relation to a defendant representative proceeding, as one of the proposed representative defendants was the then Prime Minister of Australia. See *Tasmania Wilderness Soc’y, Inc. v. Fraser* (1982) 153 C.L.R. 270, 273 (Mason, J.).

29. Chief Justice Moore of the Alberta Court of Queen’s Bench rejected the argument that Rule 42 permits only two ways by which a representative action may be commenced: (a) the plaintiff may sue on behalf of a plaintiff class if the plaintiff so chooses; and (b) the Court may authorize a defendant to defend on behalf of or for the benefit of a group. *Anderson Exploration Ltd. v. PanAlberta Gas Ltd.*, [1997] 53 Alta. L.R.3d. 204, para. 13. Chief Justice Moore recognized a third scenario:

Although the Rule does not expressly authorise a defendant to make an application to have a plaintiff sue on behalf of a class, neither does the Rule expressly prohibit such an application. As Rule 42 is capable of sustaining a broader interpretation, I see no reason to give it a limited interpretation that would have the effect of preventing a defendant from taking a step that may avoid a multiplicity of actions.

Id.

30. [2001] 201 D.L.R. (4th) 385.

31. These conditions were enunciated by the Alberta Court of Appeal in *Korte v. Deloitte, Haskins, & Sells*, [1993] 135 A.R. 389, paras. 15–22. The Supreme Court indicated that “the *Korte* criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted.” See *Western Canadian*, 201 D.L.R. at 400. The Supreme Court’s endorsement of *Korte* has had the desirable effect of ensuring that the same criteria are applied by all Canadian Courts with respect to the various, but very similar, rules governing representative actions. See *Neufeld v. Manitoba*, [2002] 24 C.P.C. (5th) 266, paras. 6–11; *Smith v. Can. (Minister of Indian Affairs & N. Dev.)*, [2002] F.C.T. 1090, paras. 8–9 (Hugessen, J.).

are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.³²

A number of problems have been encountered in relation to the operation of Rule 42 and its counterparts.³³ These problems have resulted in the introduction of comprehensive class action regimes³⁴ in the Canadian provinces of Quebec,³⁵ Ontario,³⁶ British Columbia,³⁷ Saskatchewan,³⁸ Newfoundland and Labrador,³⁹ Manitoba⁴⁰ and Al-

32. *Western Canadian*, 201 D.L.R. at 404. Australia's counterpart to the Supreme Court, the High Court of Australia, has also recognized a judicial power to terminate a properly instituted representative proceeding. See *Carnie v. Esanda Fin. Corp.* (1995) 182 C.L.R. 398, 405.

33. "The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights." *Western Canadian*, 201 D.L.R. at 399. See also *Mobil Oil Austl. Pty. Ltd. v. Victoria* (2002) 189 A.L.R. 161, 171 (holding that representative proceedings provisions are valid); *Pauli v. Ace Ina Ins.* (2002) 322 A.R. 126, paras. 22–33; ALRI REPORT, *supra* note 5, ¶¶ 99–100; *Kainaiwa/Blood Tribe v. Canada*, [2001] FTR LEXIS 1385, at *8–10; *Ho-A-Shoo v. Attorney-General of Canada*, [2000] 47 O.R.3d 115.

34. The Scottish Law Commission has described the class action procedure "as a sophisticated and improved version" of the representative action procedure. See SCOTTISH LAW COMMISSION, DISCUSSION PAPER No. 98: MULTI-PARTY ACTIONS: COURT PROCEEDINGS AND FUNDING (1994), at ¶ 6.1 [hereinafter SLC REPORT]. See also ALRI REPORT, *supra* note 5, at xix–xx; ALRC REPORT, *supra* note 10, at ¶ 5 ("[t]he class action is an extension of representative actions which originated in the English Chancery Courts."); *Carnie*, 182 C.L.R. at 403–04 (Mason, Deane & Dawson, J.J.) (interpreting representative actions in broad fashion); Justin Scott Emerson, *Class Actions*, 19 VICTORIA U. WELLINGTON L. REV. 183, 184 (1989) (describing the class action procedure in New Zealand); Charles, *supra* note 28, at 4; *Enge v. North Slave Metis Alliance*, [1999] CarswellNWT 127 (Westlaw), para. 6.

35. Code of Civil Procedure of Quebec, R.S.Q., ch. C–25, Book IX (effective as of January 1979), available at <http://www.canlii.org/qc/laws/sta/c-25/20040802/whole.html> (last visited Aug. 14, 2004) [hereinafter Quebec Code].

36. Class Proceedings Act, R.S.O., ch. 6 (1992) (effective as of January 1993), available at <http://www.canlii.org/on/laws/sta/1992c.6/20040802/whole.html> (last visited Aug. 14, 2004) [hereinafter Ontario Act].

37. Class Proceedings Act, R.S.B.C., ch. 50 (1996 Can.) (effective as of August 1995), available at http://www.qp.gov.bc.ca/statreg/stat/C/96050_01.htm (last visited Aug. 14, 2004) [hereinafter BC Act].

38. Class Action Act, S.S., ch. C–12.01 (2001) (effective as of January 2002), available at <http://www.canlii.org/sk/laws/sta/c-12.01/20040618/whole.html> (last visited Aug. 14, 2004) [hereinafter Saskatchewan Act].

39. Class Actions Act, NFLD. R.S., ch. C–18.1 (2001 Can.) (effective as of April 2002), available at <http://www.canlii.org/nl/laws/sta/c-18.1/20040706/whole.html> (last visited Aug. 14, 2004) [hereinafter NL Act].

40. Class Proceedings Act, C.C.S.M. c. C130 (2002) (effective as of January 2003), available at <http://www.canlii.org/mb/laws/sta/c-130/20040802/whole.html> (last visited Aug. 14, 2004) [last visited Manitoba Act].

berta⁴¹ and in the Federal Court of Canada;⁴² and in the Federal Court of Australia⁴³ and in the Australian States of Victoria⁴⁴ and South Australia.⁴⁵ Some of the shortcomings of the rules governing representative proceedings were recently described as follows by the Supreme Court of Canada:

Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to "opt out" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.⁴⁶

C. Traditional Judicial Approach to Opt Out Rights

As was noted above by the Supreme Court, the rules governing representative proceedings do not expressly vest courts with the power to allow represented persons to exclude themselves from the

41. Class Proceedings Act, S.A. 2003, c. C-16.6 (2003) (received the royal assent on 16 May 2003, but is not yet proclaimed), available at <http://www.canlii.org/ab/laws/sta/c-16.6/20040430/whole.html> (last visited Aug. 14, 2004) [hereinafter Alberta Act].

42. Federal Court Rules 1998 (SOR/98-106), Rules 299.1 to 299.42, available at <http://laws.justice.gc.ca/en/F-7/SOR-98-106/109744.html#rid-110035> (last visited Aug. 14, 2004) [hereinafter RC Rules]. This regime commenced in November 2002.

43. Federal Court of Australia Act, 1976, Pt. IVA [hereinafter Pt. IVA]. This regime came into operation in March 1992. See *Mobil Oil Austl. Pty. Ltd. v. Victoria* (2002) 189 A.L.R. 161, 169.

The rules permitting joinder of plaintiffs in one action and the rules providing for representative actions . . . came, so it would seem, to be seen as not flexible enough to accommodate all cases in which it would be convenient for there to be only one action to determine all the claims that were or could be made by a large number of persons against a defendant. . . . Provision has now been made in more than one Australian jurisdiction for 'class' or 'group' actions.

Id.

44. Supreme Court Act, 1986, pt. 4A (Vict., Austl.) [hereinafter pt. 4A]. This regime was deemed to have come into operation in January 2000. See *Cook v. Pasmenco* (2000) VSC 534, para. 10.

45. Supreme Court Rules, 1987, Rule 34 (South Austl.). This regime commenced in January 1987.

46. *Western Canadian*, 201 D.L.R. at 399. See also FC COMMITTEE, *supra* note 5, at 11-12; *Interclaim Holdings Ltd. v. Down*, [1999] CarswellAlta 1112, para. 4; *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins, & Sells*, [1984] 27 Man. R.2d. 311, paras. 8-9 (Kroft, J.) (suggesting the skeletal nature of Queens Bench Rule 58); *Guarantee Co. of N. Am. v. Caisse Populaire de Shippagan Ltee.*, [1988] 86 N.B.R.2d 342, paras. 12-19; *Lee v. OCCO Dev. Ltd.*, [1994] 148 N.B.R.2d. 321, para. 7 (Creaghan, J.) (referring to the lack of detailed rules governing class actions); *Horne v. Can. (Attorney Gen.)*, [1995] CarswellPEI 39, para. 25 (MacDonald, C.J.) (indicating Rule 14.01 fails to anticipate many issues in regulating class actions); Julian Donnan, *Class Actions in Securities Fraud in Australia*, 18 CO. & SEC. L.J. 82, 96 (2000).

representative proceedings and thereby avoid being bound by the outcome of such proceedings.⁴⁷ The traditional approach to this issue has been to deny to members of plaintiff classes the ability to opt out.⁴⁸ Class members who did not wish to be represented by the representative plaintiff or who opposed the proceeding could apply to the court to be appointed as a defendant in the action⁴⁹ or to be represented by a representative defendant.⁵⁰ The rationale for this regime was described as follows by an English judge, Justice Megarry, in 1969: “It seems to me that the important thing is to have before the court, either in person or by representation, all who will be affected; and provided that the issue will be fairly argued out.”⁵¹

A similar approach has been followed in the context of defendant representative proceedings.⁵² As was indicated by Lord Justice Staughton of the United Kingdom Court of Appeal in *Irish Shipping Ltd. v. Commercial Union*: “The legal advisers of Commercial Union and Alliance [the representative defendants] are no doubt capable of arguing that point; and I am confident that the foreign insurers [some

47. See also ALRC REPORT, *supra* note 10, at ¶ 5; ALRI REPORT, *supra* note 5, at ¶ 445; *Femcare Ltd v. Bright* (2000) 172 A.L.R. 713, ¶ 87 (“The representative procedure stemming from the practice of the Court of Chancery did not make provision for a represented party to opt out.”). But see Richard York, *All Together Now: Standard Term Contracts and Representative Actions*, 10 J. CONT. L. 85, 92 (1996) (“[A]n ‘opt-out’ procedure may actually be required by the words of rule 13(1) [of the NSW Supreme Court Rules]. The rule allows a representative action to be continued on behalf of ‘all except one or more of’ the represented persons. This clause, at least, requires the court to consider any application from a represented person who independently seeks to opt out of a representative action.”).

48. *Chippewas*, 29 O.R.3d at 558–59; ALRC REPORT, *supra* note 10, at ¶ 100; Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT’L L. 249, 252 (2001); *Carnie v. Esanda Finance Corp. Ltd.* (1996) 38 N.S.W.L.R. 465, 472 (“[T]he old equity procedure did not involve opting in or opting out.”). See also *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, 2 K.B. 1021, 1039 (C.A. 1910) (“The plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision.”); *Sykes v. One Big Union*, [1936] 43 Man. R. 542, 550; *Kazanjan*, *supra* note 18, at 422.

49. *Wilson v. Church*, 9 Ch. D. 552, 558–59 (1878); *Watson v. Cave*, No. 1, 17 Ch. D. 19, 21 (1881); *Hancock v. Scattergood* (1955) S.A. St. R. 1, 20; *John v. Rees*, 2 All E.R. 274, 284 (1969); *May v. Newton*, 34 Ch. D. 347, 349 (1887); *Fraser v. Cooper, Hall, & Co.*, 21 Ch. D. 718, 719 (1882).

50. *Fraser*, 21 Ch. D. at 719; *Hancock*, S.A. St. R. at 20; *John*, 2 All E.R. at 284. At the same time, courts have displayed a willingness to “redefine the class to exclude any persons where there is evidence, either at trial or before, that indicates that such a person may be prejudiced if included in the class.” *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells*, [1985] 16 D.L.R. (4th) 218, 230. See also *Anderson Exploration Ltd. v. PanAlberta Gas Ltd.*, [1997] 53 Alta. L.R.3d 204, para. 29.

51. *John*, 2 All E.R. at 284. But see *Smith v. Cardiff Corporation*, 1 Q.B. 210, 222 (1954).

52. See, e.g., *Clark v. Univ. of Melbourne* (1978) V.R. 457, 477.

of the defendant class members] would trust them to argue it. If I am wrong about that, one or more of the foreign insurers can apply to be joined as defendants.”⁵³

The 1996 judgment of Justice Adams of the Ontario Superior Court of Justice in *Chippewas of Sarnia Band v. Canada (Attorney General)*⁵⁴ is consistent with the traditional judicial reluctance to employ opt out regimes, highlighted above. The proceedings in *Chippewas* involved the first attempt to seek certification of a defendant class under the Ontario Act. The proposed representative defendants argued that such a certification would not be appropriate given that it was likely that most members of the class would simply opt out of the proceeding.⁵⁵ In response to this submission the court indicated that if that scenario eventuated it would consider making an order that the proceedings proceed as a defendant representative proceeding, pursuant to Rule 12.7, Ontario’s counterpart to Alberta’s Rule 42. This proposed strategy clearly suggests that, in the court’s view, represented persons could not opt out of defendant representative proceedings.⁵⁶

D. Contemporary Judicial Approach to Opt Out Rights

The judicial approach described above appears to have been abandoned by most contemporary courts. In Australia, in the 1996 case of *Carnie v. Esanda Finance Corp Ltd.*,⁵⁷ Justice Young of the Supreme Court of New South Wales indicated that the traditional approach—of not allowing class members to exit the proceedings—was appropriate when proceedings involved a joint right or a general right. Yet, in other cases, the proper approach to apply was to choose between an opt in model⁵⁸ and an opt out model.⁵⁹ Justice Young considered that in the plaintiff representative proceeding before him,

53. 3 All E.R. 853, 862 (C.A. 1989). See also *Parr v. Lancashire & Cheshire Miners’ Federation*, 1 Ch. 366, 375 (1913) (“What is wanted is a sufficient representation, and if the executive committee or if the trustees had desired to be added as defendants in this action, there is no question that upon application they could have been added as defendants. . .”).

54. *Chippewas*, 29 O.R.3d at 549.

55. *Id.* at 568.

56. See ALRI REPORT, *supra* note 5, at ¶ 448 n.385.

57. (1996) 38 N.S.W.L.R. 465.

58. *Id.* at 469. (“[W]ith opt-in, a person does not become one of the represented parties unless he or she makes a deliberate decision to be counted amongst those represented.”).

59. *Id.* at 472. (“Whatever its origin, the opt-in or opt-out procedure has now been accepted in most of the common law world which has adopted class actions as being a convenient system in order to notify people of proceedings in the court which might affect them.”).

an opt in procedure was appropriate.⁶⁰ In the same year, another justice of the same court, Justice Bryson, indicated that an opt in regime would, in most cases, be preferable to an opt out regime.⁶¹ Similarly, in 1997, Justice Sackville of the Federal Court of Australia made the following comments in relation to a defendant representative proceeding:

It seems to me that, before a representative order could be made (assuming this was ultimately considered to be the appropriate course), an appropriate effort should be made to ascertain whether the Agencies [the represented persons] themselves consider it appropriate to be joined in the proceedings through a representative order and whether they accept that their interests are the same as the State [the representative defendant] and other Agencies.⁶²

In the 1990s a number of Canadian courts also began to embrace opt in regimes in relation to plaintiff representative actions. In *Enge v. North Slave Metis Alliance*, for instance, Justice Vertes of the Northwest Territories Supreme Court ordered the representative plaintiffs to:

60. *Id.* at 473. (“[W]hen one has the situation that there is a potential liability on the member of the group.”). Judge Young also indicated that notices should be sent to all represented persons, in order to allow the Court to make an informed decision as to whether or not it should order the discontinuance of the representative proceeding. *See also* Robin Trigge, *Representative Actions under the Uniform Civil Procedure Rules*, 21 QUEENSL. LAW. 110, 112, 114–15 (2001); John Wilkin, *Representative Proceedings in Victoria: No Change in Contract Cases?*, 70(8) L. INST. J. 36, 38–39 (1996); *Proposal for a New Supreme Court Rule on Representative Proceedings in NSW* (Centre for Legal Process of the NSW Law Foundation and Public Interest Advocacy Centre, N.S.W., Austl. 1998), at ¶ 4.3.3 [hereinafter NSW Law Foundation].

61. Bryson stated:

“The court should only decide that some person who has not clearly stated his position should be involved in proceedings where it is impractical to obtain a decision from that person for some reason such as minority or incapacity, or where there is an overwhelming probability that such a person would wish to be involved. If it is possible to consult them, the court should not make any paternalistic assumption about its capacity to decide on behalf of others that proceedings are to be brought on their behalf. I would think there would be few occasions when what was referred to as an ‘opt out’ notice would be appropriate.” *Shepherd v. Aus. & N.Z. Group Ltd.* (1996) 20 A.C.S.R. 81, 100–01. *But see* *Rugby Union Players Ass’n v. Australian Rugby Union Ltd.*, 1997 NSW LEXIS 959, at *45 (Sup. Ct. N.S.W. 1997) (Giles, C.J.).

[T]he parties adverted to the adoption of an ‘opt-in’ or ‘opt-out’ procedure. . . . Given the paucity of relevant evidence, an ‘opt-out’ procedure should certainly not be adopted, and even an ‘opt-in’ procedure whereby the fifth defendant represented Players who consented to being represented would, it seems to me, leave an unacceptable risk that the different positions of consenting Players would not be adequately exposed.

Id.

62. *BT Australasia*, 1997 AUST FEDCT LEXIS 1068, at *87. *See also* *Morgan’s Brewery Co. v. Crosskill*, 1 Ch. 898, 900 (1908) (“I am not prepared to decide the questions raised in the absence of the other members of the [defendant] class, so as to bind them, unless the class has been consulted.”).

give notice of these proceedings, to be published in two consecutive issues of a newspaper of general circulation in Yellowknife, inviting anyone who may allegedly be part of the class represented to identify themselves to counsel for the plaintiffs. The notice will also provide that at the expiry of 60 days from the date of the second publication the class will be closed.⁶³

It was not until July 2001 that the Supreme Court of Canada was required to consider this issue. In *Western Canadian*, Chief Justice McLachlin, speaking for a unanimous court, indicated that:

[a] judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.⁶⁴

Curiously, despite this clear directive from the Supreme Court, a number of Canadian courts have adopted an approach similar to that enunciated in the Australian case of *Carnie*⁶⁵ by holding that a decision needs to be made, on the facts of the case, between an opt in model and an opt out model.⁶⁶ In one case, a judicial decision, in favor of an opt in scheme, was made.⁶⁷ In another plaintiff representative action, it was held that non-exclusion from the class is appropriate where “the right to opt out is meaningless. It is meaningless, as a

63. [1999] CarswellNWT 127, para. 17. See also *Holtslag v. Alberta*, [2000] 263 A.R. 394, para. 13 (Binder, J.); *Olsen v. Alberta Hail & Crop Ins. Corp.* [1995] CarswellAlta 41.

64. *Western Canadian*, 201 D.L.R. at 404. The power and duty of the Court presiding over representative proceedings to ensure that class members are provided with adequate notice of the proceedings have also been recognized by the High Court of Australia. See *Carnie v. Esanda Fin. Corp.* (1995) 182 C.L.R. 398, 422. The judicial recognition of this duty addresses the following criticism of the practice of not allowing class members to exit the proceedings, formulated by the Ontario Law Reform Commission: “[the rules governing representative proceedings do] not require that notice of the action be given to the class. As a result, class members who may wish to apply to be made defendants may well be unaware of the existence of the action.” OLRC REPORT, *supra* note 5, at 469.

65. This is a strange scenario given that *Western Canadian* is “now the leading case on class actions in jurisdictions . . . without comprehensive rules and/or legislative schemes governing class actions.” *Neufeld v. Manitoba*, [2001] CarswellMan 563, para. 3 (Hamilton, J.).

66. See, e.g., *Scott v. St. Boniface Gen. Hosp.*, [2002] 11 WWR 463, 471, para. 29 (MacInnes, J.); *Lloyd v. Imperial Oil Ltd*, [2003] CarswellAlta 751, para. 37 (Fraser, J.).

67. “The Plaintiffs may give notice of these proceedings to the other 30 investors, giving them 30 days to join the action.” *Metera v. Financial Planning Group*, [2003] CarswellAlta 516, para. 42 (Slatter, J.).

practical matter, if the member would be affected by a decision of the court notwithstanding an informed decision to opt out.”⁶⁸

E. Call for a Return to Non-Exclusion from Defendant Representative Proceedings

It is submitted that, in relation to defendant representative proceedings, a return to the traditional approach is called for. Opt in regimes have been correctly rejected by most law reform bodies⁶⁹ and commentators⁷⁰ as they drastically reduce the size of potential classes sought to be represented by representative plaintiffs.⁷¹ This adverse impact of opt in regimes would be even more pronounced in defendant representative proceedings given that, unlike plaintiff class members, defendant class members would be exposed to potential liability, in the event of an outcome of the representative proceeding

68. *Taylor v. Alta. Teachers' Ass'n*, [2002] A.B.Q.B 554, para. 7.

If the plaintiffs are successful in this action, the remedy obtained will be an order directing the defendant to repay administrative costs withdrawn from the plan and to stop this activity in the future. The opting out by any class member or group of members could not change this potential outcome or affect the individual rights of someone choosing to opt out.

Id. at para. 8.

69. *See, e.g.*, MANITOBA LAW REFORM COMMISSION, CLASS PROCEEDINGS 63–66 (Report No. 100 1999) [hereinafter MLRC REPORT]; ALRI REPORT, *supra* note 5, at ¶ 242 (“An opt in requirement would be fundamentally inconsistent with the access to justice rationale endorsed as a basic justification for expanded class proceedings legislation. That is to say, making justice available is the predominant policy concern and inclusiveness in the class should be promoted. People who are vulnerable should be swept in”); Ministry of the Attorney General, British Columbia, Consultation Document: Class Action Litigation for British Columbia 8 (1994) (“[the opt out model is] the more effective means to ensure that the barriers to justice, which class actions are intended to overcome, are reduced.”).

70. *See, e.g.*, John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 20–1 (1983); RAND INST. CIV. JUST., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN: EXECUTIVE SUMMARY 26 (1999) (“In consumer class actions involving small individual losses, requiring class members to opt in would lead to smaller classes that would likely obtain smaller aggregate settlements. . . . The social science research on active versus passive assent suggests that minority and low-income individuals might be disproportionately affected by an opt-in requirement, a worrisome possibility.”), available at <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf> (last visited Aug. 14, 2004).

71. *See e.g.*, Vince Morabito, *Class Actions: The Right to Opt Out Under Part IVA of the Federal Court of Australia Act 1976 (Cth)*, 19 MELB. U. L. REV. 615, 627–35 (1994). *See also* NSW Law Foundation, *supra* note 60, at ¶ 4.3.3 (“[T]he notion that people can only be part of a representative proceeding by providing consent to opt-in makes the procedure tantamount to joinder. Three judges of the Victorian Supreme Court have described the Victorian opt-in model as akin to joinder, and quite distinct from the popular notion of representative proceedings. Arguably this is inconsistent with the rule which contains no explicit requirement for consent. The concept of representation is consistent with having a constituency rather than the consent of being appointed as an agent.”).

which is not favorable to the class, and therefore have a greater incentive not to opt in.⁷²

While opt out regimes are vastly superior to opt in regimes, it is submitted that they should not be applied with respect to defendant representative proceedings. The crucial distinction between plaintiff class members and defendant class members, for the purpose of this issue, was aptly explained by the Alberta Law Reform Institute (ALRI):

Generally speaking, plaintiffs choose who they will name as defendants in their lawsuits, and the only way that someone so named can remove themselves from the lawsuit at an early stage is by establishing that there is no foundation for the plaintiff's claim against them. In short, the ordinary civil litigation would not be terribly effective if defendants could choose to opt out of lawsuits. In considering whether members of a defendant class should have the right to opt out or not, we think the more appropriate analogy is with defendants in ordinary actions than with members of the plaintiff class in a plaintiff class action. On this basis we do not think that members of the defendant class should have the right to opt out of the proceeding.⁷³

The rules governing representative proceedings themselves draw a distinction between proceedings brought by representative plaintiffs and proceedings brought against representative defendants. The former may be prosecuted without the need to first seek court authorization.⁷⁴ Court authorization is, instead, essential in relation to

72. "The crux of the distinction is: the unnamed plaintiff stands to gain while the unnamed defendant stands to lose." *Thillens, Inc. v. Cmty. Currency Exch. Ass'n*, 97 F.R.D. 668, 674 (N.D. Ill. 1983).

73. ALRI REPORT, *supra* note 5, at ¶ 464. The reasoning of the ALRI renders inapplicable to defendant representative proceedings the following criticism of the judicial practice of requiring those class members who wish to opt out to apply to the Court to be appointed as defendants, put forward by the Ontario Law Reform Commission: "A problem lies in the degree of activity demanded of the class member. Requiring a person who prefers to be excluded from the class to apply to the court usually will necessitate the services of a lawyer, with attendant costs in time and money. Thus, even if the class member somehow becomes aware of the class action and determines to seek exclusion from the class, he will be obliged to take a relatively expensive and cumbersome route to achieve this end." OLCRC REPORT, *supra* note 5, at 469.

74. "Although [the rule governing representative proceedings] requires that a representative defendant be appointed or authorized by the court to defend the action on behalf of a defendant class, a representative plaintiff requires no authorization. In other words, a representative plaintiff may well be a self-appointed advocate of the class. The absence of court approval of the representative plaintiff results in the distinct possibility that the class plaintiff may be an inadequate representative of the class. Given the binding effect of the judgment in a class action, the consequences for the other members of the class could be very prejudicial." OLCRC REPORT, *supra* note 5, at 33. *See also* Kazanjian, *supra* note 18, at 422.

defendant representative proceedings.⁷⁵ As was noted by the Supreme Court of British Columbia in *Kuzych v. White*:⁷⁶

In my view, [the rule governing representative proceedings] gives the plaintiff the right to select representative defendants when he issues his writ. He then proceeds at his own risk unless he satisfies the court at some stage of the proceedings that the persons so selected are proper persons for the court to recognize as representing numerous persons having the same interest in the cause.⁷⁷

There are only two legitimate reasons that a represented person may have for wishing to opt out of a defendant representative proceeding. One is a desire to have greater control over proceedings that might expose that person to liability.⁷⁸ But that need may be fulfilled by allowing such represented person to be appointed as a named defendant. As was explained above, this has been the approach traditionally adopted by courts to deal with those represented persons who did not wish to be represented by the named parties.

Another legitimate reason that a defendant class member may have for desiring to exit a defendant representative proceeding is a

75. “[The rule], in the form in which it is expressed, raises a question as to which I do not propose to decide anything, but it is strange that it runs thus as regards defendants. Reading the words relevant to defendants its language is ‘one or more of such persons may be sued or may be authorised by the Court or a judge to defend on behalf of or for the benefit of all persons so interested.’ One or more may therefore be sued on behalf of all or may be authorised to defend on behalf of all. If all can effectually be sued, it would be strange if all could not effectually defend. Can the rule mean that while all may be sued by representatives they cannot defend unless the Court gives authority to do so?” *Walker v. Sur*, [1914] 2 K.B. 930, 935 (Buckley, L.J.). See also *Sherbaniuk*, *supra* note 18, at 165–66.

76. [1952] 6 W.W.R. 567, 571–72. See also *Roche v. Sherrington*, [1982] 2 All E.R. 426, 428 (Slade, J.); *Walker*, 2 K.B. at 935; *Barrett v. Harris*, [1921] 51 O.L.R. 484, 491 (Middleton, J.) (“I should add that an order authorising the defendants to represent the class is, by the Rule, equally essential.”).

77. [1952] 6 W.W.R. 567, 571–72. Justice Van Camp of the Ontario Supreme Court (High Court of Justice) has explained that “there is no time limit specified. . . . However, the words ‘may be authorized by the court to defend on behalf of, or for the benefit of, all’ indicate to me that the time for obtaining a representation order is before any defence is submitted. It is difficult to accept that it can be done at any time because this could put the defendants in the position right up until trial of not knowing whether the action will ever be properly constituted.” *Dionisio v. Allain*, [1985] 50 C.P.C. 11, para. 23. Without a representation order, “it would appear that those members of the class not named in the suit will not be bound by the proceedings.” OLRC REPORT, *supra* note 5, at 33 n.155. See also BERNARD C. CAIRNS, AUSTRALIAN CIVIL PROCEDURE 254 (5th ed. 2002).

78. See, e.g., *Parsons & Starr*, *supra* note 5, at 892; *Gross*, *supra* note 5, at 624; *Diane P. Wood*, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 607–08 (1987) (“There has been a sense, however, that special solicitude is necessary toward the members of defendant classes. Any defendant, after all, hardly welcomes the idea of involvement in litigation. To be told . . . or to learn somehow that one is a defendant, but someone else is in charge of the lawsuit, seems even worse.”).

belief that the representative defendant is not adequately representative of the interests of the class.⁷⁹ But class members may request the court to replace the existing representatives or to appoint additional representatives.⁸⁰

It is also important to note that courts have implemented a number of safeguards designed to ensure that the interests of those represented by representative defendants are protected,⁸¹ including, of course, the withholding of a representation order.⁸² As these measures are similar to those employed in proceedings brought pursuant to class action regimes, they will be referred to throughout the study of defendant class actions developed in Part IV below.⁸³

79. See ALRI REPORT, *supra* note 5, at ¶ 466; *Technograph Printed Circuits, Ltd. v. Methode Elec. Inc.*, 285 F. Supp. 714, 721 (N.D. Ill. 1968); *Mudd v. Busse*, 68 F.R.D. 522, 529 (N.D. Ind. 1975); *In re Activision Sec. Litig.*, 621 F. Supp. 415, 434 (N.D. Cal. 1985); *Sebo v. Rubenstein*, 188 F.R.D. 310, 319 (N.D. Ill. 1999).

80. See *Nat'l Supply Co. Ltd. v. Greenbank*, [1941] 3 W.W.R. 711, 714.

[I]t is to be open to any one or more holders of royalty trust certificates to apply to have an additional person or persons appointed as a further representative of any class and added as a defendant if for any reason [the representative defendant] be considered by him or them as not qualified to represent all the certificate holders.

Id.

81. The High Court of Australia has drawn attention to “the capacity of the court managing representative proceedings to control the proceedings in such a manner as to ensure fairness, a capacity usually conferred by wide discretionary powers in relation to the conduct of the action.” *Mobil Oil Aus. Pty. Ltd. v. Victoria* (2002) 189 A.L.R. 161, 172 (Gleeson, C.J.). See also *John v. Rees*, 2 All E.R. 274, 283 (Ch. 1969); *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, 443; David Kell, Comment, *Evolution of Representative Actions*, 1993 LLOYD’S MAR. & COM. L.Q. 306, 306, 308; *RJ Flowers Ltd. v. Burns* [1987] 1 N.Z.L.R. 260, 282; *Farnham v. Fingold*, [1973] 2 O.R. 132, 136; Uff, *supra* note 18, at 64; *Carnie v. Esanda Fin. Corp.* (1995) 182 C.L.R. 398, 422 (Toohey & Gaudron, JJ.) (“The simplicity of the rule is also one of its strengths, allowing it to be treated as a flexible rule of convenience in the administration of justice. “); *Interclaim Holdings Ltd. v. Down*, [1999] A.C.W.S.J. LEXIS 54229, at *15–16 (Kent, J.); *Ranjay Sales and Leasing Ltd. v. Deloitte, Haskins and Sells*, [1985] 16 D.L.R. (4th) 218, 221 (Monnin, CJM); *Van Audenhove v. Nova Scotia (Attorney General)*, [1994] 134 N.S.R.2d 294, paras. 19–20.

82. See, e.g., *Temperton v. Russell*, [1893] 1 Q.B. 435; *Walker*, 2 K.B. at 930; *Roche*, 2 All E.R. at 426; *BT Australasia*, 1997 AUST FEDCT LEXIS at *1068; *London Ass’n for Protection of Trade v. Greenlands, Ltd.*, 2 A.C. 15, 39 (1916); *Barker v. Allanson*, [1937] 1 K.B. 463, 473, 475–76 (Greer, L.J.); *Cauvin*, (2003) N.S.W.S.C. at 736; Jillaine Seymour, *Representative Procedures and the Future of Multi-Party Actions*, 62 MOD. L. REV. 564, 572–74 (1999); J.F. Keeler, *Contractual Actions for Damages Against Unincorporated Bodies*, 34 MOD. L. REV. 615, 616 (1971); *Geddes v. Australasian Meat Indus. Employees’ Union* (1917) 17 N.S.W. St. R. 119; *Attorney General for Victoria v. City of Brighton* (1964) V.R. 59; *United Kingdom Nirex Ltd. v. Barton* [Oct. 13, 1986], Unreported, Q.B. (Henry, J.); *Elec. Comm. of New South Wales v. Arrow* (1990) 0001 NSW LEXIS 153119; *Mar. Union of Aus. v. Patrick Stevedores Operations Pty. Ltd.* (1998) 4 V.R. 143; *Carnie*, 182 C.L.R. at 408; *Geelong Wool Combing, Ltd. v. Textile, Clothing and Footwear Union of Australia* (2003) F.C.R. 773, para. 12 (Finkelstein, J.); *Cauvin v. Philip Morris Ltd* (2003) N.S.W.S.C. 631.

83. See *infra* notes 179, 181, 188, 189, 192, 194–196, 198, 201, 203 and 215.

III. DEFENDANT CLASS ACTIONS

A. Defendant Class Proceedings in Ontario

As was noted above, Ontario was the first and, until November 2002, only Canadian jurisdiction with a comprehensive class proceeding regime that enables the certification of defendant classes. The origins of the Ontario Act, which came into effect in January 1993, may be traced back to the outstanding study of the class action device undertaken by the Ontario Law Reform Commission (OLRC) in 1982.⁸⁴ After providing a brief summary of the major features of defendant class proceedings, the OLRC made no recommendations with respect to defendant class actions, as it was of the view that these actions raised distinct issues which necessitated a separate study.⁸⁵ A similar conclusion was reached by the Australian Law Reform Commission (ALRC) in 1988.⁸⁶ Class action reform in Ontario was considered again in 1990, this time by the Attorney General's Advisory Committee on Class Action Reform (Ontario Committee).⁸⁷ The Ontario Committee's proposed class action legislation included sections 3(2), (3) and (4), which are set out below:

84. See generally OLRC REPORT, *supra* note 5 (tracing the history of, outlining the costs and benefits of, and suggesting alternatives to class actions in Ontario).

85. According to the OLRC REPORT:

Defendant class actions raise many issues similar to those encountered in plaintiff class actions. This is apparent from a review of the case law under Rule 23. Among the issues that have arisen are the following: the adequacy of a member of the class to represent the class; the need for notice to members of the class regarding the action; the costs of the class action and the representative defendant's responsibility for those costs; the right of members of the class to remove themselves from the class by 'opting out'; the determination of individual issues once the common questions have been resolved; and settlement. However, while many of these issues are common to both plaintiff and defendant class actions, the solutions required in the defendant class action context may be quite different and, in our view, merit separate study.

Id. at 43-44.

86. According to the ALRC:

Representative defendant actions have the potential to impose direct liability on a member of the group. There is a strong argument for personal notice to be given to members of a defendant group. There may also be stronger arguments for ensuring that group members have general rights to opt out or intervene. These differences suggest that special rules may be needed to meet particular issues arising for defendant class actions. The issues merit separate study. The Commission makes no recommendations with respect to defendant classes in this report. The existing representative procedure should, however, be retained to enable defendant representative actions to be brought in appropriate circumstances.

ALRC REPORT, *supra* note 10, at ¶ 6. See also NSW Law Foundation, *supra* note 60, at ¶ 4.2.2.

87. MINISTRY OF THE ATTORNEY GENERAL, REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CLASS ACTION REFORM (1990) [hereinafter ONTARIO COMMITTEE].

(2) At any stage of a proceeding any party may move for an order requesting named defendants to defend the proceeding as a class and for an order appointing a defendant as the representative defendant.

(3) An order appointing a member of the class as the representative . . . defendant shall only be made with the consent of the person upon such terms as the court considers appropriate.

(4) On a motion pursuant [to subs (2)] or with respect to a resulting order the provisions of this Act with respect to certification apply *mutatis mutandis*.⁸⁸

The Ontario Committee's explanation of the rationale for recommending the certification of defendant classes was limited to the following comment: "[T]he Committee anticipates the need for defendant class proceedings and developed this provision to ensure that such proceedings were available and mirrored plaintiff class proceedings."⁸⁹ It is immediately apparent that there was no recognition on the part of the Ontario Committee of the distinctive features of defendant class proceedings adverted to by the OLRC and the ALRC. In light of the fact that the Ontario legislature implemented most of the Ontario Committee's recommendations, it is not surprising that defendant class proceedings brought under the Ontario Act are governed by the regimes, procedures and requirements that govern, and were designed for, plaintiff class proceedings.⁹⁰

Section 5 sets out five prerequisites for certification under the Ontario Act. The first requirement is that the pleadings disclose a cause of action.⁹¹ The second requirement is that there be an identifi-

88. *Id.* Rule 3.501(I)(2) of the Michigan Court Rules is broadly similar to the Ontario Committee's § 3(3) as it provides that "a representative of a defendant class, other than a public body or a public officer, may decline to defend the action in a representative capacity unless the court finds that the convenient administration of justice otherwise requires."

89. ONTARIO COMMITTEE, *supra* note 87, at 29–30.

90. The operation of statutes of limitations with respect to defendant class actions provides another major illustration of the problems created by the application to defendant classes, without alteration, of measures directed to members of plaintiff classes. Section 28 of the Ontario Act suspends the operation of such statutes for class members upon the filing of a class proceeding. *But cf.* *Berry*, [2001] Ont Sup CJ LEXIS 499, at *21 (Cumming, J.). The Court noted that Section 28 "would seem to operate only in favour of a plaintiff class against a *named* individual defendant(s). Where a limitation period has expired it is problematical for a plaintiff to later add defendants." To deal with this problem, the plaintiffs in *Berry* indicated to the Court that they would commence a new plaintiff class action, naming each of the defendant class members as individual defendants.

91. The Supreme Court of Canada has indicated that:

[T]he class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a

able class of two or more persons⁹² that would be represented by the representative plaintiff or defendant. The third requirement is that the claims or defenses of the class members raise common issues. The fourth requirement is that a class proceeding would be the preferable procedure for the resolution of the common issues. The final requirement is that there be a representative plaintiff or defendant who would fairly and adequately represent the interests of the class; has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding;⁹³ and does not have, on the common issues for the class, an interest in conflict with the interests of other class members.⁹⁴

The ability to commence defendant class proceedings, which is implied in Section 5, is made explicit by Section 4, providing that “any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.”⁹⁵ Another crucial provision of the Ontario Act, for present purposes, is Section 8(1)(f) which provides that an order certifying a proceeding as a class proceeding must specify the

pleading should not be struck for failure to disclose a cause of action unless it is ‘plain and obvious’ that no claim exists.

Hollick v. Toronto (City), [2001] 205 D.L.R. (4th) 19, 33.

92. See *Western Canadian*, 201 D.L.R at 401. (“[T]he class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified”.) See also *Prestage & McKee*, *supra* note 8, at 226.

93. This requirement has generated some difficulties in relation to representative defendants. See *Chippewas*, [1996] 29 O.R.3d at 570–72; *Berry*, Ont Sup CJ LEXIS 499, at 23–24 (Cumming, J.).

94. Two differences are apparent between the provisions of the Ontario Act governing defendant class actions and the provisions recommended by the Ontario Committee. The Ontario Committee’s proposed Section 3(3) imposed the requirement that the representative defendants provide their consent before assuming such a role. No similar provision appears in the Ontario Act. Secondly, the Ontario Act does not, unlike the provisions recommended by the Ontario Committee, provide that the provisions with respect to certification apply *mutatis mutandis* to defendant class proceedings.

95. “The respondents say it is up to the plaintiffs to decide who they want to sue; a party cannot simply decide on its own to become a defendant. In my view, s 4 relates to the commencement of a class action. It deals with a situation where an ordinary action has been commenced and a party decides to seek an order certifying it as a class action and appointing a representative defendant. The words ‘at any stage of the proceeding’ relate to the original action, not the class action once it is certified.” *Woods*, 17 C.P.C. (4th) at 382, paras. 15–16 (MacPherson, J.).

manner in which class members may opt out of the class proceeding and a date after which class members may not opt out. Any class member may opt out of the proceeding in the manner and within the time specified in the certification order.⁹⁶

The Ontario Committee expressed, as follows, its clear preference for the opt out model:

This provision sets out a class member's entitlement to withdraw from the class proceedings and, if desired, start an individual proceeding. . . . The value of such a model is that defendants to class proceedings are assured that they face all potential claimants in the one law suit. Those who opt-out can be specifically identified and dealt with on that basis. The opt-out model also increases the effectiveness of a class proceeding by not requiring potential litigants to take steps to be in the suit. This is particularly so in cases involving individual claims that are relatively small.⁹⁷

The Ontario Committee's comments above highlight, unambiguously, that its selection of the opt out model was based solely on the needs of plaintiff class members. No consideration was given by the Ontario Committee to the crucial issues of (a) whether the conferral of an opt out right upon members of defendant classes would serve any useful purpose, and (b) whether an opt out procedure is consistent with the objectives of defendant class proceedings.

B. Defendant Class Actions in the Federal Court of Canada

The *Federal Court Rules 1998* were amended by SOR/2002-417 to include Rules 299.1 to 299.42, in order to introduce a detailed framework to govern class actions before the Federal Court of Canada (FC Rules). These new rules came into operation in November 2002. This regime was based on the recommendations contained in a discussion paper, released in December 2000, by the Rules Committee of the Federal Court (FC Committee).⁹⁸ The FC Committee noted that there is no reason, in principle, for not permitting defendant class proceedings, as it would be unfair to deprive litigants "of the access and efficiencies of class actions when a claim is directed against a group (as opposed to on its behalf)."⁹⁹ But the FC Committee also drew attention to the fact that the rules governing class ac-

96. Ontario Act § 9.

97. ONTARIO COMMITTEE, *supra* note 87, at 33–34.

98. FC COMMITTEE, *supra* note 5.

99. *Id.* at 35.

tions should make it clear that “the criteria for certification . . . should apply as appropriate to the certification of a defendant class.”¹⁰⁰

This last comment evinces a recognition, on the part of the FC Committee, of the fact that some of the procedures governing plaintiff class actions may not be suitable for governing defendant classes. Disappointingly, this finding did not prompt the FC Committee to identify those areas where procedures, tailored specifically for defendant class proceedings, are called for. This weakness in the approach of the FC Committee is vividly highlighted by its discussion of its preference for opt out regimes. In reaching the conclusion that “the ability to opt out should be a right that members of the class can exercise,”¹⁰¹ no distinction is drawn by the FC Committee between plaintiff classes and defendant classes. A failure to ascertain whether the needs and circumstances of members of plaintiff classes, which justify the employment of opt out regimes, are the same as those of defendant class members is evident.

The implementation of most of the FC Committee’s recommendations has resulted in a regime where defendant class proceedings are referred to in only two provisions: Rule 299.15 and Rule 299.16(2). The former provision provides that “a party to an action against two or more defendants may, at any time, bring a motion for the certification of the action as a class action and the appointment of a representative defendant.” Meanwhile, Rule 299.16(2) provides that the other provisions found in the FC Rules, addressing plaintiff class actions, “apply, with the necessary modifications” to defendant class proceedings.¹⁰² No guidance is provided to the court as to what the concept of “necessary modifications” entails. More importantly, it is not clear whether this power to effect necessary modifications would authorize the court to remove privileges from defendant class members, such as the right to opt out, which are extended to all class members by the FC Rules.¹⁰³

100. *Id.*

101. *Id.* at 59.

102. It is interesting to note that this provision refers to all of the provisions governing class actions applying to defendant class proceedings with “necessary modifications” whilst the FC Committee’s recommendation envisaged necessary modifications, in relation to defendant classes, only of the criteria for certification. *See supra* note 100 and accompanying text.

103. Rule 299.23(1) allows class members to opt out of the class action in the manner and within the time specified in the certification order.

C. The Uniform Class Proceedings Act, the Alberta Law Reform Institute and the U.S. Uniform Class Actions Act

As was explained above, the employment of opt out regimes in all class proceedings, in Ontario and in the Federal Court of Canada, including those brought against defendant classes, stemmed from a failure of the committees, whose proposals formed the basis of the Ontario Act and the FC Rules, to turn their attention to the likely impact of opt out regimes on defendant class proceedings. On the other hand, the Alberta legislature was recently placed in a very advantageous position, as far as this issue was concerned. In fact, in its 2000 study of class actions, the ALRI did consider the ability of the defendant class action device to achieve some of its major objectives (such as access to justice and judicial economy) if class members were able to avoid any liability, arising from the unfavorable outcome of the class action, by simply lodging an opt out notice.¹⁰⁴

The ALRI concluded that no right to opt out should be available in defendant class proceedings, as the opt out procedure places in the hands of defendants the power to bring to an end a class action, before the merits of the plaintiff's case are considered. Furthermore, this power can be exercised despite the fact that the court has determined that the defendant class action procedure provides an appropriate means of managing the litigation, as the prerequisites for certification have been met.¹⁰⁵ The ALRI also persuasively argued that the interests of members of defendant classes may be fully protected, without the need to allow them to exclude themselves from the proceedings, by permitting them to apply (a) for the appointment of additional representative defendants and (b) to be added as named defendants.¹⁰⁶ But when the *Class Proceedings Act*, was unveiled in the Alberta Legislative Assembly on March 6, 2003,¹⁰⁷ the regime governing defendant class actions, proposed by the ALRI, was conspicuously absent. In fact, this new regime only authorizes plaintiff class actions. This omission stems from a decision by the Alberta Government to base its class action regime on the *Uniform Class Proceedings Act* (UCL Act) drafted in 1996 by the Uniform Law Conference

104. ALRI REPORT, *supra* note 5, at ¶¶ 464–467.

105. *Id.* at ¶¶ 464–65.

106. *Id.* at ¶¶ 466–67.

107. SA 2003, c C-16.5. This Act received the Royal Assent on 16 May 2003.

of Canada.¹⁰⁸ The UCL Act does not authorize defendant class proceedings.

The adoption of the UCL model in Alberta is, as far as defendant classes are concerned, incomprehensible. In fact, the ALRI directly considered the reasoning that was relied upon to exclude defendant class proceedings from the ambit of the UCL Act and found it unpersuasive.¹⁰⁹ One of the reasons for the failure of the UCL Act to authorize defendant class actions concerned the effect of opt out regimes: “unless special rules were inserted denying them the right to opt out, in many cases defendant class members would be likely to opt out and force the plaintiff to bear the cost of bringing individual actions against them.”¹¹⁰ It is difficult to understand why it is preferable to deprive potential litigants and the court system of the potential benefits associated with such proceedings, instead of creating a regime tailored for defendant class actions which, among other things, does not envisage opt out rights.

The approach recommended in the preceding sentence is the approach followed in the *Uniform Class Actions Act 1976* (Uniform Act), drafted by the U.S. National Conference of Commissioners on Uniform State Laws.¹¹¹ Section 8(d) of the Uniform Act provides that members of a defendant class, or of a plaintiff class against whom a counterclaim has been asserted, are not permitted to opt out of the action. The rationale for this prohibition is that “if members of a class against whom a claim is being asserted were permitted to exclude themselves, it is apparent that many class members would avail themselves of the opportunity, and the claimant’s possibility of satisfaction would be jeopardized.”¹¹²

The states of Iowa, New Hampshire and North Dakota have all adopted the Uniform Act.¹¹³ In Iowa, for instance, Rule 1.267(4) pro-

108. Alberta Law Reform Institute, *Current Projects: Class Actions* (2004) (“Our recommendations are based on the prototype of this model contained in the Uniform Class Proceedings Act adopted by the Uniform Law Conference of Canada in 1996.”), at <http://www.law.ualberta.ca/alri/crrntproj/classaction.html> (last visited Jan. 1, 2005).

109. ALRI REPORT, *supra* note 5, at ¶¶ 441–54.

110. Rogers, *supra* note 16, at 34.

111. See OLRC REPORT, *supra* note 5, at 69–70; Michele A. Druker, *The Iowa Uniform Class Actions Rule: Intended Effect and Probable Results*, 66 IOWA L. REV. 1241 (1981); Allen D. Vestal, *Uniform Class Actions*, 63 A.B.A. J. 837 (1977); Ian H. Scher, *A Critical View*, 63 A.B.A. J. 840 (1977).

112. Vestal, *supra* note 111, at 839. *But see* Scher, *supra* note 111, at 841.

113. IOWA R. CIV. P. 1.267(4); R. SUPER. CT. N.H. 27–A(f); and N.D. R. CIV. P. 23(h)(4). See also Holo, *supra* note 4, at 272 (recommending a new Rule 666(c)(2) for U.S. Federal Courts, which “states that no defendant class members may opt out. This provision simply en-

vides that “a member of a defendant class may not elect to be excluded.” Unfortunately, a different approach has been followed with respect to class actions in U.S. federal courts.

D. Rule 23 of the United States Federal Rules of Civil Procedure

Certification of a proceeding as a class action in U.S. federal courts requires compliance with two “steps.” First, a class “may sue or be sued” under Rule 23 if the proposed class satisfies the four threshold requirements of Rule 23(a): (1) numerosity—the class must be so numerous that joinder of all members is impracticable; (2) commonality—there must be questions of law or fact common to the class; (3) typicality—the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) adequacy of representation—the representative parties must fairly and adequately protect the interests of the class.

In addition, plaintiffs must satisfy one of the alternative conditions found in Rule 23(b). Rule 23(b) creates three different types of class actions. The first type is regulated by Rule 23(b)(1) and deals with situations where, in the absence of a class action, separate proceedings would either establish incompatible standards of conduct for the party opposing the class, or would practically prejudice the interests of class members not made parties. The second category of class actions is regulated by Rule 23(b)(2) and deals with cases where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”

Rule 23(b)(3) class actions concern cases where common questions of law or fact predominate over questions affecting only individual class members and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Rule 23(b)(3) enumerates four factors to be considered in authorizing a class proceeding under that subsection: “(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of

sure that defendant class actions will be optimally effective. By eliminating the risk, however small in reality, that defendants will opt out, the rule automatically makes defendant class actions more efficient.”).

concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”

The right to opt out is available to class members only in relation to one of the three types of class actions envisaged by Rule 23, namely, class actions governed by Rule 23(b)(3). In relation to class actions maintained under Rule 23(b)(3), Rule 23(c)(2) provides that notice must be given to the class members that: (A) the court will exclude him or her if he or she so requests by a specified date; (B) the judgment whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he or she so desires, enter an appearance through his or her counsel. In relation to the other two categories, notice to class members is not mandatory but American courts have, on occasions, utilized the wide discretion conferred on them by rule 23(d)(2) to require that notice be provided to class members.¹¹⁴

A number of similarities exist between the way in which Rule 23, the Ontario Act and the FC Rules address defendant class actions. Rule 23 extends to defendant classes—through the use of phrases and words such as “may sue or be sued” and “defenses”—the certification regimes and requirements that govern plaintiff class actions and which were created for those proceedings.¹¹⁵ Another similarity between the American and the Canadian approaches may be detected upon a review of the report of the advisory committee (U.S. Committee) that redrafted Rule 23 in 1966.¹¹⁶ No reference to defendant class proceedings appears in the U.S. Committee’s notes on Rule 23. This

114. Rule 23(d)(2) provides that “[i]n the conduct of actions to which this rule applies the court may make the appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defences, or otherwise to come into the action.” FED. R. CIV. P. 23(d)(2). As a result of amendments to Rule 23 that came into operation in December 2003, Rule 23(c)(2)(A) provides that “for any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class”.

115. See FED. R. CIV. P. 23(a). A similar approach was followed by the South African Law Commission. SALC REPORT, *supra* note 16, ¶ 2.5.7 (noting that “to make our intention clear, the draft bill should state that it is possible to institute *or defend* an action as a class action.”) (emphasis in original). See also LAW REFORM COMMISSION OF IRELAND, CONSULTATION PAPER ON MULTI-PARTY LITIGATION (CLASS ACTIONS) (LRC CP 25–July 2003) ¶ 4.149 (“The Commission believes that a single procedure should generally govern plaintiff and defendant class actions alike.”)

116. See *Advisory Committee Notes to Amendments of Rule 23*, 39 F.R.D. 69, 94–107 (1966) [hereinafter U.S. Committee].

omission has attracted vigorous criticisms from numerous U.S. commentators.¹¹⁷ Consequently, as was the case with the opt out recommendations of the Ontario Committee and the FC Committee, the U.S. Committee viewed the issue of class members exiting the proceedings solely from the perspective of plaintiff classes. The U.S. Committee explained the extension of a right to opt out to members of Rule 23(b)(3) classes by the following:

The interests of the individuals in pursuing their own litigation may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected.¹¹⁸

The District Courts for the District of Columbia and the Northern District of California, respectively, lamented that:

[u]nfortunately, the committee provides no examples of circumstances in which a *defendant* might be justified in excluding himself from a proper class action. Nor does it discuss the practical implications of exclusion from a defendant class.¹¹⁹

It is doubtful the Rule drafters foresaw the lack of practical utility of allowing a defendant to “opt out” of a class.¹²⁰

Discussion of the regimes governing defendant class proceedings in Canada and in the United States, and of the views of the various committees upon whose recommendations the regimes were based, provides an insight into the difficulties that Canadian and U.S. courts have faced in determining the proper approach to the question of exclusion from defendant classes by members of such classes. These courts have been provided with class action regimes that employ opt out regimes and have been directed to apply these regimes to all class proceedings, regardless of whether the proposed class is suing or is being sued.

Attention will now be turned to: (a) the conceptual and practical issues raised by the operation of opt out regimes in defendant class

117. See, e.g., Holo, *supra* note 4, at 223 (“[R]ule 23, as applied to defendant class actions, has a significant flaw: it contains no provisions specifically prescribing the proper procedures for certifying a defendant class. Rather, the rule simply applies the same provisions to both plaintiff and defendant class actions. However, because the prerequisites and requirements of rule 23 do not always apply to defendant class actions, courts are forced to fit potential defendant class actions into an inappropriate and awkward framework. Additionally, the framers of rule 23 never explained why defendant classes should be subject to the same procedural limitations as plaintiff class actions.”).

118. U.S. Committee, *supra* note 116, at 104–05.

119. *United States v. Trucking Emp., Inc.*, 75 F.R.D. 682, 693 n.8 (D.D.C. 1977).

120. *Weinberger v. Jackson*, 102 F.R.D. 839, 849 n.17 (N.D. Cal. 1984).

actions; and (b) the measures devised by Canadian and U.S. courts to grapple with these issues.

IV. OPTING OUT OF DEFENDANT CLASS ACTIONS

A. Potential Problems

A number of U.S. commentators have pointed out that the certification of defendant classes, where members of such classes have an unfettered right to opt out, constitutes a pointless exercise given that most class members can be expected to exit the proceedings.¹²¹ It must be acknowledged, however, that, in particular circumstances, there might exist incentives not to opt out of defendant classes.¹²² One such reason is the possibility and cost of “being individual defendants in separate actions or being individual defendants in a single, plaintiffs’ class action.”¹²³

Unfortunately, there is little information available concerning the percentage of class members who have opted out of defendant class proceedings, after being offered the opportunity to do so following the certification of defendant classes. The author was able to find information concerning opt out rates in only four defendant class actions: three in the United States and one in Ontario. In the Ontario proceeding, no defendant class members opted out.¹²⁴ In the United States, 3 defendants opted out of a class of 91;¹²⁵ no one exited another defendant class;¹²⁶ and in a third proceeding, 115 defendants opted out.¹²⁷

The opting out of defendant classes by a majority of class members “undermines the breadth and finality of judgments, increases the possibility of duplicative litigation, and lessens the probability of giv-

121. See Taylor, *supra* note 5, at 81 n.17; Wood, *supra* note 78, at 609; Ancheta, *supra* note 5, at 306–07; HARVARD Note, *supra* note 5, at 635 n.26; VALPARAISO Note, *supra* note 5, at 390; Lee, *supra* note 5, at 67; Theodore Merrill Bailey, Note, *Class Actions in Patent Suits: An Improper Method of Litigating Patents?* 1971 U. ILL. L. REV. 474, 480 n.49.

122. See, e.g., Wolfson, *supra* note 5, at 495–96. See also *infra* notes 157–160.

123. Berry v. Pulley, No. 97–CV–135179, [2001] Ont. Sup. C.J. LEXIS 499, at *20. See also ALRI REPORT, *supra* note 5, para. 449.

124. *Chippewas*, 29 O.R. 3d at 549, ¶ 772.

125. Spencer Williams, *Some Defendants Have Class: Reflections on the Gap Securities Litigation*, 89 F.R.D. 287, 297 (1980) (discussing defendant class action in *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283 (N.D. Cal. 1978)).

126. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 478 (2d Cir. 1995).

127. *In re Activision Sec. Litig.*, [1986–87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,998, 94,896 (N.D. Cal. Oct. 20, 1986).

ing plaintiffs full relief.”¹²⁸ The availability of a right to opt out of a defendant class action also has the undesirable effect of generally discouraging the commencement of suits against classes of defendants, thereby depriving society of the potential benefits associated with such proceedings. It does not appear unreasonable to submit that one of the major reasons for the attempts to seek certification of defendant classes under the Ontario Act in only a handful of cases is an assessment by lawyers acting for plaintiffs that the likelihood of many class members opting out would render the certification of defendant classes of very little practical benefit. The tendency of U.S. plaintiff attorneys to seek, whenever possible, certification of defendant classes under Rule 23(b)(1) or Rule 23(b)(2), so as to avoid Rule 23(b)(3) and its opt out regime,¹²⁹ appears to be consistent with this assessment of the Ontario regime.¹³⁰

The U.S. experience with defendant class proceedings also reveals that another significant problem generated by the ability to leave a defendant class stems from the privileged status which the rules governing the binding effect of class actions confer upon those class members who opt out. The rules in question are referred to in

128. *Williams v. Street Bd. of Elections*, 696 F. Supp. 1574, 1577 (N.D. Ill. 1988). *See also* *Wyandotte Nation v. City of Kansas City*, 214 F.R.D. 656, 664 (D. Kan. 2003) (“The court believes that preserving the right of class members to opt out at any time, as allowed by Rule 23(b)(3), would inhibit efforts to achieve a resolution of the liability issues.”); *Broadhollow Funding Corp. v. Fitzmaurice (In re Broadhollow Funding Corp.)*, 66 B.R. 1005, 1013 (Bankr. E.D.N.Y. 1986) (“If this action were certified under Rule 23(b)(3), the members of the class could ‘opt out’ . . . vitiating the certification process and undermining the chances that this litigation will resolve the common issue.”); *United States v. Conservation Chem. Co.*, No. 82-0983-CV-W-5, 1984 U.S. Dist. LEXIS 22022, at *17 (W.D. Mo. Nov. 14, 1984); *In re Arthur Treacher’s Franchisee Litig.*, 93 F.R.D. 590, 595 (E.D. Pa. 1982).

129. *See, e.g.*, *Henson v. E. Lincoln Township*, 814 F.2d 410, 413 (7th Cir. 1987); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Midland Bancor, Inc.*, 158 F.R.D. 681, 685-86 (D. Kan. 1994); *Williams*, 696 F. Supp. at 1576-77; *Mudd v. Busse*, 68 F.R.D. 522, 530 (N.D. Ind. 1975). *See also* *Graham C. Lilly, Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1040 (2003) (“Certification under Rule 23(b)(3) is understandably rare, since the mandatory opt-out provision would shatter maintenance of the class. Few plaintiffs would seek certification under (b)(3) only to have most, if not all, defendants leave the class.”); *Holo, supra* note 4, at 235; *Wood, supra* note 78, at 608; *Bailey, supra* note 121, at 480 n.49.

130. A number of representative defendants have, instead, expressed a preference for opt out defendant classes. *See, e.g.*, *Gibbs v. Titelman*, 369 F. Supp. 38, 53 (E.D. Pa. 1973); *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 500 (N.D. Ill. 1969). A unique scenario was witnessed in the *Chippewas* defendant class proceeding in Ontario where the defendants were seeking a representation order under Rule 12.7 whilst the plaintiffs were seeking certification under the Ontario Act and its opt out regime. *Chippewas*, O.R.3d at 566-67.

the U.S. as the doctrine of “non-mutual collateral estoppel.”¹³¹ The essential features of this doctrine were explained by the OLRC:

First, the doctrine of non-mutual collateral estoppel permits a person to invoke a decision of the court in a particular case, even though he [or she] himself [or herself] was not a party to the earlier litigation. Secondly, the doctrine may be invoked only against a person who was a party to the earlier litigation and who, it can be said, has had “his [or her] day in court”. A party to the earlier litigation cannot rely upon the doctrine to preclude a non-party to that litigation from having his [or her] day in court.¹³²

This doctrine places opt out plaintiffs in a strong position. In fact, if the judgment in the class action goes against the defendant, the former class members can use this result to win their individual suits, as the defendant is prevented from recontesting his or her liability.¹³³ If the class judgment is in favor of the defendant, the former class members are not bound by this result as the defendant is not allowed to invoke the doctrine against them.¹³⁴ Similar unjust scenarios are generated by this doctrine in relation to defendant class actions¹³⁵ as “opt-

131. See generally Garry D. Watson, *Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality*, 69 CAN. BAR REV. 623 (1990); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1079–82 (1986); Kennedy, *supra* note 70, at 31–33; Douglas J. Gunn, *The Offensive Use of Collateral Estoppel in Mass Tort Cases*, 52 MISS. L.J. 765 (1982); Fisch, *supra* note 11, at 215; Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Wythe W. Holt, Jr., Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 652–53 (1965).

132. OLRC REPORT, *supra* note 5, at 81–82. Justice Cumming of the Ontario Superior Court of Justice noted in *Ford v. F. Hoffmann-LaRoche, Ltd.*, No. 00–CV–200045CP, [2001] Ont. Sup. C.J. LEXIS 2012, at *8 (Ont. Super. Ct. J. Sept. 14, 2001), that “the court’s power to prevent relitigation reaches beyond the limits of the issue estoppel and *res judicata* doctrine. The power is founded on public policy. The court has power to protect the integrity of its own process.”

133. “American courts have abandoned the requirement of mutuality and developed ‘offensive non-mutual estoppel’ to estop a defendant from relitigating issues which it lost against another plaintiff. There, the court has discretion to dispense with the mutuality requirement where the party against whom the estoppel is directed has had a full and fair opportunity to litigate that same position in an earlier proceeding. In Canada, the courts have not embraced the notion of offensive non-mutual estoppel. They have, however, used their inherent power to prevent an abuse of process.” *Vos v. Hosp. for Sick Children*, No. 93–CU–72951A, [1998] Ont. Sup. C.J. LEXIS 1460, at *11 (Ont. Super. Ct. J. Oct. 28, 1998) (Benotto, J.).

134. An example of the practical application of this doctrine was provided by Watson, *supra* note 131, at 631: “[a]ssume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. [The doctrine] . . . permits P2 through P20, etc., now to sue Airline and successfully plead issue estoppel on the question of the airline’s negligence.” See also Ancheta, *supra* note 5, at 289–90.

135. “Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing

ing out defendants can defensively assert the collateral estoppel doctrine against the losing plaintiff if a favourable decision is rendered, yet are not bound by an adverse ruling.”¹³⁶

To ensure that these unsatisfactory scenarios will not be encountered in plaintiff class actions brought in the Federal Court of Canada, Rule 299.27(2) provides that “a judgment on common questions of law or fact of a class or subclass does not bind a party to the class action in any subsequent action between the party and a person who opted out or had been excluded from the class action.”¹³⁷ A similar provision, Section 27(2), appears in the Ontario Act.¹³⁸ Rule 299.27(2) and Section 27(2) provide another striking illustration of the problems created by a failure to consider the effects, on defendant class actions, of measures created for plaintiff classes.

While the Canadian provisions mentioned above are effective to ensure that a doctrine similar to the U.S. non-mutual collateral estoppel is not applicable to plaintiff class actions, they have the opposite effect in relation to defendant class actions. In fact, Rule 299.27(2) and Section 27(2) enable Canadian defendant class members who opt out to enjoy some of the privileges that are available to opt out defendants in the United States. This is because they are able to avoid the unfavorable outcome of the defendant class proceeding, in any subsequent litigation initiated against such opt out defendants by any

adjudications of the identical issue which stand squarely against their position. Also, the authorities have been . . . willing to permit a defendant in a second suit to invoke an estoppel against a plaintiff who lost on the same claim in an earlier suit . . .” *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (citation omitted). *See also Lee, supra* note 5, at 52.

136. Max, *supra* note 5, at 455 n.16. *See also In re Yarn Processing Patent Litig.*, 56 F.R.D. 648, 654 (S.D. Fla. 1972). To address these problems an American commentator has suggested that those defendant class members who opt out should not be allowed to assert collateral estoppel in the event the plaintiff loses the class action. HARVARD Note, *supra* note 5, at 635. One court has rejected this proposal on the basis that “such a limitation is beyond the power of the certifying court.” *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 306 (C.D. Cal. 1978).

137. “[A]s a matter of principle, a member should not be allowed to opt out, sit on the sidelines, and then foreclose the defendant from asserting a defence by invoking a judgment in a proceeding in which that member did not wish to participate.” FC COMMITTEE, *supra* note 5, at 72. *See also SALC REPORT, supra* note 16, at ¶ 5.11.7 (noting that this type of provision prevents “a class member from opting out of a class proceeding and then, at some later date, benefiting from a judgment on the common issues”).

138. Section 27(2) of the Ontario Act provides that a judgment on common issues of a class or subclass does not bind a party to the class proceeding in any subsequent proceeding between the party and a person who has opted out of the class proceeding. As was pointed out by Justice Keenan of the Ontario Court of Justice (General Division), “the language of section 27 is similar to that recommended [by the OLRC].” *Allan v. CIBC Trust Corp.*, Nos. 96–CU–106129, 96–CU–111026, [1998] Ont. Sup. Ct. J. LEXIS 44, at *14 (Ont. Sup. Ct. Just. Mar. 21, 1998).

of the opponents of the defendant classes. In fact, as noted above, the FC Rules and the Ontario Act expressly provide that the class proceedings do not bind the parties to the class proceedings in any subsequent proceedings involving the opt out class members. But, fortunately, unlike their U.S. counterparts,¹³⁹ opt out defendants are not able to rely on prior determinations against the plaintiffs in the class suit, by invoking collateral estoppel defensively, as such determinations are not binding on the plaintiffs and the opt out defendants in any subsequent litigation between them.

B. No Restrictions on the Opt Out Rights of Defendants

In light of the potential adverse effects of opt out regimes in defendant class actions, an obvious question is whether courts have been prepared to imply any restrictions on the ability of defendant class members to leave the proceedings. In Ontario, courts have not been prepared to impose any such restrictions. Two major lines of reasoning have been formulated to support this judicial conclusion.¹⁴⁰ First, reliance has been placed on the fact that the provision governing opt outs under Section 9 of the Ontario Act does not expressly formulate any restrictions. A second factor relied upon by Ontario courts to decline the imposition of any prohibitions or restrictions on opt out rights in defendant class actions is that the Ontario legislature, acting pursuant to the Ontario Committee's recommendations, did not implement the OLRC's recommendation that courts should, in their discretion, be able to prevent some or all of the class members from opting out.¹⁴¹

In the United States, most courts have acted on the premise that the right to opt out of Rule 23(b)(3) classes is unfettered, regardless of whether a class is sued or is suing.¹⁴² In *Northwestern National*

139. "Members of a class can receive the benefit of prior determinations against the plaintiff—whether or not they were parties to those actions—by invoking collateral estoppel defensively." *Wyandotte Nation v. City of Kansas City, Kan.*, No. 01-2303-CM, 2002 U.S. Dist. LEXIS 25144, at *14 n.18 (D. Kan. Dec. 2, 2002).

140. *See Berry v. Pulley*, No. 97-CV-135179, [2001] Ont. Sup. C.J. LEXIS 499, at *17-18 (Ont. Sup. Ct. Just. Mar. 13, 2001) (Cumming, J.).

141. OLRC REPORT, *supra* note 5, at 491.

142. *See, e.g., Employers Ins. of Wausau v. Fed. Deposit Ins. Corp.*, 112 F.R.D. 52, 57 (E.D. Tenn. 1986) ("There is nothing in the rule to indicate that the opt-out provision is not as applicable to members of a defendant class as it is to members of a plaintiff's class."). *Cf. Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 238-39 (Duniway, J., concurring). In 1985, the U.S. Supreme Court held that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or

Bank of Minneapolis v. Fox & Co., for instance, the court rejected the plaintiff's request that opt out requests lodged by defendant class members should not be accepted unless they "are submitted in good faith for the purpose of appearing individually through separately retained counsel."¹⁴³ The court held that the class members' "absolute right to 'opt out' should not be burdened with difficult considerations, simply because it is in the plaintiffs' best interests to have all [class members] included in the class."¹⁴⁴

C. Judicial Responses to the Problems Created by Opt Out Regimes in Defendant Classes

As was indicated in Part II above, in *Chippewas* the court ruled that in the event of most defendants opting out of a class, the litigation may be conducted as a representative proceeding.¹⁴⁵ An obvious problem with this approach is that it deprives litigants and the courts of the detailed guidance provided by the Ontario Act as to the procedures that are to be implemented at every stage of the proceedings.¹⁴⁶

In *Berry v. Pulley*, Judge Cumming of the Ontario Superior Court of Justice was faced with the submission of the defendants claiming that there should be no certification of the defendant class given that most of the defendant class members would opt out. Judge Cumming was of the view that it was apparent that individual defendants would achieve significant economy in respect of costs by remaining in the class action instead of becoming individual defendants in a separate plaintiff class action proposed to be brought by the

'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

143. *N.W. Nat'l. Bank of Minneapolis v. Fox & Co.*, 102 F.R.D. 507, 516 (S.D.N.Y. 1984).

144. *Id.* It is interesting to note, however, that in *Hammond v. Hendrickson*, No. 85 C 09829, 1990 US Dist. LEXIS 11071, at *5 (N.D. Ill. Aug. 23, 1990), the representative defendant was "estopped from recommending to class members that they opt out of the class" whilst in *In re Alexander Grant & Co. Litig.*, 110 F.R.D. 528, 536 (S.D. Fla. 1986), the Court indicated that it "would be reluctant to permit [defendant class members] choosing to opt-out the ability to rely on [the representative defendant's] counsel and thus, individual representation will be required."

145. See text accompanying notes 54-56.

146. Justice Adams himself acknowledged the superiority of the Ontario Act *vis-à-vis* Rule 12.7: "[I]t seems preferable to at least first use the [Ontario Act] with its available procedures and policy balances, if at all possible. Because of the great uncertainty which can arise in the administration of proceedings involving a multiplicity of parties, a court should prefer the most comprehensive regulatory regime reasonably available to it. This approach will promote economy, efficiency and expedition. These goals are of interest to all affected parties and the public at large." *Chippewas of Sarnia Band v. Canada*, [1996] O.R.3d 549, 568 (Ont. Ct. Gen. Div.).

plaintiffs against each defendant.¹⁴⁷ Judge Cumming also drew attention to the availability of the following strategies for dealing with those class members who choose to opt out:

Plaintiffs might seek an order under rule 6.01 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 . . . that the action to be initiated against individual defendants be consolidated or heard at the same time as the class action at hand. Alternatively, the plaintiffs might seek a joinder of the [defendants] in the new action who have opted out of the class action at hand upon a certification, as necessary parties to the action at hand under rules 5.03(1), (4) and (5). The underlying principle is that everyone concerned with the same issues be before the court at one hearing, unless this results in prejudice to any of the parties.¹⁴⁸

It is submitted, however, that Judge Cumming's strategy is flawed, as it seeks to rely on procedures for dealing with group litigation (such as individual proceedings followed by joinder or consolidation) which have been found wanting, and which have resulted in the creation of representative proceedings, at first, and class actions, more recently.¹⁴⁹

The approach of U.S. courts to the ability of defendant class members to opt out may be divided into five broad categories. A number of courts have certified defendant classes under Rule 23(b)(3) without discussion of the potential problems generated by the availability of the right to opt out.¹⁵⁰ In another series of cases, courts have denied certification of defendant classes under Rule 23(b)(3) on the basis of other reasons and factors but then added that,

147. *Berry v. Pulley*, [2001] Ont. Sup. C.J. LEXIS 499, at *20.

148. *Id.* at *21–22.

149. “The fact is that class actions of a restricted kind have been known to our law for many years because they have had to be invented as *ad hoc* expedients to deal with the lacunae in the present law.” LRCSA REPORT, *supra* note 18, at 5. See also VINCE MORABITO & JUDD EPSTEIN, VICTORIAN ATTORNEY–GENERAL’S LAW REFORM ADVISORY COUNCIL, CLASS ACTIONS IN VICTORIA: TIME FOR A NEW APPROACH ¶¶ 5.12–5.18, 6.4–6.6 (1997); LORD HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 224–25 (Stationary Office Books Pub., 1996); Charles, *supra* note 28, at 30; ALRC REPORT, *supra* note 10, paras. 46–58; OLRC REPORT, *supra* note 5, ch. 3; Dolgow v. Anderson 43 F.R.D. 472, 484 (E.D.N.Y. 1968) (explaining the advantages of “class action in affording relief”); Tilbury, *supra* note 28, at 6; MLRC REPORT, *supra* note 9, at 9–13 (calling current Manitoba rules on multi-party proceedings an inadequate “patchwork”).

150. See, e.g., *In re Alexander Grant & Co. Litig.*, 110 F.R.D. 528, 536 (S.D. Fla. 1986); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 689 (N.D. Cal. 1986); *In re Victor Techs. Sec. Litig.*, 102 F.R.D. 53, 63 (N.D. Cal. 1984); *Osborn v. Pa.-Del. Serv. Station Dealers Ass’n*, 94 F.R.D. 23, 26 (D. Del. 1981); *Dudley v. S.E. Factor & Fin. Corp.*, 57 F.R.D. 177, 180 (N.D. Ga. 1972); *Ferguson v. Williams*, 330 F. Supp. 1012, 1018 (N.D. Miss. 1971); *Ferguson v. Williams*, 330 F. Supp. 1012, 1018 (N.D. Miss. 1971); *N. Natural Gas Co. v. Grounds*, 292 F. Supp. 619, 635–36 (D. Kan. 1968). See also Kruger & Rogers, *supra* note 11, at 856 n.92.

in any event, the ability of defendants to opt out would render reliance on Rule 23(b)(3) inappropriate.¹⁵¹

A third judicial approach in the United States has been to certify defendant classes under either Rule 23(b)(1) or Rule 23(b)(2), despite a finding that the prerequisites of Rule 23(b)(3) had also been met.¹⁵² It is crucial to note that, in doing so, courts have followed a number of authorities dealing with plaintiff classes.¹⁵³ Some of the unfavorable effects created by the exiting of plaintiff class members from the litigation were succinctly explained by the OLRC:

To the extent that class members exercised their right to exclude themselves from the class for the purpose of prosecuting their individual suits, the desired economies would suffer and the possibility of inconsistent judicial holdings would increase.¹⁵⁴

151. See, e.g., *Technitrol, Inc. v. Control Data Corp.*, No. 17653, 1970 U.S. Dist. LEXIS 13294, at *7 (D. Md. Jan. 9, 1970) (“With the ‘opt out’ requirement of (3), little or nothing could be gained even if it was otherwise applicable.”). See also *In re Arthur Treacher’s Franchisee Litig.*, 93 F.R.D. 590, 595 (E.D. Pa. 1982); *Benzoni v. Greve*, 54 F.R.D. 450, 455 (S.D.N.Y. 1972). It is interesting to note that in *National Union Fire Insurance Co. of Pittsburgh v. Midland Bancor, Inc.*, 158 F.R.D. 681, 685 (D. Kan. 1994), the Court indicated that even the representative defendants would opt out!

152. See, e.g., *Oneida Indian Nation of Wis. v. New York*, 85 F.R.D. 701, 706 (N.D.N.Y. 1980) (“[I]n defendant class actions, it is preferable and perhaps even necessary to certify a class under either (b)(1) or (b)(2) rather than (b)(3), to avoid the possibility of defendant class members opting out of the class as is allowed under (b)(3).”). See also *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989); *Wyandotte Nation v. City of Kansas City*, 214 F.R.D. 656, 664 (D. Kan. 2003); *Tilley v. TJX Cos.*, 212 F.R.D. 43, 47 (D. Mass. 2003); *Williams v. State Bd. of Elections*, 696 F. Supp. 1574, 1577 (N.D. Ill. 1988); *Employers Ins. of Wausau v. Fed. Deposit Ins. Corp.*, 112 F.R.D. 52, 58 (E.D. Tenn. 1986); *Broadhollow Funding Corp. v. Fitzmaurice (In re Broadhollow Funding Corp.)*, 66 B.R. 1005, 1013 (Bankr. E.D.N.Y. 1986); *United States v. Conservation Chem. Co.*, No. 82-0983-CV-W-5, 1984 U.S. Dist. LEXIS 22022, at *17 (W.D. Miss. Nov. 14, 1984); *In re Alexander Grant & Co.*, 110 F.R.D. at 538; *Bailey*, *supra* note 121, at 490-91; *Wolfson*, *supra* note 5, at 494.

153. See, e.g., *Reynolds v. Nat’l Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (citing multiple authorities); *Robertson v. Nat’l Basketball Ass’n*, 556 F.2d 682, 685 (2d Cir. 1977) (same); *Green v. Occidental Petro. Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976) (relying on *WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE*); *Johnson v. City of Baton Rouge*, 50 F.R.D. 295, 300-01 (E.D. La. 1970) (relying on 1966 Advisory Committee’s Notes); *Mungin v. Fla. E. Coast Ry.*, 318 F. Supp. 720, 730 (M.D. Fla. 1970) (relying on *MOORE’S FEDERAL PRACTICE*); *Berman v. Narragansett Racing Ass’n*, 48 F.R.D. 333, 337 (D.R.I. 1969) (same); *Van Gemert v. Boeing Co.*, 259 F. Supp. 125, 130 (S.D.N.Y. 1966) (relying on 1966 Advisory Committee Notes).

154. OLRC REPORT, *supra* note 5, at 471. This is one of the reasons why a number of commentators have recommended that class members be required to obtain the approval of the court before they may be permitted to opt out. See generally Mark W. Friedman, *Constrained Individualism in Group Litigation: Requiring Class Members to make a Good Cause Showing before Opting out of a Federal Class Action*, 100 YALE L.J. 745 (1990) (advocating that the opt out provision of Rule 23 be revised so as to make the choice available only upon a showing of good cause). A far more extreme proposal, involving mandatory-litigation (no exit and no opt

An additional unsatisfactory dimension exists in defendant class actions as the right to opt out enables class members to avoid litigation in a way in which is not available to defendants in traditional litigation. As was perceptively noted by the District Court for the District of Columbia:

Defendants, unlike plaintiffs, are ordinarily involuntary participants in a lawsuit. To provide them the wherewithal to frustrate a suit that is properly certifiable as a class action simply by refusing to participate in it—by opting out—would be anomalous. Indeed, to enable defendants to defeat the “class” aspect of the action would enfeeble an otherwise potent means for remedying at once widespread civil-rights violations and other unlawful conduct.¹⁵⁵

A fourth strategy has been followed by a majority of U.S. courts. They have assessed the circumstances of the class proceedings before them to determine the likelihood of certification of a defendant class under Rule 23(b)(3) being thwarted by the departure of many class members. Where the court makes such a finding, no Rule 23(b)(3) certification of a defendant class takes place.¹⁵⁶ A judicial assessment that a mass exit from the proceedings is unlikely results in a Rule 23(b)(3) certification order,¹⁵⁷ sometimes with the proviso that if the court’s assessment later proves to be incorrect, a decertification order,¹⁵⁸ or an order modifying the class,¹⁵⁹ will be considered by the court.

out) class actions for adjudicating mass tort cases, was put forward by Professor Rosenberg. See David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

155. *United States v. Trucking Emp., Inc.*, 75 F.R.D. 682, 693 (D.D.C. 1977).

156. See, e.g., *Clark v. McDonald’s Corp.*, CV 02–0247 (RBK), 2003 U.S. Dist. LEXIS 3178, at *85–*86 (D.N.J. Mar. 3, 2003); *Heffler v. U.S. Fidelity & Guar. Ins. Co.*, No. 90–7126, 1992 U.S. Dist. LEXIS 3090, at *15–16 (E.D. Pa. Mar. 10, 1992); *In re Broadhollow*, 66 B.R. at 1013; *Flying Tiger Line Inc. v. Cent. States, S.W. & S.E. Areas Pension Fund*, No. 86–304 CMW, 1986 U.S. Dist. LEXIS 17409, at *15 n.10 (D. Del. Nov. 20, 1986); *Employers Ins.*, 112 F.R.D. at 58; *In re Arthur Treacher’s*, 93 F.R.D. at 595–96.

157. See, e.g., *Berry v. Pulley*, No. 97–CV–135179, [2001] Ont. Sup. C.J. LEXIS 499, at *20–21 (Ont. Super. Ct. J. Mar. 13, 2001); *Sebo v. Rubenstein*, 188 F.R.D. 310, 319 (N.D. Ill. 1999); *Endo v. Albertine*, 147 F.R.D. 164, 171–72 (N.D. Ill. 1993); *Alvarado Ptnrs., L.P. v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990); *In re Alexander Grant & Co.*, 110 F.R.D. at 536; *Hammond v. Hendrickson*, No. 85 C 9829, 1986 U.S. Dist. LEXIS 22198, at *34 (N.D. Ill. July 28, 1986); *In re LILCO Sec. Litig.*, 111 F.R.D. 663, 673–74 (E.D.N.Y. 1986); *N.W. Nat’l Bank of Minneapolis v. Fox & Co.*, 102 F.R.D. 507, 515 (S.D.N.Y. 1984); *Thillens, Inc. v. Cmty. Currency Exch. Ass’n of Ill.*, 97 F.R.D. 668, 682 (N.D. Ill. 1983); *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 306 (N.D. Cal. 1978).

158. See, e.g., *Alvarado Ptnrs.*, 130 F.R.D. at 675.

159. See, e.g., *Sebo*, 188 F.R.D. at 319.

Where a judicial finding is made that it would not be in the best interests of defendant class members to opt out, significant reliance is usually placed on: (a) the fact that the plaintiffs have already commenced individual proceedings against some of the class members; or (b) a judicial assessment that the plaintiffs will not hesitate to take such a measure against those who leave the class.¹⁶⁰ This judicial emphasis on individual proceedings creates a strong incentive, for those wishing to seek certification of a defendant class under Rule 23(b)(3), to commence, in conjunction with the filing of a Rule 23 proceeding, individual proceedings against most of the members of the putative defendant class. But the avoidance of this unfavorable scenario—that is, of the same adversaries being embroiled in individual and group litigation contemporaneously with respect to the same dispute—is precisely why the commencement of a class proceeding, under Rule 23 and under most of the Canadian and Australian class action regimes, has the effect of suspending the operation of statutes of limitations for every member of plaintiff classes¹⁶¹ and not just the named plaintiffs.¹⁶²

160. See, e.g., *Sebo*, 188 F.R.D. at 319; *In re LILCO*, 111 F.R.D. at 674; *In re Alexander Grant & Co.*, 110 F.R.D. at 536; *N.W. Nat'l Bank*, 102 F.R.D. at 515; *Weinberger*, 102 F.R.D. at 849; *Thillens*, 97 F.R.D. at 682; *In re Gap Stores*, 79 F.R.D. at 305–06; *Berry*, [2001] Ont. Sup. C.J. LEXIS 499, at *20–21; *Simpson & Perra*, *supra* note 11, 1332; *Williams*, *supra* note 125, at 290; *Wolfson*, *supra* note 5, at 496. *But see Clark*, 2003 U.S. Dist. LEXIS 3178, at *85; *In re Arthur Treacher's*, 93 F.R.D. at 595–96.

161. See Alberta Act, § 40; Manitoba Act, § 39; NL Act, § 39; Saskatchewan Act, § 43; BC Act, § 39; Ontario Act, § 28; Pt. IVA, § 33ZE; and Pt. 4A, § 33ZE. See also Note, *Statutes of Limitations and Defendant Class Actions*, 82 MICH. L. REV. 347, 347–48 (1983) [hereinafter MICHIGAN Note] (“The Federal Rules do not indicate when the statute of limitations is tolled as to absent, unnamed members of the class.”); *In re Activision Sec. Litig.*, [1986–1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,998, at 94,897 (N.D. Cal. Oct. 20, 1986) (“The Supreme Court has held . . . that ‘the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.’”) (quoting *Am. Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)). See also *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353–54 (1983). The tolling rule applies to all asserted class members, not just those who seek to intervene, *id.* at 350, and applies regardless of whether class certification ultimately is granted or denied. See *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985). See generally Kathleen Cerveny, Note, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686 (1985); William Jonason, Note, *The American Pipe Dream: Class Actions and Statutes of Limitations*, 67 IOWA L. REV. 743 (1982).

162. The rationale for this suspension has been described as follows by the U.S. Supreme Court and the OLRG, respectively: “Otherwise, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated,” *Devlin v. Scardeletti*, 122 S. Ct. 2005, 2010–11 (2002); and “[i]t is also apparent that [not suspending limitation periods] would militate against the policy of increased access to the courts and the vindication of small claims. It would be uneconomical for absent class members with individu-

A fifth judicial approach in the United States may also be detected. A number of U.S. courts have not regarded the certification of opt out defendant classes as an evil to be avoided whenever possible. On the contrary, they have preferred certification of defendant classes under Rule 23(b)(3) precisely, or partly, because of the right of class members to opt out.¹⁶³ This stance is based on the belief that “[d]efendant class actions embody a potential for unfairness to absent class members”¹⁶⁴ and that allowing class members to opt out constitutes an effective means of addressing such unfairness.¹⁶⁵

D. Potential Unfairness of Defendant Class Proceedings

Three major reasons have been put forward by courts for their “concern that the very concept of defendant classes may violate due process.”¹⁶⁶ The first reason is that, unlike representative plaintiffs,

ally nonrecoverable claims to incur the expense of filing precautionary motions to intervene . . .” OLR REPORT, *supra* note 5, at 779–80. See also *Crown, Cork & Seal*, 462 U.S. at 352–53; ONTARIO COMMITTEE, *supra* note 87 at 47; LRCSA REPORT, *supra* note 18, at 10; ALRI REPORT, *supra* note 5, ¶¶ 415–16. See also *Logan v. Canada*, No. 99–CV–181819 CP, [2002] Ont. Sup. C.J. LEXIS 257, at *3–4 (Ont. Super. Ct. J. Feb. 13, 2002) (Winkler, J.) (“[T]o permit a litigant to maintain their individual action . . . while at the same time acting as a representative plaintiff in a class proceeding in respect of the same issues appears, *prima facie*, to be inimical to the objects of the [Ontario Act], and in particular to the stated goal of judicial economy or litigation efficiency.”).

163. See, e.g., *Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 820 (7th Cir. 2000); *In re Seagate Tech. Sec. Litig.*, 115 F.R.D. 264, 273 (N.D. Cal. 1987); *Hammond v. Hendrickson*, No. 85 C 9829, 1986 U.S. Dist. LEXIS 22198, at *33 (N.D. Ill. July 28, 1986); *In re Activision Sec. Litig.*, 621 F. Supp. 415, 434 (N.D. Cal. 1985); *Thillens, Inc. v. Comty. Currency Ass’n of Ill.*, 97 F.R.D. 668, 682 (N.D. Ill. 1983); *Mudd v. Busse*, 68 F.R.D. 522, 529 (N.D. Ind. 1975) (opt out right would allow defendant class members to “protect themselves against possible inadequate representation of their particular . . . defenses”); *Technograph Printed Circuits v. Methode Elec., Inc.*, 285 F. Supp. 714, 721 (N.D. Ill. 1968).

164. *Baker v. Wade*, 743 F.2d 236, 244 (5th Cir. 1984). See also *Payton v. County of Kane*, 308 F.3d 673, 678 (7th Cir. 2002) (noting defendant classes should be created with care); *Coalition for Econ. Equity v. Wilson*, 72 FAIR EMPL. PRAC. CAS. (BNA) 1096, 1098 (N.D. Cal. 1996); *Cardinal Indus., Inc. v. Buckeye Fed. Sav. & Loan Ass’n (In re Cardinal Indus., Inc.)*, 105 B.R. 834, 844 (Bankr. S.D. Ohio 1989); *Follette v. Vitanza*, 658 F. Supp. 492, 507 (N.D.N.Y. 1987); *DeAllaume v. Perales*, 110 F.R.D. 299, 303 (S.D.N.Y. 1986); *Akerman v. Oryx Communications, Inc.*, 609 F. Supp. 363, 374–75 (S.D.N.Y. 1984); *Thillens*, 97 F.R.D. at 674; *Adashunas v. Negley*, 626 F.2d 600, 605 (7th Cir. 1980); *Marchwinski v. Oliver Tyrone Corp.*, 81 F.R.D. 487, 489 (W.D. Pa. 1979); *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 292 (N.D. Cal. 1978) (notice to defendants is a prerequisite for fundamental fairness).

165. “[T]here is a potential problem with virtually all defendant classes that proceed under anything but Rule 23(b)(3). Defendant classes, initiated by those opposed to the interests of the class, are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives, which means they are more in need of the due process protections afforded by (b)(3)’s safeguards.” *Ameritech*, 220 F.3d at 820.

166. *Henson v. E. Lincoln Township*, 108 F.R.D. 107, 111 (C.D. Ill. 1985).

“named defendants in a class action rarely succumb to their roles as class representatives without protest”¹⁶⁷ and courts “fear that an unwilling representative will necessarily be a poor one.”¹⁶⁸ A second perceived problem with defendant class actions relates to the fact that it is usually the plaintiff who moves for certification of a defendant class and who nominates the representatives of the defendant class.¹⁶⁹ This state of affairs provoked the following response in 1950 from Professor Zechariah Chafee, which has since been quoted by several U.S. courts:¹⁷⁰

It is a strange situation where one side picks out the generals for the enemy’s army. When A is suing a class, he naturally wants the class to lose. At best, he is not fit to make a disinterested and well-informed selection among his opponents. At worst, he has strong motives for choosing straw men and incompetents, who will lie down before his projected attack.¹⁷¹

The third reason that has been put forward by courts in the United States, for their fear that defendant class actions might generate unfair scenarios for class members, has been described as follows by the District Court for the Central District of Illinois:

Another due process problem is that an unnamed member of a plaintiff class stands to lose only the right to later bring the same cause of action. In contrast, an unnamed member of a defendant class may be required to pay a judgment without having had the opportunity to personally defend the suit.¹⁷²

167. *Marcera v. Chinlund*, 91 F.R.D. 579, 584 n.10. See also *In re Cardinal Indus.*, 105 B.R. at 844; *Broadhollow Funding Corp. v. Fitzmaurice (In re Broadhollow Funding Corp.)*, 66 B.R. 1005, 1011 (Bankr. E.D.N.Y. 1986); *Cont’l Ill. Nat’l Bank v. John Mohr & Sons*, No. 80 C 2642, 1980 U.S. Dist. LEXIS 13040, at *7 (N.D. Ill. June 25, 1980); Lilly, *supra* note 129, at 1039; HARVARD Note, *supra* note 5, at 648.

168. *In re Gap Stores*, 79 F.R.D. at 290. See also COLUMBIA Note, *supra* note 11, at 828–29.

169. *Marcera v. Chinlund*, 595 F.2d 1231, 1239 (2d Cir. 1979) (“[N]amed defendants almost never choose their role as class champion—it is a potentially onerous one thrust upon them by their opponents.”). See also *Baker*, 743 F.2d at 244; VALPARAISO Note, *supra* note 5, at 382; Kalven & Rosenfield, *supra* note 10, at 696 n.39.

170. See, e.g., *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 613 (E.D. Mich. 1985).

171. ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 237–38 (1950). See also VALPARAISO Note, *supra* note 5, at 382; C.A. Wright, *Class Actions*, 47 F.R.D. 169, 173 (1969); Lee, *supra* note 5, at 60; Note, *Denial of Due Process Through Use of the Class Action*, 25 TEX. L. REV. 64, 67 (1946) (hereinafter TEXAS Note).

172. *Henson*, 108 F.R.D. at 111–12. See also *Monument Builders of Pa. v. Am. Cemetery Ass’n*, 206 F.R.D. 113, 119 (E.D. Pa. 2002); *Heffler v. U.S. Fidelity & Guar. Ins. Co.*, No. 90–7126, 1992 U.S. Dist. LEXIS 3090, at *10 (E.D. Pa. Mar. 10, 1992); *Follette v. Vitanza*, 658 F. Supp. 492, 507 (N.D.N.Y. 1987); *Akerman v. Oryx Communications, Inc.*, 609 F. Supp. 363, 374–75 (S.D.N.Y. 1984); *Thillens v. Cmty. Currency Exch. Ass’n*, 97 F.R.D. 668, 674 (N.D. Ill. 1983); *In re N. Dist. of Cal. “Dalkon Shield” I.U.D. Prods. Liability Litig.*, 526 F. Supp. 887, 907 n.82

These three arguments will now be explored in more detail. With respect to the initiation of defendant class actions, it is crucial to note that there is nothing to prevent defendants from seeking certification of defendant classes and their appointment as representatives of such classes.¹⁷³ Indeed, the Ontario Act and the FC Rules expressly refer to any party being able to initiate the process leading to the certification of defendant class proceedings. But a more significant point is that, as highlighted by the Supreme Court of Hawaii, “the party who seeks to utilize a class action must establish his right to do so, ‘even if the class sought to be created is a defendant class’”¹⁷⁴—essentially convincing the court that the prerequisites for certification have been satisfied.¹⁷⁵ Indeed, most U.S. courts have regarded themselves as being under an obligation to “‘carefully examine the impact of [class] certification on the rights of unnamed class members’ before designating a defendant class.”¹⁷⁶

In relation to the Canadian class action regimes, as was noted by the ALRI, once a certification order has been granted by the court,

(N.D. Cal. 1981); *Marchwinski v. Oliver Tyrone Corp.*, 81 F.R.D. 487, 489 (W.D. Pa. 1979); *In re Gap Stores*, 79 F.R.D. at 290–91; *Lilly*, *supra* note 129, at 1043–44.

173. *See, e.g., Wyandotte Nation*, 214 F.R.D. at 659; *S. Ute Indian Tribe v. Amoco Prod. Co.*, 2 F.3d 1023, 1030 (10th Cir. 1993); *Weinberger v. Brokers Mortgage Servs. Inc.*, No. 84 Civ. 6847 (RLC), 1985 U.S. Dist. LEXIS 14633, at *3 (S.D.N.Y. Oct. 23, 1985); *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1222–23 (N.D. Ill. 1985); *VALPARAISO Note*, *supra* note 5, at 382 n.92.

174. *Life of the Land v. Land Use Comm’n*, 63 Haw. 166, 180 (1981) (quoting *Life of the Land v. Burns*, 59 Haw. 244, 253 (1978)). *See also Wyandotte Nation*, 214 F.R.D. at 659; *Doe v. Miller*, 216 F.R.D. 462, 465 (S.D. Iowa 2003); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Midland Bancor, Inc.*, 158 F.R.D. 681, 685 (D. Kan. 1994); *Heffler*, 1992 U.S. Dist. LEXIS 3090, at *8–9; *Kohn v. Mucia*, 776 F. Supp. 348, 352 (N.D. Ill. 1991); *Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583, 585 (S.D. Ohio 1987); *Akron Ctr. for Reproductive Health v. Rosen*, 110 F.R.D. 576, 580 (N.D. Ohio 1986); *Ragsdale*, 625 F. Supp. at 1219; *Klein v. Coun. of Chem. Ass’ns*, 587 F. Supp. 213, 227 (E.D. Pa. 1984); *Stewart v. Winter*, 87 F.R.D. 760, 768 (N.D. Miss. 1980); *Tucker v. Bd. of Comm’rs*, 410 F. Supp. 494, 499 (M.D. Ala. 1976).

175. In the United States, the “typicality” requirement has been regarded as a significant requirement for defendant classes. *See, e.g., Cont’l Ill. Nat’l Bank v. John Mohr & Sons*, No. 80 C 2642, 1980 U.S. Dist. LEXIS 13040, at *6–7 (N.D. Ill. June 25, 1980); *Mudd v. Busse*, 68 F.R.D. 522, 529 (N.D. Ind. 1975). It has been held that “[t]he defenses raised by the class representative need not be identical to those raised by other class members, and it is only when there is a unique defense forwarded by the representative which will consume the merits of the case that a court should refuse to certify a class based on a lack of typicality.” *Alexander Grant*, 116 F.R.D. at 588. *See also Monaco v. Stone*, 187 F.R.D. 50, 64 (E.D.N.Y. 1999); *Thillens*, 97 F.R.D. at 678; *Marcera v. Chinlund*, 595 F.2d 1231, 1239 (2d Cir. 1979); *United States v. Trucking Employers*, 75 F.R.D. 682, 688 (D. Col. 1977).

176. *Follette*, 658 F. Supp. at 507 (quoting *Akerman*, 609 F. Supp. at 375). *See also Adashunas v. Negley*, 626 F.2d 600, 604–05 (7th Cir. 1980); *Thillens*, 97 F.R.D. at 674; *Marchwinski*, 81 F.R.D. at 489.

[i]t must . . . be supposed, since it is a criterion for certification, that the court has concluded that a defendant class action is the preferable procedure for the fair and efficient resolution of the common issues. Therefore, we do not see why members of the defendant class should be allowed to opt out of what has been determined to be the fair and efficient procedure for resolving the common issues.¹⁷⁷

The most important of the certification requirements, in both Canada and the United States, is that the representative party would fairly and adequately represent the interests of the class.¹⁷⁸ Several U.S. courts have required that this directive be strictly observed in defendant class proceedings.¹⁷⁹ Furthermore, it has been noted that “the Court has a great deal of latitude and discretion in selecting class representatives whom it believes will provide the necessary protection”¹⁸⁰ American and Ontario courts have repeatedly displayed an unwillingness to simply accept, as adequate representatives, the named defendants nominated by the plaintiffs. In fact, on several occasions courts have concluded that all, or at least some, of the representative defendants proposed by the plaintiffs would be unlikely to fairly and adequately protect the interests of the class.¹⁸¹ When such a

177. ALRI REPORT, *supra* note 5, at ¶ 465.

178. See *Mayo v. Hartford Life Ins. Co.*, 214 F.R.D. 465, 470–71 & n.15 (S.D. Tex. 2002); *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 613 (E.D. Mich. 1985); *In re Arthur Treacher’s Franchise Litig.*, 93 F.R.D. 590, 597 (E.D. Pa. 1982); *Institutionalized Juveniles v. Sec’y of Pub. Welfare*, 78 F.R.D. 413, 414 (E.D. Pa. 1978). See also VALPARAISO Note, *supra* note 5, at 378–79; *W. Van Dercreek, The ‘Is’ and ‘Ought’ of Class Actions under Federal Rule 23*, 48 IOWA L. REV. 273, 278 (1962).

179. See, e.g., *Ragsdale*, 625 F. Supp. at 1223–24. In this regard, Chafee has written the following:

[T]he court ought to scrutinize the selected representatives of the defendant class with the greatest care and arrange for changes and additions if there is the slightest reason to suspect incompetence or the absence of the will to fight. The judge ought to regard the unnamed members of the sued class as wards of the court for the time being.

CHAFEE, *supra* note 171, at 238. See also *City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53, 60 (Mo. Ct. App. 2000); *Leon H. Weiner & Assoc., Inc. v. Krapf*, 584 A.2d 1220, 1224 (Del. 1991); *Lee, supra* note 5, at 60. With respect to representative proceedings, see *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853) (“care must be taken that persons are brought on the record fairly representing the interest or right involved”).

180. *Oneida Indian Nation of Wis. v. New York*, 85 F.R.D. 701, 705 (N.D.N.Y. 1980). See also *Doe v. Miller*, 216 F.R.D. 462, 467 (S.D. Iowa 2003) (“[T]he Court has within its power the ability to replace class representatives with other class members or to increase the number of class representatives.”); *Monaco v. Stone*, 187 F.R.D. 50, 65 n.12 (E.D.N.Y. 1999); *In re Itel Sec. Litig.*, 89 F.R.D. 104, 113 (N.D. Cal. 1981); *Gross, supra* note 5, at 643.

181. See, e.g., *Blake v. Arnett*, 663 F.2d 906, 913–14 (9th Cir. 1981); *Greenhouse v. Greco*, 617 F.2d 408, 412 (5th Cir. 1980); *Adashunas*, 626 F.2d at 605; *Monarch Asphalt Sales Co. v. Wilshire Oil Co.*, 511 F.2d 1073, 1077 (10th Cir. 1975); *United States v. Local 1804–1, No. 90 Civ. 0963 (LBS)*, 1993 U.S. Dist. LEXIS 15083, at *5–6 (S.D.N.Y. Oct. 25, 1993); *Amnesty Am.*

finding is made, one of the following four scenarios will usually follow: (a) the plaintiff's motion for certification will be denied;¹⁸² (b) the plaintiff will be asked to nominate alternative defendants;¹⁸³ (c) the putative class members will be asked to choose their representative;¹⁸⁴ or (d) the court will appoint *sua sponte* alternative or additional representatives.¹⁸⁵

Courts have also been willing to appoint defendant representatives on a provisional basis only.¹⁸⁶ They have also, wisely in the author's view, generally preferred to appoint multiple defendants.¹⁸⁷ As was explained by Judge Adams of the Ontario Superior Court of Justice, "[m]ultiple defendants are appropriate in order to share the burden of the defence and to provide confidence to the wide range of members of the class to be defended."¹⁸⁸ A related measure has been

v. County of Allegheny, 822 F. Supp. 297, 300 (W.D. Pa. 1993); *Vargas v. Calabrese*, 634 F. Supp. 910, 921 (D.N.J. 1986); *Rodriguez v. Twp. of De Kalb*, No. 80 C 1509, 1984 U.S. Dist. LEXIS 22302, at *24 (N.D. Ill. Oct. 31, 1984); *Nat'l Ass'n for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1458–59 (D. Col. 1983); *Joseph L. v. Office of Judicial Support*, 516 F. Supp. 1345, 1353 (E.D. Pa. 1981); *Payton v. Abbott Labs*, 83 F.R.D. 382, 395 (D. Mass. 1979); *Canadian St. Regis Band of Mohawk Indians v. New York*, 97 F.R.D. 453, 458; *In re Gap Stores*, 79 F.R.D. at 303; *Mason v. Garris*, 360 F. Supp. 420, 422–23 (N.D. Ga. 1973); *Benzoni v. Greve*, 54 F.R.D. 450, 454 (S.D.N.Y. 1972); *Coniglio v. Highwood Servs., Inc.*, 60 F.R.D. 359, 363–64 (W.D.N.Y. 1972); *Chippewas of Sarnia Band v. Canada*, [1996] 138 D.L.R.(4th) 574, 576; *Land Use Comm'n*, 63 Haw. at 184;. Similarly, lack of adequate representation results in denial of a representation order. See, e.g., *Walker v. Sur*, [1914] 2 K.B. 930, 934; *Metallic Roofing Co. of Canada v. Local Union No. 30*, [1905] 9 O.L.R. 171, 179.

182. See, e.g., *Nat'l Ass'n for Mental Health*, 717 F.2d at 1458–59; *Blake*, 663 F.2d at 913–14; *Adashunas*, 626 F.2d at 605; *Greenhouse*, 617 F.2d at 412–13; *Ellis v. O'Hara*, 105 F.R.D. 556, 564 (E.D. Mo. 1985); *Rodriguez*, 1984 U.S. Dist. LEXIS 22302, at *24; *Abbott Labs*, 83 F.R.D. at 395; *Amnesty Am.*, 822 F. Supp. at 300; *Vargas*, 634 F. Supp. at 921; *Mason*, 360 F. Supp. at 422–23; *Benzoni*, 54 F.R.D. at 454–55; *Coniglio*, 60 F.R.D. at 363–64; *Joseph L.*, 516 F. Supp. at 1353; *Land Use Comm'n*, 63 Haw. at 184–85;.

183. See, e.g., *Monaco*, 187 F.R.D. at 65–66; *Local 1804–1*, 1993 U.S. Dist. LEXIS 15083, at *5–6; *Gibbs v. Titelman*, 369 F. Supp. 38, 53 (E.D. Pa. 1973); *Rakes v. Coleman*, 318 F. Supp. 181, 194 (E.D. Va. 1970).

184. See, e.g., *Miller*, 216 F.R.D. at 467; *Williams v. State Bd. of Elections*, 696 F. Supp. 1574, 1578 (N.D. Ill. 1988); *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 615 (E.D. 1985).

185. See, e.g., *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 478 (2d Cir. 1995).

186. See, e.g., *Alexander Grant*, 116 F.R.D. at 589; *In re Consumers*, 105 F.R.D. at 615.

187. See, e.g., *Weinman v. Fidelity Capital Appreciation Fund*, 262 F.3d 1089, 1096 (10th Cir. 2001); *Appleton Elec. Co. v. Advance-United Expressways*, 494 F.2d 126, 132 (7th Cir. 1974); *Capital Cities/ABC, Inc. v. Rockie Ratcliff*, 1996 U.S. Dist. LEXIS 14798, at *18 (D. Kan. Sept. 20, 1996); *Webcraft Tech., Inc. v. Alden Press, Inc.*, 228 U.S.P.Q. (BNA) 182, 185 (N.D. Ill. Aug. 9, 1985); *Thillens*, 97 F.R.D. at 683; *Trucking Employers*, 75 F.R.D. at 685; *United States v. Truckee-Carson Irrigation District*, 71 F.R.D. 10, 16 (D. Nev. 1975); ; *Technograph Printed Cir., Ltd. v. Methode Electronics, Inc.*, 285 F. Supp. 714, 720 (N.D. Ill. 1968); *Berry v. Pulley*, No. 97–CV–135179, [2001] Ont. Sup. Ct. J. LEXIS 499, at *25 (Ont. Super. Ct. J. Mar. 13, 2001);.

188. *Chippewas*, [1996] 138 D.L.R.(4th) at 575. See also *Chippewas of Sarnia Band v. Canada*, [2000] Carswell Ont. 1894, at ¶ 19 (“[I]t was reasonable for the separate defendants to be

the creation of subclasses to deal with any potential intraclass conflicts or differences between the circumstances of the class members.¹⁸⁹ In *Berry*, for instance, Judge Cumming of the Ontario Superior Court of Justice divided a defendant class into seven subclasses, with different persons representing each subclass.¹⁹⁰ The court managing a defendant class action also possesses the power to decertify the proceedings if it later transpires that the reasons for granting certification either no longer exist or never existed.¹⁹¹

Another important safeguard is provided by the fact that class members have the right to appear before the court to challenge the class representative; to be joined as a named defendant or to “present to the Court any defenses inadequately presented or not already presented.”¹⁹² Section 14 of the Ontario Act and Rule 299.25(1) of the FC Rules expressly authorize courts presiding over class proceedings to permit class members to participate in the proceeding. As was explained by the Court of Appeal for Ontario:

separately represented.”); *In re Broadhollow Funding Corp.*, 66 B.R. 1005, 1010 (Bankr. E.D.N.Y. 1986) (“[A] variety of defendant class representatives enhances the probability of typicality of defenses being present.”). With respect to representative proceedings, see *National Supply Company, Ltd. v. Greenback*, [1941] 3 W.W.R. 711, 715 (“[I]f, however, it should appear before or during the trial that some one in addition to Greenbank should be appointed to press any grounds of defence in addition to those open to the majority of whom Greenbank is one, a further representation order may be made.”).

189. See, e.g., Ontario Act § (2); FC Rules, Rule 299.19(2); *Weinman*, 262 F.3d at 1106; *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 778 (2d Cir. 1986); *Alexander Grant*, 116 F.R.D. at 591; *In re Broadhollow*, 66 B.R. at 1010; *Chippewas of Sarnia Band v. Canada*, [1996] 29 O.R.3d 549, 566; Ancheta, *supra* note 5, at 294; HARVARD Note, *supra* note 5, at 641; Wolfson, *supra* note 5, at 481. With respect to representative proceedings, see *Bromley* (1863) 32 Beav 177, 188 (Romilly, MR) (stating “but if there be three or four classes who have separate and conflicting interests, then you may select two or three from each class to represent that interest, in the same way as if the whole class had been brought before the Court”).

190. *Berry*, [2001] Ont. Sup. C.J. LEXIS 499, at *8.

191. See Ontario Act § 10; FC Rules, Rule 299.21; *Monaco*, 187 F.R.D. at 59; *Alvarado Ptnrs., L.P. v. Mehta*, 130 F.R.D. 673, 676 (D. Colo. 1990); *Pennsylvania v. Local Union 542*, 90 F.R.D. 589, 591 n.2 (E.D. Pa. 1981); *In re Itel*, 89 F.R.D. at 113; *Berry*, [2001] Ont. Sup. C.J. LEXIS 499, at *13.

192. *Harris v. Graddick*, 593 F. Supp. 128, 137 (M.D. Ala. 1984). See also *Kerney v. Fort Griffin Fandangle Ass’n, Inc.*, 624 F.2d 717, 721 (5th Cir. 1980); *Wyandotte Nation*, 214 F.R.D. at 664; *Webcraft*, 228 U.S.P.Q. (BNA) at 185–86; *United States v. Rainbow Family*, 695 F. Supp. 294, 299 (E.D. Tex. 1988); Gross, *supra* note 5, at 643–44, 651–52; Max, *supra* note 5, at 454 n.10; HARVARD Note, *supra* note 5, at 637 n.40; Ancheta, *supra* note 5, at 299; Wolfson, *supra* note 5, at 466, 482, 492. With respect to representative proceedings, see *Commissioners of Sewers v. Gellatly*, 3 Ch. D. 610, 617 (1876) (“[N]ow, that party might put in a defence shewing, for instance, . . . that he has some special ground why his particular lands are exempt from the right in question.”); *Mayor of York v. Pilkington*, 25 Eng. Rep. 946, 947 (Ch. 1737) (“[N]otwithstanding the general right is tried and established, the defendants take advantage of their several exemptions, for distinct rights.”).

The [Ontario] Act makes a clear distinction between the role of a party and that of a class member. Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner in which the participation is permitted. Not surprisingly, [Section] 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class.¹⁹³

Furthermore, following the conclusion of the class proceeding, class members may seek to have an adverse judgment delivered at the conclusion of the class suit, set aside or reversed on appeal, by challenging the adequacy of the representation of the class members' interests.¹⁹⁴ As was pointed out by the U.S. Supreme Court in a 1961 defendant class suit: "the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation"¹⁹⁵

The U.S. case law on defendant class actions also evinces a judicial willingness to introduce whatever measures are believed necessary to protect the rights of defendant class members.¹⁹⁶ In *Appleton Electric Company v. Advance-United Expressways*, for instance, the

193. *Dabbs v. Sunlife Assurance Co. of Canada*, [1998] 41 O.R.3d 97, 100. See also *Chippewas of Sarnia Band v. Canada*, [1996] 29 O.R.3d 549, 569–70.

194. See, e.g., *Weinman*, 262 F.3d at 1106; *Baker v. Wade*, 743 F.2d 236, 240 (5th Cir. 1984); *Kerney*, 624 F.2d at 721. See also *Gross*, *supra* note 5, at 644; WILLIAMS, *supra* note 125, at 290; *Wolfson*, *supra* note 5, at 492; VALPARAISO Note, *supra* note 5, at 415–16; Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 594–601 (1974). With respect to representative proceedings, see *Commissioners of Sewers*, (1876) 3 Ch. D. 610, 617 (Jessel, MR): "[N]ow, that party might put in a defense shewing, for instance, that the original decree was fraudulently obtained."

195. *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 691 (1961). See also *Marcera v. Chinlund*, 595 F.2d 1231, 1240 n.13 (2d Cir. 1979); *Oneida Indian Nation of Wis. v. New York*, 85 F.R.D. 701, 705 (N.D.N.Y. 1980); *Mgmt. Television Sys., Inc. v. Nat'l Football League*, 52 F.R.D. 162, 165 (E.D. Pa. 1971). This scenario, of course, provides plaintiffs with a strong incentive to nominate adequate representative defendants. See ALRI REPORT, *supra* note 5, ¶ 442 n.377; *Wolfson*, *supra* note 5, at 479. With respect to representative proceedings, see *Taff Vale Ry. Co. v. Amal. Soc'y of Ry. Servants*, A.C. 426, 438 (1901) ("[A] trade union . . . may be sued in a representative action if the persons so selected as defendants be persons who . . . may be taken fairly to represent the body.").

196. "Steps may be taken during the course of these proceedings to insure that the rights of class members are protected" *Mgmt. Television*, 52 F.R.D. at 165. See also *Follette v. Vitanza*, 658 F. Supp. 492, 507 (N.D.N.Y. 1987); *Guy v. Abdulla*, 57 F.R.D. 14, 16 (N.D. Ohio 1972) ("The safeguards in Rule 23 are certainly adequate to protect the interests of absent parties . . .").

court appointed independent counsel to represent the defendant class other than the seventeen named defendants.¹⁹⁷

In determining whether the proposed representative defendant will fairly and adequately represent the interests of the class, most U.S. and Ontario courts have recognized that the unwillingness of such defendants to represent the class may not be regarded as a relevant factor.¹⁹⁸ Otherwise, the defendant class proceeding device would hardly, if ever, be employed.¹⁹⁹ Furthermore, several courts have noted “the irony that an unwilling defendant who vigorously opposes his representative capacity may in fact prove to be the most effective advocate of the class.”²⁰⁰ Instead, courts have focused on the need to ensure that the following factors are present:²⁰¹ (a) representa-

197. *Appleton Elec.*, 494 F.2d at 132. See also *Trucking Employers*, 75 F.R.D. at 694 (“One form of protection the court has employed has been to invite absent members of the class to appear personally before the court whenever they think it necessary or advisable to do so. Absentees have accepted the invitation by filing briefs with the court on numerous occasions.”); *Dale Electronics, Inc. v. R.C.L. Electronics, Inc.*, 53 F.R.D. 531, 537 (D.N.H. 1971) (“I am . . . going to order that any defendant who requests it shall be furnished, at the plaintiff’s expense, a copy of any deposition and/or interrogatory.”).

198. See, e.g., *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Marcera*, 595 F.2d at 1239; *Doe v. Miller*, 216 F.R.D. 462, 466 (S.D. Iowa 2003); *Luyando v. Bowen*, 124 F.R.D. 52, 58 (S.D.N.Y. 1989); *United States v. Conservation Chem. Co.*, No. 82–0983–CV–W–5, 1984 U.S. Dist. LEXIS 22022, at *25 (W.D. Miss. Nov. 14, 1984); *Thillens*, 97 F.R.D. at 679; *Braniff Airways, Inc. v. Bankers Trust Co.* (*In re Braniff Airways, Inc.*), 22 B.R. 1005, 1009 (Bankr. N.D. Tex. 1982); *Doss v. Long*, 93 F.R.D. 112, 117–18 (N.D. Ga. 1981); *Ragsdale*, 625 F. Supp. at 1223; *Cont’l Ill. Nat. Bank v. John Mohr & Sons*, No. 80 C 2642, 1980 U.S. Dist. LEXIS 13040, at *7 (N.D. Ill. June 25, 1980); *Trucking Employers*, 75 F.R.D. at 694 n.9; *Thompson v. Bd. of Educ.*, 71 F.R.D. 398, 407 n.13 (W.D. Mich. 1976); *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 499 (N.D. Ill. 1969); *Berry*, [2001] Ont. Sup. C.J. LEXIS 499, at *23–24 (per Cumming, J.); *Chippewas of Sarnia Band v. Canada*, [1996] 29 O.R.3d 549, 568–69. See also VALPARAISO Note, *supra* note 5, at 380; *Wolfson*, *supra* note 5, 482–83. But see *Blake v. Arnett*, 663 F.2d 906, 913–14 (9th Cir. 1981); *Nat’l Ass’n for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1458 (D.D.C. 1983); *Canadian St. Regis Band*, 97 F.R.D. at 458; *Mudd v. Busse*, 68 F.R.D. 522, 529–30 (N.D. Ind. 1975); *Gross*, *supra* note 5, at 622–23, 645–46; *Elizabeth Barker Brandt, Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23*, 1990 BYU L. REV. 909, 921; *Bailey*, *supra* note 121, at 483. The willingness of representative defendants to take such a role has also been regarded as an irrelevant consideration in representative proceedings. See, e.g., *Nat’l Supply*, 3 W.W.R. at 712.

199. See *Marcera*, 595 F.2d at 1239 (“But courts must not readily accede to the wishes of named defendants in this area, for to permit them to abdicate so easily would utterly vitiate the effectiveness of the defendant class action as an instrument for correcting widespread illegality.”). See also *Monaco*, 187 F.R.D. at 65; *Doss*, 93 F.R.D. at 117–18; VALPARAISO Note, *supra* note 5, at 381; HARVARD Note, *supra* note 5, at 639.

200. *In re Cardinal*, 105 B.R. at 844. See also *Thillens*, 97 F.R.D. at 679; *Marcera*, 91 F.R.D. at 584; *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 290 (N.D. Cal. 1978); *In re Broadhollow*, 66 B.R. at 1011;

201. In the context of a plaintiff representative proceeding, the Supreme Court of Canada indicated that

tion by qualified, experienced and competent counsel;²⁰² (b) the lack of conflicting or antagonistic interests between the representatives and the class members,²⁰³ (c) the absence of collusion between the plaintiffs and the named defendants,²⁰⁴ and (d) the existence of named defendants who have both sufficient resources to properly defend the action and claims substantial enough to warrant defending.²⁰⁵

In the few occasions that defendant classes have been certified under the Ontario Act, courts have ensured that adequate notice was provided to the class members.²⁰⁶ Similarly, many U.S. courts have ordered that notice be provided to members of defendant classes certified under Rule 23(b)(1) and Rule 23(b)(2)²⁰⁷ even though in pro-

in assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be 'typical' of the class, nor the 'best' possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class.

Western Canadian, [2001] 201 D.L.R.(4th) at 385, 402 (McLachlin, C.J.).

202. See, e.g., *Webcraft*, 228 U.S.P.Q. (BNA) at 185; *In re Arthur Treacher's Franchisee Litig.*, 93 F.R.D. 590, 597 (E.D. Pa. 1982); *In re Itel*, 89 F.R.D. at 113; *Oneida Indian Nation of Wis. v. New York*, 85 F.R.D. 701, 705 (N.D.N.Y. 1980). For a rare example of a judicial finding that the proposed representative defendant's "counsel is not capable of representing the defendant class," see *De Allaume v. Perales*, 110 F.R.D. 299, 306 (S.D.N.Y. 1986).

203. See *Oneida*, 85 F.R.D. at 706 ("The possibility of antagonistic interests prevents certification of a class only if the antagonism goes to the subject matter of the litigation . . ."). See also *Wyandotte Nation v. City of Kansas City*, 214 F.R.D. 656, 664 (D. Kan. 2003); *Alexander Grant*, 116 F.R.D. at 589; *Thillens*, 97 F.R.D. at 680; *Chippewas of Sarnia Band v. Canada*, [1996] 138 D.L.R.(4th) 574, 575. With respect to representative proceedings, see *Hardie & Lane, Ltd. v. Chiltren*, 1 K.B. 663, 700 (1928) ("[I]f the personal interests of the defendants conflict with the interests of the persons on whose behalf they are sued, they are obviously not the proper parties to represent such persons.").

204. See, e.g., *In re Cardinal*, 105 B.R. at 844; *In re Broadhollow*, 66 B.R. at 1011.

205. See *Alexander Grant*, 116 F.R.D. at 583; *In re Cardinal*, 105 B.R. at 844; *In re Broadhollow*, 66 B.R. at 1011; *In re Consumers*, 105 F.R.D. at 613; *Thillens*, 97 F.R.D. at 679; *In re Gap Stores*, 79 F.R.D. at 303; *Cont'l Ill. Nat'l Bank v. John Mohr & Sons*, No. 80 C 2642, 1980 U.S. Dist. LEXIS 13040, at *8 (N.D. Ill. June 25, 1980); *Chippewas*, [1996] 138 D.L.R.(4th) at 575 (Adams, J.); *Holo*, *supra* note 4, at 234; *Wolfson*, *supra* note 5, at 485; *Max*, *supra* note 5, at 455 n.14.

206. See *Berry*, [2001] Ont. Sup. C.J. LEXIS 499, at *30 (Cumming, J.); *Chippewas*, 29 O.R.3d at 572. In *Chippewas*, the court ordered the plaintiff to "assume the costs of giving notice." *Chippewas*, 29 O.R.3d at 572. It is also vital to note that Section 19(1) of the Ontario Act and Rule 299.37(1) of the FC Rules empower the courts to order, at any time, any party to give such notice as they consider necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

207. See, e.g., *Wyandotte Nation*, 214 F.R.D. at 659; *Webcraft*, 228 U.S.P.Q. (BNA) at 186; *Canadian St. Regis Band*, 97 F.R.D. at 459; *In re Braniff*, 22 B.R. at 1009; *Marcera*, 91 F.R.D. at 585; *Leist v. Shawano County*, 91 F.R.D. 64, 69 (D. Wis. 1981); *In re Itel*, 89 F.R.D. at 127; *Oneida* 85 F.R.D. at 707; *Lynch Corp. v. MII Liquidating Co.*, 82 F.R.D. 478, 483 (D.S.D. 1979);

ceedings certified under these rules notice is not mandatory.²⁰⁸ On some occasions, plaintiffs have been ordered to provide,²⁰⁹ and/or meet the cost of, such notice.²¹⁰

Another important measure for protecting the interests of defendant class members is provided by the mechanisms governing the settlement or discontinuance of class actions.²¹¹ Such settlements or discontinuances need to be approved by the court.²¹² An integral part of these mechanisms is that class members must be given an opportunity to convince the court that the proposed settlement would not be fair, adequate or reasonable.²¹³ If the named defendants enter into a

Redhail v. Zablocki, 418 F. Supp. 1061, 1068 (E.D. Wis. 1976); *Trucking Employers* 75 F.R.D. at 685; *Thompson*, 71 F.R.D. at 418; *Truckee-Carson*, 71 F.R.D. at 18; *Guy v. Abdulla*, 57 F.R.D. 14, 18 (N.D. Ohio 1972); *Danforth v. Christian*, 351 F. Supp. 287, 289 (W.D. Mo. 1972); *Dale Electronics, Inc. v. RCL Electronics, Inc.*, 53 F.R.D. 531, 533 (D.N.H. 1971). *See also* Gross, *supra* note 5, at 626–51; *Ancheta*, *supra* note 5, 301–02; *Ball*, *supra* note 10, at 619; *Parsons & Starr*, *supra* note 5, at 895; VALPARAISO Note, *supra* note 5, at 416–19. *But see* *Weinman*, 262 F.3d at 1110; *Baksalary v. Smith*, 591 F. Supp. 1279, 1289 (E.D. Pa. 1984); *Institutionalized Juveniles v. Sec’y of Pub. Welfare*, 78 F.R.D. 413, 415 (E.D. Pa. 1978); *Lynch v. Household Finance Corp.*, 360 F. Supp. 720, 722 (D. Conn. 1973); *Penn. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 292 (E.D. Pa. 1972); *N. Natural Gas Co. v. Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1968); HARVARD Note, *supra* note 5, at 646 (“[N]otice should only be required when, and to the extent that, it is needed to ensure [effective] representation [of the defendant’s interest].”).

208. *See supra* note 114.

209. *See, e.g., In re Itel*, 89 F.R.D. at 127 (“the Court will order plaintiffs to send notice of the action to *all* members of the underwriter classes and therefore avoid any due process problems due to lack of notice.”) (emphasis added). *See also* *Holo*, *supra* note 4, at 267; MICHIGAN Note, *supra* note 161, at 362–63.

210. *See, e.g., Coalition for Econ. Equity v. Wilson*, 72 FAIR EMPL. PRAC. CAS. (BNA) 1096, 1098 (N.D. Cal. Dec. 16, 1996) (“Because it is the plaintiffs that seek to maintain this suit as a class action, and because the cost of notice should be *de minimis*, the cost will be borne by the plaintiffs.”); *Lynch Corp.*, 82 F.R.D. at 483 (“It does not seem fair to make the defendants pay for a class certification they oppose, when on the merits of the case they might have no liability.”). *See also* Gross, *supra* note 5, at 660; *Ball*, *supra* note 10, at 619; Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1065 (1954).

211. *See* FED. R. CIV. P. 23(e); Ontario Act § 29; FC Rules, Rules 299.31 and 299.32.

212. *See* *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970); *Tilley v. TJX Cos.*, 212 F.R.D. 43, 49 (D. Mass 2003); *Monument Builders of Pa., Inc. v. Am. Cemetery Ass’n*, 206 F.R.D. 113, 121 (2002); *Endo v. Albertine*, 147 F.R.D. 164, 172 (N.D. Ill. 1993); *Alvaredo Pmrs.*, 130 F.R.D. at 676; *Pa. Ass’n*, 343 F. Supp. at 289; *Dale*, 53 F.R.D. at 536 (“Rule 23(e) . . . fully insures that no settlement will be binding without an opportunity for all of the defendants to be heard in opposition. I can assure the defendants that the issue of liability will not be held binding on any members of the class by way of dismissal or compromise if there is an objection.”).

213. *See, e.g., Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) (“Class members must be given an opportunity to convince the court that the settlement proposed would not be fair, adequate, or reasonable.”); *Brimner v. Via Rail Canada, Inc.*, [2000] 50 O.R.3d 114, 122 (Brockenshire, J.) (“The practice has developed of giving notice of an intended settlement and hearing representations by objectors and intervenors before granting approval.”); Note, *Leading Cases:*

settlement agreement unfavorable²¹⁴ to the class members or refuse to enter into an advantageous agreement, “the court retains numerous powers to protect the interests of the class, the least of which is decertification.”²¹⁵

Attention can now be turned to the third argument set out above, concerning the potential unfairness of defendant class actions, namely, that defendant class members may be asked to pay damages whilst someone else, the named defendant, has the carriage of the defense. This argument is largely inaccurate.²¹⁶ Conte and Newberg have addressed the issue thus:

In most cases that seek to recover monetary relief against members of a defendant class, the determination of the amount of monetary relief against each class member will raise some individual issues that cannot be resolved on a common basis in a class proceeding. In addition, the defendant must be afforded an opportunity to present unique defenses. Thus, independent proceedings will be required to establish the amount of monetary relief to which the plaintiff is entitled to recover against any particular defendant class member. A specific monetary judgment against individual defendant class members is not available on a class action basis, except to the limited extent of developing a common formula or guideline that will serve as the measure of damages in proceedings against individual class members.²¹⁷

This state of affairs is expressly recognized by Rule 3.501(I)(1) of the Michigan Court Rules which provides that “an action that seeks to recover money from individual members of a defendant class may not be maintained as a class action.”

Federal Jurisdiction and Procedure, 116 HARV. L. REV. 332, 340 (2002) (“all class members have the right to challenge a proposed class settlement at a fairness hearing and are assured notice of the proposed settlement and an opportunity to be heard. Objectors have the right to introduce evidence to create a record. At fairness hearings, class members may also challenge the adequacy of representation when objecting to the fairness of the proposed settlement.”).

214. In *In re Cardinal*, 105 B.R. at 838, the court denied approval of a settlement proposed by some of the representative defendants.

215. *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 304 (N.D. Cal. 1978). See also *In re Activision Sec. Litig.*, 621 F. Supp. 415, 434 (N.D. Cal. 1985).

216. See *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 387 (7th Cir. 1996); *Canadian St. Regis Band*, 97 F.R.D. at 457; *Pennsylvania v. Local Union 542*, 90 F.R.D. 589, 594–95 (E.D. Pa. 1981); *In re Gap Stores*, 79 F.R.D. at 293; *Guy v. Abdulla*, 57 F.R.D. 14, 16 (N.D. Ohio 1972); *Dale*, 53 F.R.D. at 535–36. See also Gross, *supra* note 5, at 634, 643, 652; Wolfson, *supra* note 5, at 466; Max, *supra* note 5, at 468–69; HARVARD Note, *supra* note 5, at 637; Ball, *supra* note 10, at 619–20.

217. CONTE & NEWBERG, *supra* note 5, at 349. With respect to representative proceedings, see e.g., *National Supply*, 3 W.W.R. at 714 (“[B]ut it should be understood that there shall be no personal judgment for payment of money against the holders of royalty certificates other than the named defendants in respect of such claims.”). See also 1922 Note, *supra* note 5, at 91.

In light of the analysis developed in this Part, it is not surprising that there have been very few reported instances of inadequate representation of defendant classes in the United States.²¹⁸ This scenario is vividly illustrated by the fact that in the United States the only actual illustration of the unfairness that can result from defendant class actions, which has generally been provided by those who regard defendant classes as potentially unfair, is a 1945 defendant class action in Texas.²¹⁹ It is difficult to see why the United State's positive experience—when considered in its totality—with defendant class actions should not similarly be enjoyed in Canada, especially when one considers that, as a result of Section 12 of the Ontario Act,²²⁰ Ontario courts may make any order they consider appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination.²²¹

V. CONCLUSION

It has been shown that members of defendant classes should not be allowed to opt out of defendant representative proceedings and defendant class actions as that right is inconsistent with the policy objectives of these proceedings and is not necessary in order to protect the interests of class members. It is therefore submitted that the rules governing representative proceedings and the Ontario Act and the

218. See *Doss v. Long*, 93 F.R.D. 112, 117 (N.D. Ga. 1981).

219. See generally *Richardson v. Kelly*, 144 Tex. 497 (1945). In *Richardson*, “defendant class members attacked an adverse judgment on the ground that the plaintiff had purposely chosen as class representatives members whose personal liability was small in relation to that of the other defendants; consequently, the named defendants offered little if any opposition to the plaintiff’s claims. Moreover, the class members asserted that the plaintiff had excluded from the named defendants certain members purporting to have contract provisions specially limiting their liability.” *Henson v. E. Lincoln Township*, 108 F.R.D. 107, 112 n.5 (C.D. Ill. 1985). See also *Ancheta*, *supra* note 5, at 300 n.79; HARVARD Note, *supra* note 5, at 640; VALPARAISO Note, *supra* note 5, at 382 n.93; Wright, *supra* note 171, at 173 n.24; Lee, *supra* note 5, at 60 n.63; Bailey, *supra* note 121, at 483; Van Dercreek, *supra* note 178, at 278 n.26; Kruger & Rogers, *supra* note 11, at 858 n.111; Note, *Due Process Requirements of a State Class Action*, 55 YALE L. J. 831 (1946) (analyzing *Richardson v. Kelly*); CHAFEE, *supra* note 171, at 234–42.

220. A similar provision does not appear in the FC Rules, as a result of the FC Committee’s conclusion that “in the era of case management, such provisions are unnecessary. Instead, class proceedings should be treated as ‘specially managed proceedings’ under Rule 385.” FC Committee, *supra* note 5, at 66. As a result, Rule 384.1 provides that “an action commenced by a member of a class of persons on behalf of the members of that class shall be conducted as a specially managed proceeding.”

221. See OLC REPORT, *supra* note 5. See also Morabito, *supra* note 14, at 673; SLC REPORT, *supra* note 34, at ¶ 4.85; MLRC REPORT, *supra* note 69, at 88.

FC Rules should be amended in order to remove from defendant class members the ability to opt out.

In the absence of the amendments proposed above, courts presiding over defendant representative proceedings should return to the traditional approach of not allowing represented persons to opt out but permitting them, instead, to apply to the court to be appointed as named defendants. An alternative approach, which is arguably consistent with the current provisions of the Ontario Act and the FC Rules governing opt out rights, is provided by the regime implemented in 1988 by the U.S. District Court for the Northern District of Illinois in *Williams v. State Board of Elections*.²²² In *Williams* the court provided members of defendant classes certified under Rule 23(b)(3) with the following three options:

(A) To do nothing, in which case they will remain members of the defendant class to which they have been assigned; (B) To opt out of the class and be joined as individual party defendants; (C) To opt out of the class, but stipulate that they will agree to be bound by the outcome of the litigation, in which case we will excuse them from all further proceedings. This third option would seem to be the option of choice for members of the defendant class who do not oppose the plaintiffs' position on the merits.²²³

The court explained as follows the rationale for this regime:

Although a procedure by which opt-out defendants remain in a lawsuit may appear unorthodox, it is actually no different from what would occur if these necessary party defendants had all been joined individually. They would be free to retain counsel in groups if they chose, but their decision to be represented singly or in groups would not alter the fact that they were defendants in the case.²²⁴

222. 696 F. Supp. 1574 (N.D. Ill. 1988).

223. *Id.* at 1578.

224. *Id.*