"Class Roots: The Genesis of the Ontario *Class Proceedings Act*, 1966-1993"

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Abstract

Nearly 25 years since its passage, the Ontario *Class Proceedings Act* has become one of the most frequently debated procedural mechanisms of its kind. The CPA came about following the release of the Attorney General's Advisory Committee (AGAC) Report in 1990. None of the current narratives explain how this Report pulled together so many divergent interests where previous attempts had failed. My thesis answers this question with reference to the historical sources and the legal, political and social changes that took place throughout this period.

This thesis also highlights the unique nature of the AGAC consultation process, which saw the negotiation of a consensus between the parties and the subsequent drafting of legislation. Although this process was effective, however, it led to compromises and a lack of democratic oversight that continue to affect the CPA and its goals of access to justice to this day.

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Chapter 1
Introduction

A. Overview

On June 24, 1982, Attorney General Roy McMurtry announced to the Ontario legislature[1] that the Ontario Law Reform Commission had completed its *Report on Class Actions*.[2] The result of six years of deliberation and running to nearly 900 pages, the OLRC Report was widely hailed as one of the most comprehensive treatments of the subject, covering almost every aspect of class actions in exhaustive detail. It was accompanied by draft legislation and had been especially commissioned by the Attorney General, with McMurtry stating the following year that he regarded class action reform as "a high priority. I would expect to be discussing these issues … with my cabinet colleagues in the early autumn, with a view to possibly bringing first reading legislation before the House by the end of the year."[3]

The draft Act was never passed. The OLRC Report gathered dust on the shelves of the Ministry of the Attorney General for more than five years, while the Conservative government was voted out of power and a minority Liberal government took its place, continuing the reformist agenda initiated by the 1985 Liberal-NDP accord once it won a majority in 1987. While certain interest groups made submissions to the Ministry on the OLRC Report and class actions, virtually no steps were taken towards reform. Then, in 1988 and with the strong backing of a Liberal government, Attorney General Ian Scott turned his activist eye towards class actions. Focused on the subject of access to justice, Scott saw class actions as a way of securing justice for consumers, environmental groups

[1] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 32nd Parl, 2nd Sess (June 24, 1982) (Roy McMurtry), online: <http://www.olip.ontla.on.ca/hansardeissue/32-2/l087.htm> [Hansard, June 24, 1982].
[2] Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) [OLRC Report].
[3] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 32nd Parl, 3rd Sess (June 17, 1983) (Standing Committee on Administration of Justice, Estimates, Ministry of the Attorney General), J-173, Ontario Law Reform Commission files, Nov 1976 - Dec 1982, Project name: class actions, RG 4-66, BA77, Box No B380537, Archives of Ontario [Hansard June 17].

and others on a mass scale, while levelling the playing field between plaintiffs and powerful defendants.

Ready to help him was Michael Cochrane, an ambitious young lawyer who had joined the Policy Development Division of the Ministry of the Attorney General just weeks before Scott was appointed. The OLRC Report was just one of a number of projects that had been idling at the PDD, and Cochrane volunteered to dust it off and move it forward.[4] Together, the two men were to create a unique consultation process that saw key stakeholders from business, the legal profession, consumer groups and environmental organizations gathered together in a mediation-style process. This process involved a political commitment to undertake reform; a commitment by the group to reach a consensus, or there would be no legislation at all; a public and up-front commitment by the participants to several written terms of reference, which were non-negotiable and around which the legislation would be designed; and a willingness to discuss interests and goals, rather than lock into particular positions.[5] Trained as a mediator, Michael Cochrane chaired the Attorney General's Advisory Committee on Class Action Reform and successfully negotiated a compromise between the vastly differing viewpoints at the table.[6] The resulting consensus on such a controversial topic was a surprise to everyone, including Premier David Peterson.[7]

However, it was not without compromise. The OLRC Report had called for various mechanisms to level the playing field for plaintiffs and remove procedural and substantive barriers to class actions. In particular, it recommended that traditional costs rules ("two-way" costs, where the losing party paid the successful party's legal costs) should not apply to class actions. Instead, each party should pay its own costs, no matter

[4] Interview with Michael Cochrane, June 28, 2016 [Cochrane Interview 2].
[5] MG Cochrane, "The Process of Principled Negotiation of Public Policy: An Overview" (unpublished, on file with the author) at 5-8 [Cochrane Principled Negotiation]. This approach borrows from the Principled Negotiation approach developed by Roger Fisher *et al* in *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd ed (New York: Penguin Books USA, 1991). There is some overlap between Cochrane's paper and the principles outlined in *Getting to Yes*, including focusing on interests, not positions; and insisting on objective criteria for negotiation. These principles were based on the work of the Harvard Negotiation Project, and taught as part of the Project's Program of Instruction for Lawyers (see notes in *Getting to Yes*). Cochrane was almost certainly exposed to these principles when he took part in negotiation training at Harvard in 1989.
[6] Ministry of the Attorney General (MAG), Policy Development Division, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Ministry of the Attorney General, 1990) [AGAC Report or Advisory Committee Report].
[7] Interview with Michael Cochrane, April 21, 2016 [Cochrane Interview 1].

which party was successful (the "no-way costs" rule).[8] Cochrane and Scott had originally proposed the same costs mechanism, and it was one of the Cabinet-approved terms of reference for the work of the Advisory Committee. However, it quietly fell to the wayside, as the business groups asserted their position that class actions should depart as little as possible from the traditional rules of litigation: for them, it was either traditional costs rules or no class actions at all. The no-way costs rule was one of the casualties of the compromise struck by the Advisory Committee, and the decision not to include it has been questioned by class actions lawyers to this day.[9]

In addition, the consultation process led to compromises not only in the shape of reform itself, but also in the process by which the legislation was created. Some on the Advisory Committee – and also those who had not been invited to participate – questioned a process that only invited certain parties to the table, leaving other major stakeholders such as women's groups out in the cold. The members of the Advisory Committee worked long and hard to agree to a compromise, and were justifiably proud of the consensus that resulted. Unfortunately, that pride took a proprietary turn in that they were unwilling to allow legislative counsel a free hand in drafting the statute. Due process would dictate that legislative counsel draft the legislation (using the Advisory Committee's report as guidance only), which would then be debated by the legislature and any necessary amendments made. This was not the process followed for the *Class Proceedings Act*.[10] In that case, legislative counsel drafted the statute clause by clause, in regular consultation with the members of the Advisory Committee, who signed off on the finished draft to ensure that it reflected their consensus. Before the Bill was tabled in the legislature, Scott made a commitment to the Advisory Committee that he would get the

[8] Another costs mechanism put forward by various commentators, such as Neil Williams who prepared draft legislation for the Consumers' Association of Canada in 1974, was that of "one-way costs". Under this scheme, successful plaintiffs would be awarded costs by the court, but successful defendants would have to pay their own costs. NJ Williams, "Consumer Class Actions in Canada – Some Proposals for Reform" (1975) 13 Osgoode Hall Law Journal 1 at 51-52 [Williams 1975]; NJ Williams, *Consumer Class Actions in Canada: A Study Prepared for the Consumers' Association of Canada* (Ottawa: Consumers' Association of Canada, 1974) [Williams 1974].

[9] Law Commission of Ontario, *Review of Class Actions in Ontario: Issues to be Considered* (Toronto: LCO, 2013), online: <http://www.lco-cdo.org/en/class-actions-project-scope> at 9-11 [LCO 2013].

[10] *1992*, SO 1992, c 6 [CPA]. The companion statute to the CPA is the *Law Society Amendment Act (Class Proceedings Funding), 1992*, SO 1992, c 7 [LSAA].

Bill through the readings and committee stages with no substantive changes.[11] That is what happened, and the CPA received Royal Assent on June 25, 1992 – with virtually no input from the democratically elected representatives of the Ontario Legislature.

The process by which class action reform came about in Ontario, therefore, reflects an uncomfortable tension between an innovative mediation-style process that brought many of the major stakeholders to the table to negotiate a compromise, and the democratic process with its usual avenues of consultation and statute-creation. The departure from due process meant that certain compromises were never reviewed or approved by a wider audience – including crucial decisions on the issue of costs. While several Advisory Committee members argue that reform might never have come about otherwise,[12] those compromises continue to affect class proceedings to the present day, often to the detriment of the philosophy of access to justice that underlies the CPA.

B. Why a historical study of the CPA?

Nearly a quarter of a century has passed since class action reform came about in Ontario. Since then, the CPA has become one of the most frequently debated procedural mechanisms of its kind. Plaintiff lawyers proclaim the CPA as the bastion of access to justice, while defence lawyers emphasize its safeguards against frivolous use and the requirements that must be met before class actions can proceed.

At the same time, the Law Commission of Ontario (LCO)[13] has begun a wide-ranging review of the Act, acknowledging that, "[i]t is unclear whether the CPA is working as intended and many unforeseen challenges associated with it have become fodder for discussion in conferences, academic papers, professional associations, social media and other commentary."[14]

In light of the LCO's review, a study of the genesis of the CPA is timely. By examining the origins of the Act, the controversies to which it gave rise and the views that were current at the time of its passage, clarity can be brought to issues that are currently under the LCO's spotlight, as well as the manner in which the CPA is used and

[11] Cochrane Interview 1, *supra* note 7.
[12] *Ibid*; interview with Advisory Committee member, April 13, 2016 [AC Member Interview].
[13] The LCO is the successor to the Ontario Law Reform Commission.
[14] LCO 2013, *supra* note 9, at 2.

interpreted by stakeholders today. For example, one subject of the LCO's review is the issue of costs. Numerous commentators have questioned why the Attorney General's Advisory Committee did not follow the OLRC's recommendations on no-way costs. In the case of *Bayens v Kinross Gold Corporation*,[15] Justice Perell stated that the loser-pays regime creates a strong economic disincentive for plaintiffs to bring claims. He concluded that, "[i]t may be wise for the Legislature to revisit whether any of this is what it intended when it rejected the Law Reform Commission's recommendation that class actions not be governed by the loser pays principle."[16] Justice Strathy came to a similar conclusion in the 2011 case of *Dugal v Manulife Financial Corporation*:[17]

> One of the important goals of class proceedings is to provide access to justice to large groups of people who have claims that cannot be economically pursued individually. In Ontario, the costs rules applicable to ordinary actions apply to class proceedings – the loser pays. The costs of losing can be astronomical – well beyond the reach of all but the powerful and very wealthy – not exactly the group the legislature had in mind when the C.P.A. was enacted.[18]

This discussion on the subject of costs can be informed by a review of the history of the CPA, and especially the deliberations of the Attorney General's Advisory Committee and the subsequent passage of the legislation. These deliberations provide vital insight as to why the Advisory Committee rejected the OLRC's recommendations on costs. A review of these reasons will inform any review of the CPA today.

A review of the history of the statute will also reveal the political influences that shaped it. Economic theory has shed light on the politicization of law reform by positing two grounds for legal change: public interest grounds (both economic – for example, correcting a market failure – and non-economic, such as fair distribution of resources or protection of vulnerable groups) and private interest grounds (for example, pressures from various interest groups).[19] The literature on the history of class proceedings has

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[15] 2013 ONSC 4974 [*Bayens*].
[16] *Ibid* at para 35.
[17] 2011 ONSC 1785. Both *Dugal* and *Bayens*, *supra* note 15, are cited in LCO 2013, *supra* note 9.
[18] *Ibid* at para 27.
[19] See, for example: A Ogus, *Regulation: Legal Form and Economic Theory* (New York: Oxford University Press, 1994) [Ogus]; RA Posner, *Theories of Economic Regulation* (New York: National Bureau of Economic Research, 1974), online: <http://www.nber.org/papers/w0041.pdf> [Posner].

focused almost exclusively on public interest grounds. For example, both Shaun Finn and Bill Bogart state that class proceedings legislation came about as a response to market failure (in that small claims were not being litigated because they were not individually economically viable) and, to a certain extent, fair distribution of resources and paternalism (for example, to modify the behaviour of corporate and other actors who hold power and privilege, and to protect consumers and other relatively vulnerable groups).[20] However, a review of the historical record reveals that private interests were also at play in the creation of class proceedings legislation.[21] While public interest grounds acted as the pull towards reform, private interests such as business groups acted as the pull away from it. Business groups opposed reform for as long as they could and, when reform seemed inevitable, sought to influence the creation of the legislation (most notably through the groups' influence on the Attorney General's Advisory Committee) to ensure that it was as conservative as possible. Business groups were able to do this because of the unique nature of the consultation process instituted by Ian Scott, as detailed above.

My study will also present a more nuanced picture of the class proceedings debate than has been presented to date. For example, the widely accepted narrative is that, after more than two decades of controversy, an activist attorney general (Ian Scott) commissioned the 1990 Attorney General's Advisory Committee Report and thereby "broke the logjam" that had prevented the advent of class actions.[22] This narrative, however, does not explain how the report suddenly pulled together so many divergent

[20] S Finn, "In a Class All Its Own: The Advent of the Modern Class Action and its Changing Legal and Social Mission" (2005) 2:2 The Canadian Class Action Review 333 [Finn 2005]; S Finn, *Étude d'un recours évolutif: redéfinir la procédure sui generis du recours collectif Québécois* (2011, unpublished LLM thesis, on file at the Faculté de Droit, Université Laval) [Finn 2011]; WA Bogart, J Kalajdzic, I Matthews, "Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?" (Report for The Globalization of Class Actions Conference, Oxford University, December 2007) [Bogart 2007].

[21] While there is extensive work on the role of private interests in the conduct of class proceedings, virtually no scholarship exists on the role of these interests in the creation of the legislation itself. Examples of the former include: D Hensler *et al*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica: RAND Institute for Civil Justice, 1999); A Cassone and G Ramello, "Private, club and public goods: the economic boundaries of class action litigation" in JG Backhaus *et al* eds, *The Law and Economics of Class Actions in Europe: Lessons from America* (Cheltenham: Edward Elgar Publishing, 2012) at 101 [Backhaus]; J Beisner *et al*, "Class Action 'Cops': Public Servants or Private Entrepreneurs?" (2005) 57 Stanford Law Review 1441.

[22] Bogart 2007, *supra* note 20, at 3; MG Cochrane, "Conditions for Instituting Class Actions" in A Prujiner and J Roy eds, *Class actions in Ontario and Quebec: Proceedings of the first Yves Pratte Conference* (Montreal: Éditions Wilson & Lafleur Ltée, 1992) at 3 [Yves Pratte Conference]. Even Cochrane, Chair of the Attorney General's Advisory Committee, writes (without explanation) that the Committee's delivery of a unanimous report occurred "much to everyone's surprise".

interests, and why those interests had not been reconciled before. My study will compare and contrast the OLRC and Advisory Committee Reports, as well as the surrounding debate and the changes in the wider legal culture, to answer precisely those questions.

In light of the Law Commission of Ontario's current review of the Act, the results of this research will be of assistance not only to the LCO but also to lawyers, other stakeholders, legal academics and policymakers. This detailed historical study, looking at class actions from an interdisciplinary perspective, will build upon and contribute to the existing literature on the history of class proceedings and access to justice.

C. Literature Review

For the most part, historical analyses of class action reform in Ontario have been limited to brief overviews involving the seminal Supreme Court of Canada decision in *Naken*,[23] in which the court severely narrowed the scope of class actions at common law; the OLRC Report; and the Advisory Committee Report.[24] Slightly more detailed analyses have included the increased activity of the Ministry of the Attorney General leading up to the formation of the Advisory Committee, including Ian Scott's Conference on Access to Civil Justice in Toronto in June 1988,[25] and the recommendations on class actions of the Uniform Law Conference of Canada in August of that year.[26] Such narratives can be found in the work of Michael Cochrane, chair of the Attorney General's Advisory Committee, in the years following the enactment of the CPA.[27] Cochrane's narrative has, for the most part, been picked up uncritically by other commentators.[28]

Very little academic scholarship has looked further than that. The relatively short articles that have touched on the history in Ontario generally cover the entire history of

[23] *GM (Canada) v Naken*, [1983] 1 SCR 72 [*Naken*].
[24] See, for example, P Perell, "Class Action Devils and Angels" (2013) 30:3 Thomas M. Cooley Law Review 285 [Perell], although Justice Perell also discusses the roots of the class action in equity.
[25] Ministry of the Attorney General, *Conference on access to civil justice: June 20-22, 1988* (Toronto: Ministry Of The Attorney General, 1988) [Access to Justice Conference].
[26] Uniform Law Conference of Canada (ULCC), Proceedings of the Seventieth Annual Meeting, held at Toronto, Ontario, August 1988, online: <http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1988ULCC0070.pdf> [ULCC 1988].
[27] MG Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Aurora: Canada Law Book Inc, 1993), at 1-4 [Cochrane 1993]; "Conditions for instituting class actions", in Yves Pratte Conference, *supra* note 22, at 3.
[28] See, for example, MA Eizenga and E Davis, "A History of Class Actions: Modern Lessons from Deep Roots" (2011) 7 Canadian Class Action Review 3.

class actions, from their beginnings in the Court of Chancery to the present day. They treat each period in a fairly cursory manner – including the crucial period during which the device was actually being debated in Ontario.[29] The more in-depth treatments stick largely to the case law on class actions. For example, John Kazanjian looks at the roots of class actions in equity, and then conducts a useful review of the case law in England, in Ontario and in other provinces.[30] However, this is where his historical analysis ends, and the structure of the article clearly indicates that he is conducting such an analysis simply to answer present-day questions. This is largely true for other articles that look at the equitable beginnings of class actions and review the case law.[31] While these provide a useful overview of how the Ontario courts handled class actions prior to the enactment of the CPA, they reflect a narrow view that legal history consists purely of prior court decisions. Such articles do not look at the wider context of the CPA, and the political and social influences that shaped it.

There have been fairly detailed historical treatments of the class action device in other jurisdictions. With regard to Québec, the most in-depth work is that of Shaun Finn.[32] Finn discusses the genesis of Québec class proceedings legislation, with reference to the debates in the legislature and the reports from the Standing Committee on Justice. He provides a useful analysis of the cultural and political context of the movement for reform, but he does so without reference to wider "non-legal" sources such as newspaper articles and correspondence of key players. Catherine Piché has also looked at the history of the class action in Québec,[33] relating her review to an overarching analysis of the cultural impact of class actions, and the way in which class actions are also informed by culture. Again, however, Piché does not look at other historical sources. Both scholars

[29] *Ibid*; Perell, *supra* note 24.
[30] JA Kazanjian, "Class Actions in Canada" (1973) 11 Osgoode Hall Law Journal 397 [Kazanjian].
[31] Williams 1975, *supra* note 8; C Gillespie, "The Scope of the Class Action in Canada" (1981) 11 Manitoba Law Journal 215; L Nissen, "Class Actions in Canada: An Environmental Perspective" (1984) 48 Saskatchewan Law Review 29 [Nissen]; JK Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984) 4 Windsor Yearbook of Access to Justice 229.
[32] Finn 2005 and Finn 2011, *supra* note 20.
[33] C Piché, "The Cultural Analysis of Class Action Law" (2009) 2 Journal of Civil Law Studies 101, at 120 and 123 [Piché].

rely almost exclusively on case law, academic commentary and (in their discussion of other provinces) the reports of the provincial Law Commissions on class actions.[34]

The most notable historian of class actions is Stephen Yeazell, who looks in depth at the roots of class actions in equity and English history.[35] Yeazell focuses on group litigation in the 16th, 17th and 18th centuries, and finds that such litigation was the result of the two relationships that governed the lives of many English people: the manor-copyholder (or landlord-tenant) relationship, and the parishioner-priest relationship. Both involved various rights and duties, including the payment of rent (to the manor) and tithes (to the parish priest). As these groups struggled to work out the customary laws that governed their relationships, they turned to the Court of Chancery to declare what those customary laws were. In that sense, early modern litigation was not really litigation by classes, but requests by pre-existing groups to declare what the law was. Yeazell argues that such "group litigation" was fundamentally different to the modern class action, because (a) the groups existed as social entities independent of the lawsuit (whereas aggregation in modern class actions increases the power of individuals by grouping them together), and (b) the issues at stake involved status and declaratory remedies (whereas modern class actions involve individual claims of right which are generally remedied by monetary damages).[36]

In doing so, Yeazell undermines the assumptions of many other scholars of class actions, who state that class actions have an unbroken history that stretches back to the Court of Chancery. Indeed, even the proponents of reform in Ontario pointed back to this history in order to legitimize what appeared to be a procedural novelty. Attorney General Ian Scott did this when he addressed the Canadian Manufacturers' Association in September 1989:

> [Class actions] have been a part of our legal system for a great many years and in fact can be traced to the early part of the eighteenth century. Until the

[34] For an overview of class actions in each Canadian province, see M Good, "Access to Justice, Judicial Economy and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2010) 47 Alberta Law Review 185.
[35] S Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977) 77:6 Columbia Law Review 866 [Yeazell 1977]; S Yeazell, *From Medieval Group Litigation to the Modern Class Action* (New Haven: Yale University Press, 1987) [Yeazell].
[36] Yeazell 1977, *ibid*, at 876-877.

> fusion of law and equity in 1873 in England, and in 1881 Ontario, this procedural device was employed only in Courts of Chancery.[37]

Yeazell argues persuasively that such arguments are incorrect. This would explain why courts such as the Supreme Court of Canada in *Naken* were so reticent to adopt class actions in the absence of legislative authority, because there was little historical precedent for doing so. It also explains why there was a dearth of group claims for monetary damages in the 20th century after the fusion of the courts, a phenomenon commented on by Kazanjian,[38] because class actions were overwhelmingly an equitable and declaratory device. The modern class action is therefore fundamentally different from its forbears.[39] This fact was conveniently overlooked by many of the proponents of class action reform in Ontario and elsewhere, but it explains why the device provoked such bitter opposition from business interests and other more conservative groups. H. Patrick Glenn, in his scholarly commentary on and opposition to class actions, noted that group litigation throughout history was highly exceptional in character, a "serious judicial usurpation of the functions of the legislature", and "an instrument of royal political and social policy rather than as a strictly 'adjudicative'" procedure.[40]

Yeazell was not the first to write of the equitable origins of class actions,[41] but his work is so authoritative that it has guided most of the subsequent scholarship on the subject.[42] However, his work on US class actions in the 20th century has since been built

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[37] Notes for Remarks by the Honourable Ian Scott, Attorney General, to the Luncheon Meeting of the Canadian Manufacturers' Association, September 19, 1989 (at 2), speeches and notes for remarks by Ian Scott, F 4339-1, Box No B222612, Archives of Ontario [CMA Speech].

[38] Kazanjian, *supra* note 30, at 433-436.

[39] Curiously, the modern defendant class action (involving a class of defendants) bears much more similarity to group litigation in equity: S Chiodo, "Defendant Class Actions: Awkward Twin or Distant Cousin?" (2015) 10:3 Class Action Journal 649.

[40] HP Glenn, "Class Actions in Ontario and Québec" (1984) 62:3 Canadian Bar Review 247 at 271-272 [Glenn]. Glenn took the position that judicial activism in the context of class actions was inappropriate even if it was authorized by legislation, because it would involve a distortion of the traditional judicial function. He did not specifically discuss how the *Charter* factored into this analysis. The effect of the *Charter* on the class actions debate in Ontario will be addressed in Chapter 3.

[41] It should be noted, however, that Yeazell was not the first to write of the equitable roots of class actions. See Z Chafee, "Bills of Peace with Multiple Parties" (1932) 45 Harvard Law Review 1297; J Story, *Commentaries on Equity Pleadings*, 8th ed (Boston: Little, Brown, and Company, 1870), available online: Hathi Trust Digital Library <http://babel.hathitrust.org/cgi/pt?id=njp.32101068559671;view=1up;seq=7> [Story]; F Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (New York: Gale Academic, 2010).

[42] See, for example, GC Hazard Jr *et al*, "Historical Analysis of the Binding Effect of Class Suits" (1998) 146:6 University of Pennsylvania Law Review 1849; F Valdes, "Procedure, Policy and Power: Class

upon, most notably by David Marcus who has conducted significant original historical research on the genesis of Rule 23[43] and its political, social, cultural and economic context.[44] Through the lens of the philosophical tension within class actions (do they confer substantive rights, or are they merely procedural?), Marcus looks beyond the case law and academic commentary relied on by most other scholars of class actions history. He refers to primary "non-legal" sources such as newspaper articles, records of institutional proceedings, reports and submissions from interest groups, and writings and speeches of key players. He not only looks at the official reports of the committee that drafted the various revisions to Rule 23, but also their working papers, notes, and correspondence. In addition, Marcus refers to events occurring in the wider society that affected the development of Rule 23. His contrast between the "regulatory conception" of class actions (whereby proponents of Rule 23 saw it as a mechanism for regulation of big business, environmental polluters and others) and the "adjectival conception" (whereby more conservative interests held that Rule 23 should not depart from the traditional rules of court and was merely procedural in nature)[45] is compelling and is reflected in the history of class actions in Ontario.

Marcus' work on US class actions therefore provides a model for a detailed look, in the broader legal historical sense, of the genesis of class proceedings legislation. By contrast, and as noted above, many legal academics define "history" very narrowly to mean "precedent". This is the internal view of legal history that is largely limited to a review of the case law and tracking developments in doctrine without an in-depth look at influences outside of the law. Often it is also instrumental, in that its purpose is to use history to explain or justify modern day phenomena. There are some exceptions in the current literature. For example, Bill Bogart has written numerous articles on the influence of the *Charter* and its role in changing the legal and cultural landscape that preceded

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Actions and Social Justice in Historical and Comparative Perspective" (2008) 24 Georgia State University Law Review 627.

[43] Rule 23 of the *Federal Rules of Civil Procedure* governs class actions in the United States federal court: *Federal Rules of Civil Procedure*, Title IV: Parties, Rule 23: Class Actions, 383 US 1029 (1966), available online: Legal Information Institute <https://www.law.cornell.edu/rules/ frcp/rule_23> [Rule 23 or 1966 rule].

[44] D Marcus, "The History of the Modern Class Action, Part I: *Sturm Und Drang*, 1953-1980" (2013) 90 Washington University Law Review 1 [Marcus].

[45] *Ibid* at 4-11.

class action reform.[46] Bogart argues persuasively that the *Charter* changed perceptions of the judicial function, as well as of individual and collective rights, and thereby helped prepare the ground for the CPA.[47] He also links the evolution of class actions with wider societal developments such as the rise of mass consumerism and government bureaucracy, and the increased use of the class action mechanism in the US.[48] Catherine Piché also discusses the influence of the *Charter*[49] and links class actions with the wider culture. However, Piché's work focuses largely on Québec, and neither author discusses the genesis of the Ontario CPA with regard to the historical record.

My research will follow Marcus' example by using a wide array of historical sources to study the development of class actions law in Ontario in relation to its social, economic, political and legal background. This is the "law and society"[50] or "external" approach to legal history as espoused by Brian Simpson and numerous Canadian scholars,[51] as opposed to the internal legal perspective on class actions that is restricted to canvassing and analyzing case law and other legal documents.[52] Scholars of external legal history examine history on its own terms. This history looks at legal institutions and players and their work in society, as well as the dynamics of lawmaking. It seeks to explain legal developments with reference to the wider social and political context, and relies on both legal and "non-legal" sources such as archival documents, newspaper articles, interviews and other material.[53]

In studying legal history in this way, scholars such as Simpson have found that the sources reveal an underlying story that often explains why cases were decided a certain way or legislation passed in a certain form.[54] Presently, there is no such external

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[46] WA Bogart, "Naken, the Supreme Court and What Are Our Courts For?" (1984) 9 Canadian Business Law Journal 280 [Bogart 1984]; "Questioning Litigation's Role – Courts and Class Actions in Canada" (1987) 62:3 Indiana Law Journal 665 [Bogart 1987].
[47] WA Bogart, "Ambiguity" in Yves Pratte Conference, *supra* note 22, at 3.
[48] Bogart 1984, *supra* note 46.
[49] Piché, *supra* note 33, at 120 and 123.
[50] P Knepper, *Writing the History of Crime* (London: Bloomsbury Academic, 2016), Chapter 1, "Legal History", at 13-16 [Knepper].
[51] See, for example, AWB Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48:3 University of Chicago Law Review 632; WW Pue and B Wright, *Canadian perspectives on law & society: Issues in legal history* (Ottawa: Carleton University Press, 1988).
[52] Knepper, *supra* note 50, at 10-11.
[53] *Ibid.*
[54] A fascinating example is the underlying story of *R v Dudley and Stephens*, elucidated in AWB Simpson, *Cannibalism and the Common Law* (Chicago, University of Chicago Press, 1984).

legal historical analysis of class actions reform in Ontario. That will form the subject of my thesis, in which the underlying story of the CPA will be revealed.

D. Methodology

My research involves a thorough review of the historical record, in order to determine the views, intentions and deliberations of four key groups: the general public; major stakeholders such as consumers' groups and corporate actors; the legal profession and the legal academy; and the debaters and drafters of the legislation within the provincial government. This approach is widely accepted and commonly used amongst those who espouse the "external" approach to legal history.[55] While the sources I have consulted often overlap among the four groups, as a general rule, the sources for each group are as follows:

(i) **The general public.** I have gauged public opinion of the debate over class actions by consulting major daily and community newspapers.

(ii) **Major stakeholders.** I have reviewed the submissions and reports of major stakeholders, including their oral submissions during committee and legislative proceedings.

(iii) **The legal profession and the legal academy.** I have reviewed contemporaneous articles and monographs published by lawyers; articles and monographs published by legal academics; lawyers' submissions to the government; lawyers' submissions in cases such as *GM (Canada) v Naken*; and contemporaneous conference materials.

(iv) **The provincial government.** I have reviewed the legislative debates in Hansard, as well as the reports and papers of the Ontario Law Reform Commission; Cabinet minutes, standing committee reports and submissions; records of the Ministry of the Attorney General; legislative drafts; and key players' biographies and autobiographies.[56]

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[55] A Musson and C Stebbings, "Introduction", and J Baker, "Reflections on 'Doing' Legal History", in A Musson and C Stebbings, eds, *Making Legal History: Approaches and Methodologies* (New York: Cambridge University Press, 2012).

[56] See, for example, the writings of Attorneys-General R McMurtry (*Memoirs and Reflections* (Toronto: University of Toronto Press, 2013)) [McMurtry]; and I Scott (with N McCormick, *To Make a Difference: A Memoir* (Toronto: Stoddart Publishing, 2001)) [Scott].

In addition to a comprehensive review of the documentary record, I have also used oral history, in the form of the Oral History Collection of the Osgoode Society for Canadian Legal History,[57] as well as semi-structured interviews with central figures. Interviewees were selected through purposive sampling (based on participants' knowledge and experience) and snowballing (to facilitate identification of and access to key players).[58] Prior to contacting any interviewees, ethics approval was obtained from the Research Ethics Board of York University.[59]

There were limits to my sampling approach, in that several people whom I wanted to interview (especially members of the Attorney General's Advisory Committee) did not respond to my requests despite repeated follow-ups. Nevertheless, I was able to interview Michael Cochrane, the chair of the Advisory Committee, as well as at least one member of the Committee from each side of the debate (*ie* the business and consumer/environmental sides). In addition, I was able to interview some authors of the OLRC Report as well as officials who were at the Ministry of the Attorney General at the relevant time. These interviews, together with the interviews in the Osgoode Society archive, gave me a good picture of the reform debate throughout this period.

E. Terminology

Before moving on to a review of the beginnings of class actions in English law, a section on class actions terminology is necessary. It will be assumed that the reader has a basic knowledge of civil procedure in Ontario; however, the field of class actions has several terms of art that need to be defined in order to clarify the discussion.

An action or application is a "class" proceeding when it is brought on behalf of a group of people, and the suit claims that this group has been affected by the actions of one or more defendants. Before the CPA was passed in Ontario, certain groups could bring class actions pursuant to a number of statutes – for example, tenants under the

[57] Available online: <http://www.osgoodesociety.ca/oral-history>.
[58] This method is used widely in the social sciences: see, for example, A Aliverti, "Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-Related Offences" (2012) 21:4 Social and Legal Studies 511 at 513 (and accompanying references).
[59] Ethics Approval from Chair of Human Participants Review Committee, Office of Research Ethics, York University, granted February 19, 2016.

Residential Tenancies Act,[60] or shareholders under the Ontario *Securities Act*.[61] These statutory actions will be referred to as "representative actions", as will actions brought purely for injunctive, declaratory or other equitable relief (also available before the CPA). Modern day group actions for damages, brought under Rule 75 or the CPA (or their equivalent in other jurisdictions), that were theoretically available to a wide variety of groups and for various causes of action, will be referred to as "class actions" or "class proceedings".

The group on whose behalf a class action is brought is generally defined in the statement of claim (for example, "all Canadians who ingested drug X between 2010 and 2014") and the individuals in this group are known as class members. Depending on the jurisdiction, the class can either be "opt-in" (individuals must take steps to be included in the class, such as submitting a form) or "opt-out" (individuals captured by the class definition are automatically included in the class, unless they take steps to be excluded). Class members are not parties to the action. They are represented by one or more representative plaintiffs, who are parties. The lawsuit is brought in the name of the representative plaintiff, who is named in the style of cause, is subject to discovery and can be liable for costs, just like a plaintiff in an ordinary action.

There are several stages to a class action. Many (but not all) jurisdictions have a certification requirement for class actions, where a motion must be brought for court approval of the action as a class proceeding. Certification can be a controversial issue, as it imposes on class actions a requirement that is not imposed on ordinary proceedings. The certification stage generally requires that a number of criteria be met. In some jurisdictions, this includes an assessment of the merits of the action, while certification in other jurisdictions is solely a procedural hurdle. If an action is certified, it will then move to a common issues trial. This is akin to an ordinary trial, except the issues to be determined are "common" across the class (for example, "did the drug ingested by the class members materially increase the risk of heart disease?"). If one or more common issues are determined in favour of the class, then the action will move to the individual issues stage. This step determines issues that arise from the common questions, but

[60] *Residential Tenancies Act*, RSO 1980, c 452, cited in the OLRC Report, *supra* note 2, at 264-265.
[61] *Securities Act*, RSO 1980, c 466, Part XXII, cited in the OLRC Report, *ibid*, at 233.

cannot be determined in common – for example, individual damages. Often this step is completed through a claims process, whereby individual class members will make a claim for their damages and submit supporting documentation.

Damages can sometimes also be determined without reference to the individual class members' discrete claims. This can occur when the defendant's liability has been established and some or all class members are entitled to monetary relief, and it is possible to calculate the totality of the harm caused by the defendant. In this situation, an "aggregate damages" award can be made to the class as a whole, which is subsequently apportioned among the class members. In certain jurisdictions, if any part of this award remains unclaimed by class members after a certain amount of time, it is automatically returned to the defendant. In some situations, it may not be possible or practicable to distribute a monetary award (aggregate or otherwise) to individual class members. In that case, a *cy-près*[62] award can be made, whereby the award is given to a charity or non-profit organization, or distributed in another way that can reasonably be expected to benefit class members.

Because a class action encompasses a group of individuals who are not parties, those class members must be notified of their rights at the various stages of the proceeding. This entails giving notice to the class members (this can usually be given in a number of ways, whether by direct mail, newspaper notice or social media). In some jurisdictions, such as the United States (which has constitutional "due process" requirements), notice is mandatory for certain types of class action; in others, it is within the discretion of the court. Notice is usually given after certification, once the proceeding has been certified as a class action, because then any subsequent judgment will bind class members. In an "opt-out" jurisdiction, if class members do not want to be bound by any subsequent judgment, they must exclude themselves within a certain period of time. Obviously, they cannot exclude themselves if they do not know about the action, which is why notice and the way in which it is given is important. Notice is also usually given after a determination of the common issues, so class members are able to make claims at the individual issues stage.

[62] *Cy-près* is a legal French term that can be translated as "as near as possible". It originated in the law of charitable trusts.

While there are other terms that are used in class actions, I have defined the terms that tend to be the object of controversy in the policy-making context. Many of them certainly proved controversial when class actions reform was being debated in Ontario.

F. Scope and Structure

The focus of my thesis will be on Ontario, the first common law jurisdiction in Canada to enact class proceedings legislation. Apart from a handful of cases,[63] there appears to have been very little interest in class actions in the province until the reform to Rule 23 of the US *Federal Rules of Civil Procedure* in 1966 and the subsequent debate in Québec. The debate in Ontario in fact did not begin until the early 1970s, and my investigation therefore begins at that point. It will end upon the coming into force of the CPA on January 1, 1993.[64] While I intend to do a thorough study of primary historical sources within the scope of my research, I will be relying almost exclusively on secondary sources when referring to other jurisdictions and time periods.

The debate on class action reform in Ontario was preceded by the origins of class actions and group proceedings in the Court of Chancery, the limited jurisprudence in the UK and subsequently Ontario, and the rise of class actions in the US and elsewhere. That will therefore form the second chapter of this thesis. The third chapter will cover the period from the early 1970s, when class actions began to be discussed in Ontario in the context of federal competition legislation and provincial consumer protection laws, to 1985, encompassing the release of the OLRC Report and the Supreme Court of Canada's decision in *Naken*. The fourth chapter will look at the reform debate under the tenure of Ian Scott as Attorney General, the lead-up to and release of the Advisory Committee Report, and the subsequent passage of the CPA. Finally, my conclusion will provide an analysis of the history of the debate and its impact on the work of class actions lawyers in Ontario today.

Of the period leading up to the enactment of the CPA, Shaun Finn writes eloquently that:

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[63] Examples are cited in the OLRC Report, *supra* note 2, at 18-32.

[64] The legislative history of the CPA essentially ends with its coming into force on January 1, 1993. The CPA has remained in its original form since then, except for a minor amendment in 2006 to reflect the fact that the Ontario Court (General Division) was renamed the Superior Court of Justice.

> Common law Canada was becoming increasingly sensitized to the class action. Beneath the surface, the seed planted by the provincial [OLRC] report was slowly taking root, stretching out, and sending tentative, unseen shoots towards the sunlight.[65]

This thesis will, for the first time, investigate the history of class actions reform in Ontario in depth, revealing those shoots as well as the factors that aided or hindered their growth.

[65] Finn 2005, *supra* note 20, at 364.

Chapter 2
Class Actions in England, North America, Australia

A. Representative Proceedings in Equity and English Law

Class actions have their forbears in equity. They first emerged in medieval England from about the year 1200,[66] and usually involved pre-existing groups suing for a declaration of rights: for example, villagers suing for a declaration against the manorial lord that they had a right to graze common land. Representative actions reached their ascendancy in England in the 17th century, and since that time, as Stephen Yeazell has written, they have been put to three chronologically separate and distinct uses.[67] In the first phase, such proceedings were used to modernize and adjust the customary law governing manorial (landlord-tenant) and parochial (priest-parishioner) relationships on the eve of the agricultural revolution. In the second phase, in the late eighteenth and nineteenth centuries, the proceedings were instead used in disputes between new sets of groups, such as business persons and trade unions. For Yeazell, the third phase involves the emergence of the modern class action in the United States. The first two phases will be examined below, while the third phase will be reviewed later in this chapter.

Prior to 1873, judicial authority was vested in two systems: the common law courts, which dealt with strictly "legal" matters, and the Court of Chancery, which dealt with "equitable" rights. Common law courts saw disputes as purely a two-party affair; they took a narrow view of the joinder rule and only allowed permissive joinder if the judgment would affect the direct and immediate interests of the people to be added. The court of equity, however, existed to adjudicate not only the immediate dispute but also the rights that would be affected by it. This court called for compulsory joinder of all persons whose interests would be affected by the suit, so that the eventual judgment would bind everyone and no further related suits would be brought.[68]

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[66] Yeazell, *supra* note 35 at 38. See also RB Marcin, "Searching for the Origin of the Class Action" (1974) 23 Catholic University Law Review 515, which outlines the history of the class action in the British Isles from the 14th century onwards.
[67] Yeazell 1977, *supra* note 35 at 867.
[68] Kazanjian, *supra* note 30 at 399-400; Williams 1975, *supra* note 8 at 8-9.

There were occasions, however, where all interested parties could not be located or it would be impractical to join them, so the court of equity began to make use of the representative action. Under this device, one person could bring a suit on behalf of all interested persons, and any judgment would bind all those people. In this way, the compulsory joinder rule would not prevent the parties from "com[ing] at justice",[69] and the court could still avoid an inefficient multiplicity of suits.[70] This relaxation of the rule was essential for groups such as tenants who had disputes with their manorial lord,[71] or parishioners who wished to assert their rights against their parish priest.[72] As society industrialized and commerce became more complex, business people also combined and collectivized, but these collectives lacked separate legal personality (this was prior to the birth of the modern corporation). They therefore exercised their group claims through the court of equity.[73]

It was considered acceptable to bind people even if they did not know about the judgment, because equitable suits did not involve claims for damages and therefore did not directly affect people's financial interests. Relief was generally declaratory or injunctive, and the declaration or injunction usually involved the rights of a pre-existing group.[74] Stephen Yeazell is one of the few scholars to have noted this distinction between representative actions at equity, and modern day common law class actions (generally involving damages and class members with no pre-existing bond):

> Once one realizes that the relief sought was a declaration of custom, the problem [of absent class members] seems far less urgent. Having one's day in court loses some of its significance if what the court does at the end of that day is simply to declare what shall be the law tomorrow, without retrospectively applying that law to a specific dispute.[75]

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[69] *Duke of Bedford v Ellis*, [1901] AC 1 (HL) at 8 [*Ellis*], cited in WE McNally and BE Cotton, "Guiding Principles Regarding the Constitution of a Representative Defendant and a Defendant Class in a Class Action Proceeding" (2003) 27 Advocates' Quarterly 110 at 115-116.
[70] Kazanjian, *supra* note 30 at 401.
[71] *How v The Tenants of Bromsgrove* (1681) 23 ER 277; *Brown v Howard* (1701), 21 ER.
[72] *Brown v Vermuden* (1676), 1 Chan Ca 271; *Brown v Booth* (1690), 121 ER 960.
[73] Kazanjian, *supra* note 30 at 401. See also *City of London v Richmond* (1701), 2 Vern 421 ER 870; *Chancey v May* (1722), 24 ER 265.
[74] See, for example, *Lloyd v Loaring* (1802), 31 ER 1302 (lodge of Freemasons seeking injunction against dissident member); *Adair v The New River Company* (1805), 32 ER 1153 (shareholders seeking an account of moneys owing against the corporation).
[75] Yeazell 1977, *supra* note 35 at 891.

The declaration of the rights of one member of the group was a declaration of the rights of all. The subject matter of the dispute simply had to be a general proprietary right in which all parties had a common interest, and the parties had to be so numerous that actual joinder would be impracticable.[76]

From about the mid-1800s, the popularity of group litigation at equity began to decline. The birth of the corporation meant that businesses had standing to sue and be sued in their own right.[77] In addition, Parliament enacted several statutes that dealt with the issues regularly faced by corporations, which reduced business peoples' tendency and desire to resort to group litigation to clarify those issues.[78] Equity litigation in general began to fall out of favour, with the publication of Dickens' *Bleak House* in 1852-1853 illustrating the torturous delays and overly complex nature of that system. A campaign for court reform led to the fusion of the courts of law and equity with the passage of the *Supreme Court of Judicature Act, 1873*.[79] From this point onwards, representative actions could be brought in the courts of common law under Rule 10, which was very similar to the later Rule 75 and read as follows:

> Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued or may be authorized by the Court to defend in such action on behalf of or for the benefit of all parties so interested.[80]

However, because of their equitable roots, representative actions were not well received by the English courts when those actions involved monetary damages. This is because, as noted above, binding absent class members was much more troublesome when financial interests were involved. Damages were also generally different for each class member, as opposed to declaratory relief that was the same for everyone. Equitable representative

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[76] Two other criteria (privity between the group and the adversary, and privity between members of the group) were abandoned by the Lord Chancellor in *The Mayor of York v Pilkington* (1737) 26 ER 180. The Lord Chancellor reasoned that equity courts entertained Bills of Peace even though they did not necessarily involve such privity, and that representative actions should be no different. The requirement that the right in question be proprietary also disappeared in 1901, in the *Ellis* (*supra* note 69) and *Taff Vale* (*infra* note 84) decisions.

[77] Yeazell, *supra* note 35 at 124-125.

[78] *Ibid* at 210-212.

[79] 36 & 37 Vict, c 66 (UK). The fusion took effect in Ontario in 1881 by way of *The Ontario Judicature Act, 1881*, 44 Vict, c 5 [*Ontario Judicature Act*].

[80] Rules of Court, Order XII, Rule 10, enacted as a schedule to the *Ontario Judicature Act*, *ibid*.

actions were simply a different beast than common law class actions for damages, and the courts treated them differently.

Many commentators, including the authors of the OLRC Report, have noted that class actions began promisingly after the fusion of the courts, but express confusion at the courts' restrictive interpretation of them from the beginning of the 20th century.[81] When one looks at the difference between equitable and common law group actions, however, the reason for this restrictive interpretation is clear: the major representative actions brought in England after 1873 were received favourably by the courts because they involved equitable relief only. The restrictive interpretation began in 1910, with the bringing of a class action that involved claims for damages. To understand this explanation, however, is to acknowledge that there is a profound difference between representative actions in equity and class actions at common law, and this is to acknowledge that the modern day class action is a substantial departure from precedent. Such an acknowledgement did not fit in with the 20th century reformers' efforts to play down the innovative nature of class proceedings and thereby reassure business and other groups supporting the status quo.[82]

The two major representative actions for equitable relief after 1873 were *Duke of Bedford v Ellis*[83] and *Taff Vale Railway Co v Amalgamated Society of Railway Servants*.[84] *Duke of Bedford v Ellis* involved a group of fruit and vegetable growers who claimed to be entitled to certain statutory rights regarding the use of Covent Garden Market. They sought equitable relief in the form of a declaration and an injunction. A majority of the House of Lords found that a class action could be brought, because three criteria had been satisfied: there was a common interest, a common grievance, and the relief sought was beneficial to all whom the plaintiff proposed to represent.[85] The second case, *Taff Vale*, involved a registered trade union and whether it could be sued for an injunction in its registered name. The law lords found in *obiter* that a defendant class action was a viable procedural alternative. Given that both these cases involved claims

[81] OLRC Report, *supra* note 2 at 10-13.
[82] Yeazell 1977, *supra* note 35 at 866-867.
[83] *Supra* note 69.
[84] [1901] AC 426 (HL) [*Taff Vale*].
[85] *Ibid* at 8.

for equitable relief, they did not pose the procedural difficulties that were posed by claims for damages.

These difficulties arose in a 1910 case, *Markt & Co Ltd v Knight Steamship Co Ltd*,[86] which was a representative action for damages. The plaintiffs' goods had been damaged when a Russian warship destroyed the defendant's vessel, on the suspicion that it was carrying contraband. The plaintiffs sued on behalf of 44 other shippers and sought "damages for breach of contract and duty in and about the carriage of goods by sea."[87] The English Court of Appeal found that the plaintiffs could not bring a representative action, because there was no common interest. First, the shippers all had separate contracts with the defendants (no common interest); second, their damages were all different; and third, the defendants might be able to raise different defences against different shippers.[88] The relief sought (monetary damages) was necessarily personal to each shipper, and this relief could not therefore be beneficial to all whom the plaintiffs proposed to represent. The case therefore failed the test articulated in *Duke of Bedford v Ellis*, and could not proceed as a representative action.[89]

The subsequent jurisprudence followed the ruling in *Markt*. Very few representative actions could satisfy the three-part test articulated in *Duke of Bedford v Ellis*: common interest, common grievance, relief beneficial to all. The exceptions were largely cases that sought equitable relief or damages from a common fund (such as a trust – trusts also being part of the law of equity), or involved groups that pre-existed the litigation, such as unions, who were not simply bound together by individual contracts against the same defendant.[90] There were also some cases in which the courts allowed representative actions for a declaration of liability; in those cases, class members would then have to follow up with their own individual suit for damages.[91] However, the

[86] [1910] 2 KB 1021 (CA) [*Markt*].
[87] *Ibid* at 1022. See also M Stiggelbout, "The Recognition in England and Wales of United States Judgments in Class Actions" (2011) 52:2 Harvard International Law Journal 433 at 446 [Stiggelbout].
[88] *Markt*, *ibid*, at 1029-30, 1035, 1040; Stiggelbout, *ibid*, at 447.
[89] *Markt*, *ibid*, at 1035, 1040-1041.
[90] *EMI Records Ltd v Riley*, [1981] 2 All ER 838 (Ch) (suit brought on behalf of all members of a music industry trade association).
[91] *Prudential Assurance Co Ltd v Newman Industries Ltd*, [1979] 3 All ER 507 (Ch).

seeking of monetary relief, or the presence of individual contracts, were major impediments to representative actions in England.[92]

The situation was similar in Ontario, where the case law generally followed the precedent set by *Markt*. Representative actions in which the claims of class members were based on separate contracts were found not to satisfy the "common interest" requirement,[93] as were actions that sought monetary relief.[94] Courts in Ontario continued to be largely unreceptive to class actions until the 1970s, when group litigation began to increase in popularity following class action reform south of the border.

B. Class Actions in the United States

Class actions in the United States have undergone a long and complex history. This history is further complicated by the fact that class actions are available at two levels of courts in the US – the state level and the federal (national) level. The discussions on reform in Ontario, as well as the various reports on class actions in that province, were influenced far more by the federal Rules than those at the state level. The focus of this section will therefore be on federal class actions in the US.[95]

The concept of representative litigation entered the United States in the early 19th century, when Supreme Court Justice Joseph Story discussed the mechanism in his treatise on equity.[96] Story also looked at the representative action in the case of *West v Randall*,[97] a decision he wrote as a judge of the United States Court of Appeals for the First Circuit. The case arose from a dispute over the estate of West involving numerous individuals, and the issue before Story was which of those individuals should be made parties to the lawsuit. The action originated in equity (as it involved a trust), and Story held that the same rule that applied in equity in England should apply in the United

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[92] *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd*, [1980] 1 All ER 1097 (QB); *Smith v Cardiff Corporation*, [1954] 1 QB 210.
[93] *Preston v Hilton* (1920), 48 OLR 172 (HC Div); *Shields v Mayor*, [1953] OWN 5 (CA); *Agnew v Saulte Ste Marie Board of Education* (1976), 2 CPC 273 (Ont HCJ).
[94] *Turtle v City of Toronto* (1924), 56 OLR 252 (App Div). See also Williams 1975, *supra* note 8 at 30.
[95] A good overview of US class actions at the state level can be found in the OLRC Report, *supra* note 2 at 64-70. Until the 1980s at the earliest, class action litigation in the US federal courts was far more significant than litigation at the state level: Marcus, *supra* note 44 at 5.
[96] Story, *supra* note 41. The history of US class actions generally is discussed in Yeazell, *supra* note 35.
[97] 29 F Cas 718 (RI 1820), available online: <https://law.resource.org/pub/us/case/reporter/F.Cas/0029.f.cas/0029.f.cas.0718.pdf>.

States: namely, that all persons materially interested in the subject matter of the suit should be joined as parties.[98] The rule applied for the same reason as it did in England – to ensure a complete adjudication of all the issues between the parties, to prevent a multiplicity of suits, and to protect the rights of everyone involved.[99] Where it was not possible to bring all the parties before the court, "a few may sue for the benefit of the whole".[100] In other words, representative litigation could be resorted to in the context of equity, if it was required for justice to be done. However, this was not a blanket rule: "[a] bill cannot be sustained in equity, which is multifarious and embraces distinct matters, affecting distinct parties, who have no common interest in the distinct matters."[101]

In 1833, Story's ruling was codified in Equity Rule 48. Although this rule allowed for representative litigation where it was impractical to join all interested parties, such litigation could not bind absent parties. For practical purposes, the rule was therefore ineffective.[102] The Supreme Court got around this problem by interpreting the rule so that absent parties could be bound.[103] However, uncertainty as to the binding nature of such judgments persisted, even after a revision of the Equity Rules in 1912.[104] In the early part of the 20th century, Equity Rule 48 became Rule 38 as part of a major restructuring of the Rules. When the courts of law and equity were fused in the US at the federal level in 1938, Equity Rule 38 became *Federal Rules of Civil Procedure*, Rule 23,[105] and representative actions became available for both legal and equitable relief.

The original Rule 23 attempted to provide some guidance to the courts as to the types of actions that would be amenable to class treatment. The rule described three different types of class actions: true, hybrid and spurious.[106] True actions involved rights that were enjoyed jointly; hybrid actions involved rights to property, where the rights were several; and spurious actions involved several rights, with only common questions

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[98] *Ibid* at 1.
[99] *Ibid* at 8.
[100] *Ibid* at 10.
[101] *Ibid* at 1.
[102] Yeazell, *supra* note 35 at 221.
[103] *Ibid* at 221-222.
[104] OLRC Report, *supra* note 2 at 8.
[105] 308 US 653 (1938) [original Rule 23 or old Rule 23].
[106] These terms are not used in the original Rule 23, *ibid*, but over time they came to be used to describe the categories laid out in that rule: OLRC Report, *supra* note 2 at 8.

of law or fact affecting them.[107] The true actions were closest to their equitable forbears, because they involved a pre-existing group (property owners) with a common interest (property).[108] Hybrid actions still involved a pre-existing group, even though their property rights were not held in common. It was the spurious actions, however, that gave the courts the most trouble. Most courts allowed binding judgments as to absent class members only in the first two categories, so the spurious category soon became completely worthless.[109] In other words, it was essentially only the actions that were closest to their equitable forbears (those with a pre-existing group and/or a common interest) that survived as class actions under the new regime. The US federal experience, in this sense, was similar to the English and early Ontarian experience.

The categorizations under the old Rule 23 proved overly conceptual and extremely difficult for courts to follow. In addition, there were significant problems with notice, and this affected the due process rights of absent class members.[110] These problems, and the virtually useless nature of the "spurious" category, led to calls to reform the rule. These were answered in 1966.[111] Under the 1966 rule, all class actions bound absent class members[112] and contained specific safeguards for their rights, including requirements for notice. In addition, actions had to be certified by the court before they could proceed as a class action, and the certification requirements included the following:[113]

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

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[107] W Landers and B Vance, "Comments: Federal and State Class Actions: Developments and Opportunities" (1975) 46 Mississippi Law Journal 39 at 75 [Landers and Vance].
[108] This conclusion was supported by Landers and Vance, *ibid*, who stated that the purpose of this categorization was "to give meaning to the terminology of 'common or general interest' as used in the Field Code version of the class action rule" (at 74-75).
[109] *Ibid* at 75.
[110] *Ibid.*
[111] Rule 23, *supra* note 43.
[112] *Ibid*.
[113] *Ibid*, Rule 23(a).

Most importantly, the 1966 rule did away with the old categories, constructing in their place a new tripartite structure:[114]

- Rule 23(b)(1) class actions were designed to avoid the risk of individual judgments that would impose incompatible standards of conduct on defendants, or be dispositive of or impair the interests of other members of a group;
- Rule 23(b)(2) class actions involved class injunctive and declaratory relief;
- Rule 23(b)(3) class actions could be maintained where questions of law or fact common to class members predominated over individual issues, and where a class action was superior to other methods for adjudicating the controversy.

It was Rule 23(b)(3) that was the most revolutionary part of the new rule. The other two kinds of class actions were fairly close to their equitable predecessors: Rule 23(b)(1) actions largely encompassed pre-existing rights or members of a pre-existing group, and thus were closer to the "true" actions under the old rule;[115] and Rule 23(b)(2) actions were only for equitable relief. Rule 23(b)(3) actions, however, encompassed class members who might only be tied together by the conduct of the defendant.[116] The first two parts of the new tripartite structure had arguably always been available, albeit without the new protections and requirements applicable to all class actions. The third part, however, was a drastic departure from precedent and constituted the birth of the modern class action as we know it today.

One of the reasons Rule 23(b)(3) was so revolutionary is that it allowed the aggregation of claims that were not economically viable on an individual level, without any pre-existing ties between class members. The departure from equitable claims also meant that class actions for damages were suddenly available,[117] opening up the horizons for class litigation in a massive way. Combined with contingent fees and no-way costs, the incentives for entrepreneurial class counsel were plentiful.[118] However, the due process protections specific to Rule 23(b)(3), including individual notice of each class

[114] L Silberman, "The Vicissitudes of the American Class Action – With a Comparative Eye" (1999) 7 Tulane Journal of International and Comparative Law 201 at 204 [Silberman].
[115] *Ibid.*
[116] *Ibid.*
[117] OLRC Report, *supra* note 2 at 54-55.
[118] Silberman, *supra* note 114 at 205.

member's right to opt out, could also cripple a class action, leading to procedural delays and rendering the action economically unviable.[119] Notice also had to be provided where any certified class action was dismissed or settled, and such dismissal or settlement could not occur without court approval.[120] Because the U.S. was the first jurisdiction in the world to explicitly allow class actions for damages, other jurisdictions have looked to Rule 23 as both an example and a warning in structuring their own class actions regimes. This includes Ontario.

The provisions of Rule 23 were used prolifically from 1966 to the early 1970s in a range of proceedings, from civil rights lawsuits to consumer actions, in order to "dispens[e] justice to socially or economically disadvantaged groups as well as to small claimants generally."[121] Class actions were also used to supplement government securities and anti-trust regulations,[122] with many plaintiff class action lawyers styling themselves as "private attorneys general".[123] As enthusiasm for the new class actions device ran high, courts were initially liberal in their willingness to certify.[124]

However, this tendency slowed from the early 1970s.[125] Several landmark decisions at that time stymied class actions for damages at the federal level.[126] In *Snyder v Harris*[127] and *Zahn v International Paper Co.*,[128] the US Supreme Court held that the $10,000 minimum requirement for the federal courts to take jurisdiction applied per class member. In other words, it was not sufficient for the claims of the class to total more than $10,000; each class member's claim had to total more than that amount. This removed almost every consumer class action, and many others as well, from the federal courts'

[119] This is essentially what happened in *Eisen v Carlisle & Jacquelin*, 417 US 156 (1974) [*Eisen*].
[120] 1966 rule, *supra* note 43, Rule 23(e).
[121] A Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'" (1979) 92 Harvard Law Review 664 at 678 [Miller].
[122] This concept was first suggested by H Kalven Jr and M Rosenfield in their 1941 article, "The Contemporary Function of the Class Suit" (1941) 8 University of Chicago Law Review 684.
[123] A Homburger, "Private Suits in the Public Interest in the United States of America" (1974) 23 Buffalo Law Review 343 at 345; M Cappelletti, "Vindicating the Public Interest through the Courts: A Comparativist's Contribution" (1976) 25 Buffalo Law Review 643 at 660; J Coffee Jr, "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working" (1983) 42:2 Maryland Law Review 215. The plaintiff in *Eisen*, *supra* note 119, was one such "private attorney general".
[124] Silberman, *supra* note 114 at 205.
[125] Miller, *supra* note 121 at 679.
[126] A summary of these cases can be found in the OLRC Report, *supra* note 2 at 58-62.
[127] 394 US 332 (1969).
[128] 414 US 291 (1973).

jurisdiction.[129] In *Eisen*, as noted above, the Supreme Court held that, as far as possible, individual class members must receive notice in a Rule 23(b)(3) suit, and the costs of that notice must be paid by the representative plaintiff. This had the effect of removing many damages actions from the federal courts, as they would be cost-prohibitive. *Eisen* also removed district courts' ability to conduct preliminary hearings on the merits of a case, which had generally been favourable to plaintiffs. Finally, courts were far more reluctant to award lawyers' fees. Although the US had no-way costs, courts could make an exception for the "private attorney general", lawyers whose successful prosecution of the case had furthered the public interest. However, the Supreme Court effectively wiped out this exception in *Alyeska Pipeline Service Co v Wilderness Society*,[130] stating that lawyers' fees were not recoverable absent express statutory authorization.

From the mid to late 1970s, the class actions pendulum swung back towards the middle, in "a period characterized by increasing sophistication, restraint, and stabilization in class action practice."[131] Plaintiffs' lawyers defined the scope of their claims and classes much more carefully and realistically, and defence lawyers, in turn, became less resistant to the prospect of class actions.[132] Judges also began to exercise their managerial functions in a much more nuanced way, redefining classes, granting partial certification, and bifurcating cases where necessary.[133] The US Supreme Court had softened its stance so that, by 1982, the OLRC Report could conclude that, "the attitude of that Court to class actions ... in recent years, may be characterized as one of cautious acceptance."[134] This was something of a boon to the reformers in Ontario, as they could refer to the US experience to show how the class action was, for the most part, a balanced remedy that treated the rights of plaintiffs and defendants with equal concern.

C. Ontario in the 1970s: the Precursor to Reform

As noted earlier in this chapter, Ontario was largely unreceptive to class proceedings until the 1970s, when the effects of the United States' new Rule 23 began to make themselves

[129] Silberman, *supra* note 114 at 205-206.
[130] 421 US 240 (1975).
[131] Miller, *supra* note 121 at 680.
[132] *Ibid.*
[133] *Ibid* at 680-681.
[134] OLRC Report, *supra* note 2 at 62.

felt. Representative proceedings in Ontario were governed by Rule 75, which was similar to the previous Rule 10 and stated that, "[w]here there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all."[135] An increasing number of actions in Ontario, including those involving separate contracts and those for monetary relief, were found to satisfy the "same interest" requirement. As John Kazanjian has noted, the phrase defies clear and specific meaning, which was ideal for the flexible approach of the court of equity, but invited arbitrary treatment once it was codified as a rule of civil procedure.[136] Where earlier in the 20th century the "same interest" requirement had been interpreted inflexibly, then, the Ontario courts began interpreting it more generously from 1970 onwards.[137]

In doing so, they took the lead from several decisions in British Columbia. The two most notable were *Shaw v Real Estate Board of Greater Vancouver*[138] and *Chastain v British Columbia Hydro and Power Authority*.[139] In *Shaw*, a group of real estate salespersons brought a representative action for an accounting, in order to recover portions of commissions that they claimed had been wrongfully withheld by the defendant. The court held that it was immaterial that the group members had been wronged in their individual capacity, "provided, of course, that their claims were not for personal damages."[140] Because the group had brought their action for equitable relief – that is, for an accounting and not for damages at common law – it did not matter to the court that calculating the entitlement of each class member would involve "long, detailed and difficult accountings."[141] What was important was that the class had the "same interest" in that they had a common interest in the success of the action:

> A class action is appropriate where if the plaintiff wins the other persons he purports to represent win too, and if he, because of that success, becomes

[135] Rule 75 of the Rules of Practice of the Supreme Court of Ontario.
[136] Kazanjian states that the phrase "same interest" and "common interest" were used interchangeably in equity: Kazanjian, *supra* note 30 at 416-418.
[137] As the OLRC Report has noted, courts did not have difficulty with the "numerous persons" requirement, unless there were so few class members that they could just as easily have been joined in an ordinary action: OLRC Report, *supra* note 2 at 18-19, citing *Goodfellow v Knight* (1977), 2 CPC 209 (SCTD).
[138] (1973), 36 DLR (3d) 250 (BCCA) [*Shaw*].
[139] (1973), 32 DLR (3d) 443 [*Chastain*].
[140] *Shaw*, *supra* note 138 at 253-254.
[141] *Ibid* at 255.

> entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief...[142]

This "common success" criterion was also followed in *Chastain*.[143] In that case, the plaintiff brought a representative action on behalf of hydro customers who had been required to pay a security deposit (the practice was discriminatory because only customers with poor credit histories were required to pay the deposit). The action sought equitable relief, in the form of a declaration that the defendant had no authority to require deposits, as well as an injunction preventing the defendant from keeping current deposits. The injunction was effectively a claim for monetary relief (which would involve returning different amounts to each customer), but the court nevertheless allowed it to proceed. McIntyre J. concluded that the plaintiffs and those whom they represented "form a group having the same interest in the cause."[144] In other words, all class members had the same interest in the success of the action.

The case law in Ontario in the 1970s reflects the dual strands of *Shaw* and *Chastain*: first, the adoption of the "common success" test, and second, the creative use of equitable remedies to bypass the restrictions of *Markt* and claim monetary relief on behalf of the class. *Farnham v Fingold*[145] was a representative action brought on behalf of non-controlling shareholders, who claimed they had been unjustly deprived of a premium that had been paid to the controlling shareholders upon the sale of the company. They sought several forms of relief, including a declaration, an accounting, and damages. Despite the plaintiffs' creative efforts to seek relief by equitable means, the Court of Appeal in fact chose to treat the action as one for damages. Jessup JA treated the holding in *Markt* as *obiter*, and instead preferred the holding in *Taff Vale*, which would permit a more flexible approach to representative actions.[146] While the plaintiffs in *Farnham* sought a pro-rata share of damages, Jessup JA expressed circumspection about class actions for damages where individual assessments would be required. Not only would such an action deprive the defendant of the ability to conduct discoveries to establish

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[142] *Ibid* at 254.
[143] This case is discussed in Williams 1975, *supra* note 8 at 12-13.
[144] *Chastain*, *supra* note 139 at 443.
[145] [1972] 3 OR 688 (HC); [1973] 2 OR 132 (CA).
[146] *Ibid* at 135.

individual entitlement, but, in the event of success, the defendant would only have recourse for costs against the plaintiff, even though his or her costs had been increased by multiple separate claims.[147] Jessup JA's statement implied that class actions for separately assessed damages could be problematic.[148]

The case of *Cobbold v Time Canada Ltd.*[149] built on the success of *Farnham* and adopted the "common success" test from the BC jurisprudence. The plaintiff in *Cobbold* brought an action for breach of contract, on behalf of himself and other subscribers with unexpired subscription contracts, when the defendant suspended publication of its magazine in Canada. The defendant had since been supplying the US version of *Time* and, because that version was more expensive, it had curtailed the length of the class members' contracts. The plaintiff sought relief in the form of specific performance (delivery of *Time* for the full length of the original contracts) or a declaration that the class members were entitled to damages. This case is another example of the creative use of equitable relief in order to bypass the restrictions of *Markt*. Nevertheless, the defendant objected that the action was essentially one for damages, and also pointed out that each class member had a separate contract with the defendant. The court allowed the action to proceed anyway pursuant to the "common success" test in *Shaw*. Citing that case, Stark J. stated that, "a class action is appropriate if it can be shown that success for the plaintiff means success for the other members of the class, especially where the same measure of success applies equally to all."[150] It helped that the class members were not claiming damages that had to be individually assessed, but were instead seeking damages that could be assessed in the aggregate.[151]

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[147] *Ibid* at 136.
[148] Kazanjian, *supra* note 30 at 435-436; Williams 1975, *supra* note 8 at 32-33. The issue of individually assessed damages was one of the issues that later prevented the *Naken* case (*supra* note 23) from proceeding as a class action.
[149] (1976), 13 OR (2d) 567 (HCJ).
[150] *Ibid* at 569.
[151] The action was, however, dismissed at trial on the grounds that the class members who had been sent the US version of *Time* instead had not suffered any damages. The class members who instead received a refund from *Time* were found to have settled with the defendant, and were therefore excluded from the class. Costs were awarded against the plaintiff in an unspecified amount: *Cobbold v Time Canada Ltd*, 1980 CanLII 1879 (ON SC).

This approach was successful at the Ontario Court of Appeal in *GM (Canada) v Naken*.[152] The representative plaintiff was suing on behalf of persons who purchased new models of the Firenza, manufactured by General Motors, in 1971 and 1972. The Firenza was a notoriously unreliable vehicle, finding its place in automotive history next to the flaming Pinto.[153] As a Canadian newspaper reported more than a decade later:

> The Firenza made mechanics rich. Owners picketed car lots all over Ottawa, Montreal, Oshawa and Toronto, protesting its low resale value. They sued dealerships. They formed an association and drove a motorcade to Parliament Hill to protest – along the route one Firenza broke down, barfing smoke at the sky.[154]

The plaintiffs in *Naken OCA*, not surprisingly, alleged that the vehicles were in breach of the manufacturer's collateral warranty. They sought pro-rata damages in the same creative way as in *Farnham*, alleging that each class member had suffered $1,000 in damages based on the reduced resale value of each car caused by the breach of warranty.

At the first instance, the defendant's motion to strike was dismissed.[155] However, the Divisional Court saw through the plaintiffs' creative presentation of their damages claim and allowed the defendant's appeal.[156] It held that individual assessments for damages would be required, and that the class members' damages could not be disguised as aggregate damages simply by capping the claims at $1,000 each.[157] In addition, the court held that the claims involved individual contracts.[158] The class members did not have the "same interest", and could not claim that their case involved a "common fund"

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[152] 1979 CanLII 1983 (OCA) [*Naken OCA*].
[153] The Pinto was a vehicle manufactured by Ford that became infamous in the 1970s for bursting into flames if its gas tank was ruptured in a collision. It is now the subject of one of the main exhibits at the American Museum of Tort Law.
[154] B Evenson, "The Lemon Car Legacy", *Ottawa Citizen* (July 26, 1992), p A4 [Lemon Car Legacy], in Policy Development Division (PDD) Counsel correspondence files, Class Proceedings – Media, RG 4-40, Box No B703283, Archives of Ontario [PDD Media].
[155] *Naken et al v General Motors of Canada Ltd et al*, 1975 CanLII 498 (ON SC).
[156] *Naken et al v General Motors of Canada Ltd et al*, 1977 CanLII 1317 (ON SC).
[157] *Ibid.*
[158] The plaintiffs acknowledged that the main contracts were formed between class members and various automobile dealers, not the manufacturer; however, they claimed that GM had established a preliminary or collateral contract with class members by inducing them to purchase their vehicles through advertising and other means. The court held that this question of reliance was inescapably individual, and that a common cause of action was therefore missing (*ibid*).

out of which all class members would be paid if the case succeeded. The suit could not therefore proceed as a class action under Rule 75.[159]

At the Court of Appeal, Arnup JA allowed the plaintiffs' appeal and permitted the pleading to stand.[160] While the contracts between the class members and various automobile dealers were not common, there was a collateral contract between GM and the class members, whereby GM's advertisements and other representations had induced those class members to buy the vehicles. The only members of that class, however, were those that had relied upon the advertisements. The pleading therefore had to be amended to narrow the class to those people, so that there would be a "common interest" among the class.[161] In that way, the plaintiffs' damages would be sought on behalf of the class as a class, instead of just part of the class. Damages could therefore be assessed in the aggregate. While individual proceedings would be necessary in order for each class member to demonstrate that they had relied upon the manufacturer's warranty, Arnup JA held that such proceedings could be held after the common questions were answered, and that this should not be a bar to a class action.[162]

This was a promising development towards the increased use of class actions in Ontario.[163] It was not an unqualified win, however. Two subsequent decisions from the Court of Appeal for Ontario clarified the jurisprudence on damages class actions, making it clear that a class action could not proceed where individual assessments for damages were required. In *Seafarers International Union of Canada v Lawrence*,[164] the plaintiffs sought damages for defamation. The court concluded that the damages for each class member would be different, and that it would not be possible to establish the exact amount of damages and pro-rate that amount among the class.[165] In *Stephenson v Air*

[159] *Ibid.*
[160] *Naken OCA*, *supra* note 152. See also: unknown author, "Judge rules Firenza action is proper, if change made", *Globe and Mail* (October 13, 1978), p 5, in Ontario Law Reform Commission files, Nov 1976 - Dec 1982, Project name: class actions, RG 4-66, BA77, Box No B380543, Archives of Ontario [B380543].
[161] *Naken OCA*, *ibid*.
[162] *Ibid*.
[163] Unfortunately, the development was cut short when the Supreme Court of Canada overturned the Court of Appeal's decision and said the case could not proceed as a class action: *Naken*, *supra* note 23. The Supreme Court's decision will be reviewed in detail in the next chapter.
[164] (1979), 24 OR (2d) 257 (CA).
[165] *Ibid* at 263-264.

Canada, the Court of Appeal for Ontario[166] affirmed the earlier judgment of Southey J.[167] This judgment held that a group of people who had bought Air Canada flights in August 1978, only to find the flights were subsequently cancelled due to a strike, could not proceed with a class action for damages. Again, there was no common fund available in this case, and no way in which damages could be assessed in the aggregate. Individual enquiries as to damages would have to be conducted, and this meant that a class action would not be fair to the defendants.[168]

Nevertheless, it was clear that Ontario courts were becoming accustomed to the idea of class actions in general, even if they would still not permit Rule 75 proceedings involving individual damages or individual contracts. This development was reflected in other jurisdictions in Canada and internationally, where class actions were being researched, debated and even legislated.

D. Developments in Other Jurisdictions

i) New Brunswick

The vanguard of the movement for class actions was led by consumer protection and environmental rights advocates. Postwar Canada, like many other countries in the West, saw a dramatic rise in mass production and the availability of consumer products. However, this development took place without many of the institutions that were required to protect consumers and ensure that transactions were fair. This led to a nationwide movement advocating for consumer rights and the means for enforcing them.[169]

In New Brunswick, this movement led to the creation of the Consumer Protection Project in the Law Reform Division of the New Brunswick Department of Justice. This project looked into various consumer protection mechanisms over a number of years, one of which was class actions. The project's third report, released in 1976, recommended

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[166] The Court of Appeal for Ontario gave its decision on February 10, 1981 without reasons. Its decision is cited in the OLRC Report, *supra* note 2 at 24.
[167] (1979), 26 OR (2d) 369 (HCJ).
[168] *Ibid* at 369-370. See also: unknown author, "Class action suit against Air Canada ruled out", *Toronto Star* (February 12, 1981), no page number stated, B380543, *supra* note 160.
[169] One of the organizations that sprang out of this movement was the Consumers' Association of Canada, which was instrumental in bringing about class action reform in Ontario and elsewhere: A Sadovnikova *et al*, "Consumer Protection in Postwar Canada: Role and Contributions of the Consumers' Association of Canada to the Public Policy Process" (2014) 48:2 The Journal of Consumer Affairs 380 [Sadovnikova].

that legislation permitting class actions be enacted.[170] However, like many initial proposals for statutory change, the New Brunswick report adopted the new Rule 23 of the US *Federal Rules of Civil Procedure* with very little change. Such proposals were troublesome in that they imported the weaknesses of Rule 23, such as the requirement for individual notice in damages class actions that, as noted above, could cripple class actions and even prevent them altogether.

Nevertheless, the report of the Consumer Protection Project was an important first salvo in the fight for reform. While New Brunswick would not end up introducing class actions legislation until 2006,[171] its officials informed other jurisdictions' research into class actions, as well as that of the Uniform Law Conference of Canada.[172]

ii) British Columbia

British Columbia also undertook early research into the possibility of class action reform. In August 1977, J Douglas Lambert, the BC delegate to the Uniform Law Conference of Canada and member of the BC Law Reform Commission, presented the annual meeting with a memorandum on class actions.[173] The memorandum was only a preliminary outline of the issues to be discussed by the ULCC, with more in-depth research to follow once the ULCC had given guidance. Nevertheless, it was useful in outlining current developments,[174] the state of the current law, and possibilities for reform, as well as crucial issues such as costs, certification and the distribution of damage awards.[175]

In response, the ULCC established a committee to monitor developments in the field and possibly prepare model uniform provisions for consideration the following

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[170] KJ Dore and RW Kerr, *Third Report of the Consumer Protection Project*, Vol 1 (Fredericton: New Brunswick Department of Justice, Law Reform Division, 1976).
[171] *Class Proceedings Act*, SNB 2006, c C-5.15, since repealed and replaced by RSNB 2011, c 125.
[172] The correspondence between Basil Stapleton, Director of the New Brunswick Law Reform Branch, and Michael Cochrane is detailed in Chapter 4. Stapleton encouraged Cochrane to have Ontario class actions placed on the ULCC agenda.
[173] Uniform Law Conference of Canada (ULCC), Proceedings of the Fifty-Ninth Annual Meeting, held at St Andrews, New Brunswick, August 1977, at 208-213, online: <http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1977ULCC0059.pdf>.
[174] This included the debate about the Federal *Combines Investigation Act* as well as the work of the OLRC on class actions, both of which will be discussed in Chapter 3: *ibid* at 208-210.
[175] *Ibid* at 211-212.

year.[176] While the provisions had not been prepared by the time of the 1978 meeting, the committee was able to report that legislation had been introduced and passed in Québec[177] that year.[178] That legislation, which is detailed further below, was to prove a major influence on the movement for class proceedings reform in Ontario.

In 1979, BC passed the *Trade Practice Act*[179] that empowered the Director of Trade Practices, or any other person, to bring an action for a declaration or an injunction on behalf of aggrieved consumers.[180] The action could be brought on behalf of consumers generally, or on behalf of a specific group of consumers. This was not a class action statute of general application (such legislation would not be passed in BC until 1996),[181] and it allowed only equitable relief. However, several commentators at the time noted that section 18(3) allowed courts, in an action for a permanent injunction, to restore to consumers any property or money of which they had been deprived by an unconscionable act.[182] Effectively, then, a consumer class action for damages could be brought under this statute. As such, it was very widely applicable and reflected the wider movement for consumer protection and class action reform.

iii) Saskatchewan

Similarly, in 1978, Saskatchewan passed *The Department of Consumer Affairs Act*,[183] pursuant to which the provincial Attorney General could maintain an action on behalf of any person or class of persons who alleged that they had suffered loss as a result of illegal

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[176] *Ibid* at 29. The committee consisted of J Douglas Lambert (BC) as chair, Prof Hubert Reid and Daniel Jacoby (Québec), and Derek Mendes da Costa and Simon Chester (Ontario). Mendes da Costa was the Chair of the OLRC at the time, and Chester was counsel at the Policy Development Division at the MAG.
[177] *An Act Respecting Class Actions*, RSQ, c R-2.1 [Québec CPA]. The passage of the Québec legislation will be detailed later in this chapter.
[178] Uniform Law Conference of Canada, Proceedings of the Sixtieth Annual Meeting, held at St John's, Newfoundland, August 1978, at 111-112, online: <http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1978ULCC0060.pdf> [ULCC 1978]. Marie José Longtin, Assistant Director of Legislation at the Department of Justice of Québec, who had replaced Daniel Jacoby, reported on the passage of the Québec legislation (at 111).
[179] RSBC 1979, c 406.
[180] *Ibid* at s 18(1).
[181] *Class Proceedings Act*, RSBC 1996, c 50. BC was reportedly waiting for the outcome of the debate in Ontario before enacting legislation: J Prichard, "Class Action Reform: Some General Comments" (1984) 9 Canadian Business Law Journal 309 at 313.
[182] E Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977), 15 Osgoode Hall Law Journal 327 at 365 [Belobaba 1977].
[183] RSS 1978, c D-9.

conduct affecting consumers.[184] This statute was of narrower application than the BC *TPA*, because only the Attorney General could bring a consumer class action; however, unlike the *TPA*, class actions for damages could be brought with a view to compensating consumers.[185] The provisions of the *DCAA* were partly the result of a study by the Saskatchewan Law Reform Commission as part of its Consumer Credit Law Project,[186] commenced in 1975, which looked at the potential for class actions as a means of protecting consumer credit rights.

Although Saskatchewan made some headway towards reform of its consumer protection laws, there appears to have been little other movement towards class action reform until after Ontario passed the CPA. In the end result, a class actions statute of general application was not passed in Saskatchewan until 2001.[187]

iv) Australia

In 1977, in its *Thirty-Sixth Report Relating to Class Actions*,[188] the Law Reform Committee of South Australia[189] recommended legislation enacting a class actions procedure. The proposals included a draft statute that was modelled on the new Rule 23 of the US *Federal Rules of Civil Procedure*. However, legislative amendments allowing for class actions were not passed until 1987.[190] Under these provisions, a class suit may be commenced "where numerous persons have common questions of fact or law requiring adjudication."[191] The plaintiffs must bring a motion for certification and for directions, but certification will not be refused simply because the action involves individual damages or separate contracts.[192]

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[184] *Ibid*, s 10.
[185] The statute is not very clear on this point, however: see OLRC Report, *supra* note 2 at 293, particularly note 75 and accompanying text.
[186] Law Reform Commission of Saskatchewan, *Fourth Annual Report* (Regina: Law Reform Commission of Saskatchewan, 1977).
[187] *The Class Actions Act*, SS 2001, c C-12.01.
[188] Law Reform Committee of South Australia, *Thirty-Sixth Report Relating to Class Actions* (Adelaide: Government of South Australia, 1977).
[189] Australia is a federation of six states, with 10 federal territories. South Australia and Victoria are two of the states discussed in this section.
[190] An overview of the South Australian class action regime can be found in V Morabito, "Taxpayers and Class Actions" (1997) 20:2 University of New South Wales Law Journal 372 at 377 [Morabito].
[191] *Supreme Court Rules* 1987 (SA), Rule 34.01.
[192] *Ibid*, Rules 34.02 and 34.03, cited in Morabito, *supra* note 190 at 377.

The only other state to have undertaken its own reform initiative is Victoria.[193] In 1986, the Victorian Parliament introduced class actions by way of amendment to the *Supreme Court Act*.[194] The procedure allowed for representative proceedings where three or more people had the right to the same or substantially the same relief against the same person, or where there were common questions of law or fact.[195] However, the procedure was extremely limited. Firstly, it was opt-in and all represented persons had to consent to the procedure in writing[196] and be named in the originating process.[197] The statutory provisions did not provide any other guidance to the courts, but merely empowered them to give directions concerning the administration of a class action.[198] As a result, the new procedure came under heavy fire from both the courts and the federal Australian Law Reform Commission. The latter was particularly critical of the limits posed by the opt-in procedure. The courts were frustrated by the vague nature of the provisions, combined with their restrictive nature that stopped the courts from using their discretion to overcome the deficiencies.[199] No class actions ever reached trial under these provisions.

In 1997, the Victorian Attorney-General's Law Reform Advisory Council recommended to the Victorian Government that comprehensive class actions legislation, similar to Part IVA of the *Federal Court of Australia Act*, be introduced. The Victorian Government did not respond, so the Supreme Court of Victoria took the initiative and established a class action regime that was virtually identical to part IVA by way of a new Order 18A to the *Supreme Court (General Civil Procedure) Rules 1996*. A constitutional challenge to the validity of the new regime came about shortly thereafter, on the basis that Order 18A exceeded the Court's power to draft rules of court.[200] The challenge was rejected by the Court of Appeal for Victoria, but the fear that the High Court of Australia

[193] An overview of the Victorian class action regime can be found in Morabito, *ibid*, at 375-376.
[194] 1986 (Vict), ss 34(a) and 35(2)(a) [*Supreme Court Act*], cited in S Clark and C Harris, "Multi-Plaintiff Litigation in Australia: A Comparative Perspective" (2001) 11 Duke Journal of Comparative & International Law 289 at 294 [Clark and Harris 2001].
[195] *Supreme Court Act*, *ibid*, s 34(a).
[196] The consent had to occur either before the proceeding was commenced, or afterwards with leave of the Court: *ibid*, ss 35(2)(a) and 35(4).
[197] *Ibid*, s 35(3).
[198] *Ibid*, s 35(5).
[199] Clark and Harris 2001, *supra* note 194 at 294-295.
[200] *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545.

might declare Order 18A invalid led the Victorian Parliament to intervene and introduce legislation.[201]

At the federal level, the Commonwealth Attorney General first referred the question of class action reform to the Australian Law Reform Commission in 1977.[202] In 1979, the ALRC published a Discussion Paper calling for reform.[203] The report discussed the arguments for and against class actions, before concluding that reform was necessary in order to keep up with the technological and marketplace developments of the 20th century.[204] The proposals in this Discussion Paper were modelled closely on US Rule 23. Various consultations were conducted on these proposals, with draft legislation being released for public comment in June 1988,[205] and the ALRC's final report tabled in the legislature in December of that year.[206] However, the legislation did not come into force until March 1992,[207] just months before the Ontario CPA came into force.

The federal legislation followed the ALRC Report and Discussion Paper, except for the fact that it did not include a class actions fund (publicly-financed or otherwise).[208] Like the ALRC Report and Discussion Paper, the legislation was based largely on US Rule 23, but differed from those provisions in several important respects.[209] Firstly, it contained no certification requirement. Secondly, it did not require that common issues predominate over individual issues. Thirdly, it expressly provided for the determination

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[201] *Courts and Tribunals Legislation (Miscellaneous Amendments) Act*, 2000 (Vict), s 14. The background to this legislation is explained by V Morabito, "Group Litigation in Australia – 'Desperately Seeking' Effective Class Action Regimes", National Report for Australia for The Globalisation of Class Actions Conference, Oxford University, Dec 2007, online: <http://globalclassactions.stanford.edu/sites/default/files/documents/Australia_National_Report.pdf>.

[202] S Clark and C Harris, "The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?" (2008) 32 Melbourne University Law Review 775 at 780 [Clark and Harris 2008].

[203] Law Reform Commission of Australia, *Access to the Courts II: Class Actions* (Canberra: Government of Australia, 1979).

[204] *Ibid* at 34.

[205] This development is discussed in detail in Chapter 4.

[206] Australian Law Reform Commission Report No 46, *Grouped Proceedings in the Federal Court* (Canberra: Government of Australia Publishing Service, 1988), online: <https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc46_Summary.pdf> [ALRC Report]; Clark and Harris 2008, *supra* note 202 at 780.

[207] *Federal Court of Australia Act*, 1976 (Cth); Part IVA was inserted into this Act to allow for class actions, by way of the *Federal Court of Australia Amendment Act*, 1991 (Cth), No 181, s 3: Clark and Harris 2008, *ibid*, at 780, and accompanying notes.

[208] Clark and Harris 2008, *ibid*, at 780, and accompanying notes. However, changes introduced around the same time sanctioned contingency fee arrangements, albeit with a ban on agreements that calculated the fee by reference to a percentage of the amount recovered: Clark and Harris 2001, *supra* note 194 at 295 and accompanying notes.

[209] Clark and Harris 2001, *ibid*, at 296-298.

of individual issues such as causation, so that even personal injury claims could proceed as part of a class action.[210] In this sense, the federal Australian legislation was more plaintiff-friendly than US Rule 23.

v) Québec

Class proceedings, a development of the equitable and common law traditions of English-speaking countries, would not appear to fit comfortably with a Francophone civil law jurisdiction. Nevertheless, Québec was the first province in Canada to enact class actions legislation, and it spearheaded reform for the rest of the country. This was part of an increasing trend towards law reform in the province following the Quiet Revolution.[211] Québec had enacted other ground-breaking legislation such as *An Act Respecting Matrimonial Regimes*[212] that, like class actions, was studied by the OLRC.[213]

The class action device does not seem to have been subject to a long-standing debate in Québec.[214] The Parti Québécois government was voted into power on November 15, 1976, on a platform of promoting access to justice and implementing social and remedial legislation.[215] Bill 39 respecting class actions[216] was introduced in the legislature just a few months later in 1977, as part of a wider reformist agenda that included labour reform and the enactment of a consumer protection statute.[217] The Bill itself had a strong consumer protection purpose. During the legislative debates, one Member declared that it was "destined to re-establish a balance between the isolated

[210] In the US, personal injury claims are not permitted to proceed as a class action. Instead, if hundreds or thousands of personal injury claims are filed that share common issues of fact, the Judicial Panel on Multidistrict Litigation will group them together for the purposes of efficiency in a "multi-district litigation" (MDL) and transfer them to one district.
[211] C L'Heureux-Dubé, "The Quebec Experience: Codification of Family Law and a Proposal for the Creation of a Family Court System" (1984) 44:6 Louisiana Law Review 1575 at 1578.
[212] SQ 1969, c 77, cited in Ontario Law Reform Commission, *Report on Family Law, Part IV: Family Property Law* (Toronto: Ministry of the Attorney General, 1974), at xii.
[213] *Ibid.*
[214] A brief history of class actions in Québec is provided in Finn 2005, *supra* note 20 at 352-361. This account is reproduced in French in Finn 2011, *supra* note 20 at 31-43.
[215] Piché, *supra* note 33 at 118.
[216] *Projet de Loi 39, Loi Sur Le Recours Collectif.*
[217] Finn 2005, *supra* note 20 at 352.

citizen and companies".[218] The Québec Council of Employers took issue with this characterization in its report on class actions,[219] objecting to the

> [R]hetoric according to which all large companies are exploitative, profit is immoral, and (when profits have indeed been earned) they were acquired illegally and on the back of someone else ... Is it necessary, when seeking to protect the vulnerable, to automatically assume that the adverse party is a thief?[220]

Nevertheless, there was wide public support for reform despite the concerns of employers and other business groups. This support extended to the legal profession, with the Barreau du Québec submitting its *Mémoire* in January 1978.[221] The Barreau welcomed the introduction of class actions, having been studying the procedure since 1974,[222] although it pointed out that class actions should not create new substantive rights, and must be compensatory rather than punitive.[223]

On June 8, 1978, *An Act Respecting the Class Action*[224] was adopted in the legislature, adding an entire book to the *Code of Civil Procedure*.[225] The Act was based heavily on US Rule 23, as well as the Civil Practice Law and Rules of the State of New York.[226] As the Québec delegation to the ULCC reported at its annual meeting in 1978,[227] the salient points of the new legislation included the following:

i) Only "natural persons" could bring a class proceeding (in other words, the remedy was foreclosed to corporations and other purely legal persons);[228]

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[218] *Journal des débats,* Troisième session – 31ième Législature: audition des memoires sur le project de loi no 39 (le 7 mars 1978) B-262 (Member of the National Assembly (MNA) Fernand Lalonde), cited in Finn 2005, *ibid*, at 353.
[219] Conseil du patronat du Québec, *Mémoire à la Commission parlementaire de la justice sur le projet de loi 39: Loi sur le recours collectif* (Québec: CPQ, 1978).
[220] *Ibid* at 33-34, cited in Finn 2005, *supra* note 20 at 353.
[221] Barreau du Québec, *Mémoire à la Commission parlementaire de la justice sur le projet de loi 39: Loi sur le recours collectif* (Québec: Barreau du Québec, 1978).
[222] *Ibid* at 1.
[223] *Ibid* at 3.
[224] Québec CPA, *supra* note 177.
[225] Book IX of the *Code of Civil Procedure*, which came into force on January 19, 1979, cited in Finn 2005, *supra* note 20 at 354.
[226] Finn 2005, *ibid*, at 352.
[227] ULCC 1978, *supra* note 178 at 113-120.
[228] *Ibid* at 114.

ii) Leave of the court had to be sought for the bringing of a class action, in the form of a "motion for authorization", which would not involve an assessment of the merits of the action;[229]

iii) On the motion for authorization, the court would consider the allegations and whether "they seem to justify the conclusions sought", the existence of a group, the existence of common questions of law or fact, whether other group proceedings would be difficult or impractical, and whether the plaintiff would adequately represent the group;[230]

iv) Notice at the certification stage was compulsory;[231]

v) Class members were included in the class unless they opted out, and they had a right to do so;[232]

vi) Collective recovery (aggregate damages) was permitted, with discretion given to the Court as to the distribution of any residue;[233]

vii) With regard to costs, traditional costs rules continued to apply – however, legal fees could be taken out of any settlement or judgment before distribution to the class;[234] In addition, a Class Action Assistance Fund (*Fonds d'aide aux recours collectifs* or the "Fonds") paid the plaintiff lawyer's fees, the costs of notification and general disbursements.[235]

There were some aspects of the Act that had not been borrowed from the US. These included the "natural persons" requirement, the requirement that the allegations "seem to justify the conclusions sought" (basically, a requirement that the facts as pleaded support one or more causes of action), and, most importantly, the Class Action Assistance Fund. The idea of a government-supported Fund to reimburse fees and disbursements did not exist in the US and was completely new to Québec. It was to form an important precedent for Ontario and was significant in facilitating class proceedings legislation there.

The Québec legislation had rather an uninspiring start. In the first five years following its enactment, an average of only 20 class actions per year were commenced

[229] *Ibid* at 115. "It is not the wish of the legislator to allow an examination on the merits of the action at the motion stage [but] it will be possible to examine the person alleging the facts as to [their] veracity."
[230] *Ibid* at 115.
[231] *Ibid* at 115-116.
[232] *Ibid* at 116.
[233] *Ibid* at 117-118.
[234] *Ibid* at 118-119.
[235] *Ibid* at 119.

(compared to an average of 55,000 cases brought annually in Québec Superior Court).[236] The Fonds was also vastly underutilized, with only $15,500 of the $100,000 available to claimants being used in 1979.[237] As a result, amendments were introduced in 1982 upon the advice of consumer groups and the Fonds.[238] Cooperatives were added to the organizations entitled to act as class representatives, without requiring that someone in the class had to have been a member of that organization when the action arose. Immediate appeals as of right from certification orders were repealed for defendants. Most importantly, the powers of the Fonds to finance class actions were extended, and a controversial supplementary counsel fee was repealed. These changes retained the traditional two-way costs rules, but provided greater protection from costs risks for representative plaintiffs.

Unfortunately, however, the Québec courts showed reluctance to give the legislation full effect. This persisted even into the 1980s, with two major decisions from that decade showing the courts' cautious approach. In both *Nault v Canadian Consumer Co Ltd*[239] (a consumer class action) and *Comité de citoyens et d'action municipale de St-Césaire c Ville de St-Césaire*[240] (an action by residents against a municipality for passing a series of by-laws), the courts stated that a class action was not the appropriate vehicle for resolution of the class members' claims.[241] In the same conservative manner as the Ontario courts prior to the early 1970s, the Québec courts emphasized the differences between class members (different contracts in *Nault*, and different interests in the outcome in *St-Césaire*) rather than the common issues that bound them together.

This approach changed in 1990, at the same time as Ontario was debating the CPA in the legislature. *Tremaine c AH Robins Canada Inc*[242] involved the notorious Dalkon Shield, a contraceptive device that the plaintiffs alleged was faulty and that had

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[236] Glenn, *supra* note 40 at 255.
[237] Canadian Press, "Class action fund plan needs better publicity, Québec officials say", *Canadian Press* (January 31, 1981), P3, B380543, *supra* note 160.
[238] Glenn, *supra* note 40 at 257-259. See also Bogart 1987, *supra* note 46 at 687.
[239] [1981] 1 SCR 553 at 354-355, cited in Finn 2005, *supra* note 20.
[240] [1986] RJQ 1061, cited in Finn 2005, *ibid*, at 355-356. This proceeding was commenced under the class action provisions of the *Code of Civil Procedure*, although there were alternative avenues of redress for the petitioners (plaintiffs) under the *Code* (for example, by way of joinder under Articles 59 or 67). The Court pointed to these alternative avenues when denying the petitioners' motion for authorization.
[241] Canadian Press, "Court denies class action", *Globe and Mail* (May 12, 1981), p 11, B380543, *supra* note 160.
[242] [1990] RDJ 500 [*Tremaine*], cited in Finn 2005, *supra* note 20 at 357.

led to pregnancies and pregnancy-related complications among class members. The Court of Appeal held that differences between class members should not prevent the authorization of a class action, and stated that the plaintiffs' case rose and fell on the question of whether the design of the Dalkon Shield was faulty. It disagreed with the court of first instance when it called the class action "an extraordinary procedure", holding instead that a class proceeding was purely a procedural vehicle like any other contained in the *Code of Civil Procedure*.[243] This reasoning was followed in numerous subsequent cases,[244] showing that the class action provisions of the *Code* were receiving a more liberal interpretation consistent with consumer rights and corporate responsibility.

The Québec class action began to be truly effective just when the CPA came into force in Ontario. While Québec's reform had blazed a trail for the rest of Canada, its courts' tardiness in recognizing and giving effect to the innovative nature of the device meant that Ontario caught up quickly.

E. Conclusion

The rise of class actions in North America and Australia was accompanied by a rising sympathy towards the device in the Ontario courts. The liberal interpretation of the "common success" test meant that class actions could proceed under Rule 75 even where class members did not all have the same contract (as long as their contracts were substantially identical) and even if damages were claimed (as long as those damages could be assessed in the aggregate).

However, despite these developments, it became increasingly clear to all observers that Rule 75 was inadequate to deal with complex litigation such as the modern class action. Academic commentators noted that courts were procedurally ill-equipped to deal with issues such as damages assessments and distribution,[245] notification of absent

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[243] *Tremaine*, *ibid*, at 507.

[244] See, for example, *Comité d'environnement de La Baie inc c Société d'electrolyse et de chimie Alcan ltée*, [1990] RJQ 655 (class action allowed to proceed on behalf of 2,400 residents who claimed loss of enjoyment of their properties due to the defendant's pollution); and *Syndicat national des employés de l'Hôpital St-Ferdinand c Curateur public du Québec (CSN)*, [1994] RJQ 2761 (Que CA); aff'd [1996] 3 SCR 211 (class action allowed to proceed on behalf of hospital patients who suffered as a result of the defendant union's 33-day illegal strike). Both cases are cited in Finn 2005, *supra* note 20 at 358-361.

[245] Williams 1975, *supra* note 8 at 53-54.

class members and disposition of unclaimed awards.[246] Even the Court of Appeal in *Naken*, although it allowed that class action to proceed, asked for legislative intervention:

> [T]he plaintiffs face many procedural and evidentiary difficulties if this action is allowed to proceed. If we are to have consumer class actions in Ontario it would be highly desirable that there be enacted legislation or rules of practice or both, pursuant to which such actions could be conducted.[247]

Such a plea was highly prescient, and would be echoed by the Supreme Court of Canada in the same case. The Supreme Court's decision in *Naken* was one of the many catalysts to reform that would occur in the years leading up to the Attorney General's Advisory Committee Report and the passage of the CPA.

[246] Kazanjian, *supra* note 30 at 436.
[247] *Naken OCA*, *supra* note 152.

Chapter 3
The Early Campaign for Reform and the OLRC Report

The later part of the 20th century, particularly from the late 1960s onwards, saw an expansion of bureaucracy in public administration, while mass production became ever more pervasive in private industry.[248] As the size of institutions and businesses grew, they became increasingly distant from the citizens that used them.[249] A wider swath of citizens was become affected by the actions of those institutions and businesses, at the same time as it was becoming increasingly difficult to obtain recourse against those bodies. This era saw the rise to prominence of activists such as Ralph Nader, who campaigned for consumer, environmental and other rights, as well as recourse for breach of those rights. The cost of litigation meant that very few individuals would be willing to sue the government or a multi-national corporation for a wrong done to them; however, class actions rose in popularity as people began to see that there was strength in numbers. As Neil Williams has observed:

> No matter how just the claim, it is the exceptional person who will embark on litigation against an intransigent business corporation or government agency, particular if the individual stake is only small. However, a vindication of rights becomes a realizable prospect when the citizen sues not just for himself but also for hundreds and possibly thousands of others in an identical position.[250]

This enthusiasm occurred not only in the United States with the enactment of the new Rule 23 that allowed for class actions for damages; as noted in the previous chapter, it arose in numerous jurisdictions including Canada. Following the developments occurring in their neighbour to the south, the passage of the new Rule 23 was viewed with interest by Canadian advocates of consumer, environmental, and civil rights. With the

[248] J Benidickson, "From Empire Ontario to California North: Law and Legal Institutions in Twentieth-Century Ontario" in DJ Guth and WW Pue eds, *Canada's Legal Inheritances* (Winnipeg: Canadian Legal History Project, Faculty of Law, University of Manitoba, 2001) at 620, 644-647 [Benidickson].
[249] J O'Grady, "Consumer Remedies" (1982) 60:4 Canadian Bar Review 549 at 550-551. See also Sadovnikova, *supra* note 169.
[250] Williams 1975, *supra* note 8 at 3.

increasingly liberal attitude of the courts towards class actions, these advocates were encouraged to press for a similar remedy in Canada.

A. The Fight for Consumer Rights

Consumer rights were on the rise in the late 1960s and 1970s in North America, with the enactment of public regulation such as the Ontario *Consumer Protection Act*[251] and the establishment of consumer protection agencies such as the federal Department of Consumer and Corporate Affairs.[252] These measures were taken to redress the imbalance of power between consumer and producer, and to protect consumers against economic losses.[253] As consumer rights proponents occupied the vanguard for the campaign for class actions in Canada,[254] the issue was increasingly debated in the press. Consumer advocates argued that expanding rights was pointless without a machinery to enforce those rights. Because consumers would not bother bringing a small individual claim arising from shoddy goods because of the expense, delays and inconvenience, an effective machinery should include class actions.[255] Class actions under Rule 75 were brought against corporations such as GM[256] and Ford.[257] The lawyers in those cases rose

[251] RSO 1970, c 82.
[252] Public Interest Advocacy Centre, *Consumer Protection in Canada and the European Union: A Comparison*, online: PIAC <https://www.piac.ca/wp-content/uploads/2014/11/piac_report_consumer_protection_in_canada_and_the_europeon_union_a_comparision.pdf> at 23-25.
[253] I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets*, 3rd ed (Oxford: Hart Publishing, 2012), at 4-5.
[254] Williams 1975, *supra* note 8 at 2.
[255] M Trebilcock, "Our 'legal machine can't enforce rights'", *Globe and Mail* (September 11, 1972), p 6 [Trebilcock 1972], in Ontario Law Reform Commission files, Nov 1976 - Dec 1982, Project name: class actions, RG 4-66, BA77, Box No B380537, Archives of Ontario [B380537]. Trebilcock, a University of Toronto law professor, made similar arguments in his article, "Private Law Remedies for Misleading Advertising" (1972) 22 University of Toronto Law Journal 1. He later worked on the OLRC Report on class actions.
[256] The *Naken* action was commenced in July 1973, and the defendant brought a motion to strike two years later (on the grounds that the pleading disclosed no reasonable cause of action). *Naken*'s journey through the courts is detailed in Chapter 2, and its ultimate fate is detailed later in this chapter.
[257] As a result of the publicity surrounding *Naken*, the plaintiffs' lawyer in that case, Jeffery Lyons, also represented owners of Ford vehicles that were prone to rusting: Rusty Ford Owner's Association, "Civil Litigation Against Manufacturers of Defective Automobiles" (1976), Jeffery Lyon Fonds, MIKAN No 4583565, Container 1, Item 17, Library and Archives Canada. However, Lyons learned from his experience with GM and advised his Ford clients to fight in the court of public opinion instead. This tactic succeeded, with a settlement forthcoming later that year: E. Dorais, "Ford to pay $300 rust compensation", and C. Sinclair, "Rust settlements will polish Ford's image", *Montreal Gazette* (September 25, 1976), B1, both available online: Google Newspaper Archives

to prominence as consumer rights advocates, with Jeff Lyons (counsel for the plaintiffs in the Ford action and the *Naken* case against GM) being dubbed "Canada's Ralph Nader".[258]

On the other side, business interests argued that allowing class actions would harm legitimate businesses, place an enormous burden on the courts, and prove expensive, slow, cumbersome and ineffective for consumers.[259] The case for consumer class actions was also made in several working papers commissioned by the Canadian Consumer Council in the early 1970s. Two of those papers looked at the subject of consumer advocacy, and both recommended the facilitation of class actions for the purpose of enforcing consumer rights.[260]

As the debate continued and complaints about the condition of manufactured goods (particularly vehicles) increased, the Ontario government asked the Ontario Law Reform Commission to study the subject.[261] The OLRC's *Report on Consumer Warranties and Guarantees in the Sale of Goods*[262] was tabled in the Ontario legislature in June 1972. The OLRC Consumer Report made various recommendations in order to increase the availability of consumer remedies in Ontario, including giving the Consumer Protection Bureau the power to mediate all warranty disputes, and also to bring test cases to determine important questions of law.[263] However, although the OLRC considered whether to recommend amending the Ontario law to allow for the bringing of consumer

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<https://news.google.com/newspapers?id=mpkuAAAAIBAJ&sjid=tqEFAAAAIBAJ&pg=4536%2C2735306>.

[258] J Lorinc, "Jeffery Lyons paved the way for consumer lawsuits", *Globe and Mail* (August 7, 2015), online: <http://www.theglobeandmail.com/news/jeffery-lyons-paved-the-way-for-consumer-lawsuits/article25891542>. For contemporaneous news coverage of Lyons' role in the *Naken* case, see P Dalby, "Father and son geared for battle with auto giant", *Toronto Star* (September 15, 1981); W Darroch, "GM pulls out big-gun lawyers", *Toronto Star* (September 17, 1981); both articles can be found in B380543, *supra* note 160.

[259] A Abbott, "…But proposal 'may do more harm than good'", *Globe and Mail* (September 11, 1972), p 7 [Abbott article], B380537, *supra* note 255. Abbott was then President of the Retail Council of Canada.

[260] M Trebilcock, *The Case for a Consumer Advocate* (Ottawa: Canadian Consumer Council, 1972); E Belobaba *et al*, *On the Question of Consumer Advocacy: A Working Paper* (Ottawa: Canadian Consumer Council, 1972). See also Belobaba 1977, *supra* note 182 at 363-365. Both authors would go on to participate in the two major reports that led to class action reform in Ontario – Trebilcock in the OLRC Report, and Belobaba in the Attorney General's Advisory Committee Report.

[261] J Ziegel, "Review: *Report of the Ontario Law Reform Commission on Consumer Warranties and Guarantees in the Sale of Goods*" (1973) 22:2 International and Comparative Law Quarterly 363 at 364.

[262] (Toronto: Ministry of the Attorney General, 1972) [OLRC Consumer Report].

[263] *Ibid* at 108-109.

class actions, it ultimately decided that class actions needed to be investigated separately as they raised broader questions of a substantive and procedural nature.[264]

The question of class actions in the consumer context was raised again in July 1974, in a study directly on the subject commissioned by the Consumers' Association of Canada.[265] The CAC Study recommended class action reform in order to facilitate consumer claims. Specifically, the study stated that class action provisions should include a certification test; class members should receive notice following certification and be permitted to opt out; that discontinuance, dismissal or settlement only occur with court approval; and that class actions should not be barred simply because they make a claim for individual damages.[266] With regard to costs, the CAC Study was particularly controversial in that it recommended a "one-way" costs rule – so that costs could be awarded to a successful plaintiff, but the plaintiff would not have to pay costs to a successful defendant.[267]

These numerous reports gradually built up the case for consumer class actions throughout the 1970s. However, consumers were not the only group advocating for reform. As consciousness of consumer rights grew, so did consciousness of the environment and the damage that was being done to it.

B. Environmental Rights and Standing

The late 1960s and early 1970s also saw the rise of environmental awareness in Canada. The formation in the US of groups such as Friends of the Earth, as well as the publication of books such as *Silent Spring* (on the damage caused by the spraying of pesticides)[268] led to a parallel movement in Canada, with the foundation of movements such as Greenpeace and Pollution Probe, and the establishment of government agencies such as Environment and Climate Change Canada. Similarly, disasters such as the nuclear meltdown at Three

[264] *Ibid*.
[265] Williams 1974*, supra* note 8.
[266] Williams' recommendations are also summarized in Williams 1975, *supra* note 8.
[267] *Ibid* at 51-52.
[268] R Carson, *Silent Spring* (Boston: Houghton Mifflin, 1962).

Mile Island in the US[269] and stories of widespread pollution in Canada[270] led to increased awareness of the harm that increasing industrialization could cause to both humans and their environment.[271]

For those wishing to sue corporations for widespread environmental harm, however, there was virtually no recourse.[272] Three barriers stood in the way of these environmental actions.[273] The first was the "common interest" requirement that prevented many such actions in the 1970s.[274] Class actions for private nuisance involved numerous individual issues and therefore did not satisfy this requirement;[275] class actions for public nuisance were problematic for different reasons, as described below.

The second barrier was financing, as the application of traditional costs rules would have prevented many litigants from undertaking the risk of an environmental action.[276] The 1970s saw the advent of a publicly-funded legal aid program in Ontario as well as the establishment of clinics (partly funded by the government) such as the Canadian Environmental Law Association.[277] The financing of public participation in environmental actions was a subject dear to Ian Scott (then in private practice).[278] When he later became Attorney General, he oversaw the introduction of the *Intervenor Funding Project Act*[279] that provided qualified interveners with advanced funding.[280]

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[269] A class action was filed with regard to this disaster, resulting in a $25 million settlement in 1981: B Franklin, "Concerns Agree to Pay $25 Million for Losses Caused by 3 Mile Island", *New York Times* (February 22, 1981), p 1, B380543, *supra* note 160.
[270] See, for example: R Platiel, "Fluoride threat started 20 years ago", *Globe and Mail* (June 18, 1979), p 10, B380543, *ibid.*
[271] Benidickson, *supra* note 248 at 644-645; J McLaren, "The Common Law Nuisance Actions and the Environmental Battle – Well Tempered Swords or Broken Reeds" (1972) 10 Osgoode Hall Law Journal 505 at 505-506.
[272] An Environmental Rights Bill, introduced as a private member's bill by the Liberals in 1979, was voted down by the legislature: unknown author, "Environmentalists worried as PCs set to kill private bill", *Globe and Mail* (December 5, 1979), p 4, B380543, *supra* note 160.
[273] Very few environmental class actions were brought in the US, largely because individual issues (such as defences) were generally held to predominate over common issues: S Chester, "Class Actions to Protect the Environment: A Real Weapon or Another Lawyer's Word Game?" in J Swaigen, ed, *Environmental Rights in Canada* (Toronto: Butterworths, 1982) at 78.
[274] Nissen, *supra* note 31 at 47; OLRC Report, *supra* note 2 at 275.
[275] OLRC Report, *ibid*, at 274-275.
[276] I Scott and R Anand, "Financing Public Participation in Environmental Decision Making" (1982) 60 Canadian Bar Review 81 at 114-119 [Scott and Anand]. Scott intervened in several environmental court actions after becoming Attorney General, and had also been counsel to the Berger Inquiry on the Mackenzie Valley Pipeline: Benidickson, *supra* note 248 at 652; Scott, *supra* note 56 at 57.
[277] Benidickson, *ibid*, at 642-643.
[278] Scott and Anand, *supra* note 276.
[279] SO 1988, c 71 [*Intervenor FPA*].

The third and major obstacle was that of standing. Environmental suits at common law were generally brought by way of an action for public nuisance, because they involved interference with a public right (such as the right to fish or the right to clean air).[281] However, the infringement of public rights was a matter for the Attorney General, who was guardian of public rights and therefore the only one who could sue to remedy their breach.[282] The only way anyone else could have standing to sue is if he or she suffered particular direct damage over and above that suffered by the public generally.[283] This was a major impediment to environmental class actions, as many interest groups readily acknowledged.[284]

This rule was relaxed throughout the 1970s, in a series of cases beginning with *Thorson v Canada*.[285] *Thorson* was an action brought by a taxpayer who was suing on the basis that the *Official Languages Act* was unconstitutional, as was the *Appropriation Act* that provided money to implement the *OLA*. While the lower courts decided that Thorson did not have standing, a majority of the Supreme Court of Canada held that he did. They reasoned that the question sought to be adjudicated would otherwise be immune from judicial review, because there was no-one particularly aggrieved, the government was unwilling to direct a reference, and the Attorney-General was unwilling to institute proceedings on behalf of the public. Two subsequent decisions, *Nova Scotia Board of Censors v McNeil*[286] and *Canada (Minister of Justice) v Borowski*,[287] were decided on a similar basis. According to the three cases, the requirements for public interest standing

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[280] Benidickson, *supra* note 248 at 652. Scott's support for intervener funding can also be seen in his impromptu promise to the Women's Legal Education and Action Fund (LEAF) to give them $1 million to fund their intervention in constitutional challenges: Scott, *supra* note 56 at 134-135. Scott was also a firm supporter of legal clinic funding (at 175).

[281] W Estey, *Public Nuisance and Standing to Sue* (1972), 10 Osgoode Hall Law Journal 563 at 565.

[282] *Ibid* at 566.

[283] *Ibid* at 568. See also *Cowan v Canadian Broadcasting Corporation*, 1966 CanLII 225 (ON CA). For a list of environmental representative actions that were not permitted to proceed because the plaintiff was held not to have standing, see Nissen, *supra* note 31 at 46-49.

[284] Letter from Marc Denhez, lawyer for Heritage Canada, to the Civil Procedure Revision Committee (Williston Committee), dated June 7, 1978, B380537, *supra* note 255; letters from John Swaigen, General Counsel of the Canadian Environmental Law Association, to Roy McMurtry (November 9, 1978) and Derek Mendes da Costa, OLRC Chairman (November 13, 1978), asking that the OLRC projects on standing and class actions be made a priority: both letters can be found in B380543, *supra* note 160.

[285] [1975] 1 SCR 138.

[286] [1976] 2 SCR 265 (Nova Scotia resident challenging the constitutionality of the censorship provisions under the *Theatres and Amusements Act,* RSNS 1967, c 304).

[287] [1981] 2 SCR 575 (Saskatchewan resident challenging the constitutionality of the provisions of the *Criminal Code* permitting procurement of miscarriage).

would be met where there was a serious issue as to the validity of the Act in question; where the applicant was directly affected by the Act or had a genuine interest in its validity; and where there was no other reasonable and effective way of bringing the issue before the Court.[288]

In making these decisions, the Supreme Court of Canada loosened the reins on the requirement that the ability to sue must be based on a traditional legal interest and the one-to-one adversarial model.[289] This would have important ramifications for class actions. Indeed, many of the actors involved in the later work on class actions by the Ministry of the Attorney General were involved in the efforts to change the law on standing – including Ian Scott.[290] In addition, the rapidly evolving law of standing led the Ontario Law Reform Commission to commence a study of the subject, although the report was not completed until long after the OLRC Report on class actions.[291]

In the midst of this rise in consumer and environmental activism, combined with developments in the US and changes in the common law to accommodate the cases that were increasingly being brought before the courts in Ontario, Attorney General Roy McMurtry decided that the time had come for the OLRC to study class actions as well. In his letter to the Commission,[292] McMurtry acknowledged that court decisions in Ontario would continue to change the law on class actions, and also that the Commission was studying the related law on standing. He also referred to the OLRC Consumer Report and its position that class actions was a complex area of the law that merited separate study,[293] before concluding that, "I think that the time has come for a comprehensive look

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[288] *Ibid* at 575-576.
[289] Bogart 1987, *supra* note 46 at 667-668.
[290] R Furness, "Inquiry must hear waste site opponents", *Globe and Mail* (November 3, 1977), in Ontario Law Reform Commission files, Nov 1976 - Dec 1982, Project name: class actions, RG 4-66, BA77, Box No B380538, Archives of Ontario [B380538]. The article reports on the efforts of north Toronto residents to have standing to appear before the Royal Commission on Waste Management to challenge the approval of a landfill permit. The Divisional Court granted them standing. Ian Scott appeared as counsel on that case, along with John Swaigen of the Canadian Environmental Law Association (CELA). CELA was later to participate in the Attorney General's Advisory Committee on Class Action Reform.
[291] Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989). Curiously, there is no evidence that the OLRC Report on Standing influenced the deliberations of the Attorney General's Advisory Committee on Class Action Reform, whose report was released in 1990 (AGAC Report, *supra* note 6).
[292] Letter from Attorney General Roy McMurtry to Allan Leal, Chairman of the OLRC, November 17, 1976 [AG Reference], B380537, *supra* note 255.
[293] In fact, H Allan Leal, then Chairman of the OLRC, had sent the class actions section of the OLRC Consumer Report to the MAG Policy Development Division just six days before McMurtry wrote the AG

at the nature of the class action and the advisability or inadvisability of its development, in one form or another, in Ontario."[294] It was to be another six years, however, before the Commission released its recommendations. In the meantime, there would be further significant developments in the debate on class actions.

C. Class Actions and the *Combines Investigation Act*

In 1975, the federal government amended the *Combines Investigation Act*[295] to permit civil actions for violations of the Act. Persons who had suffered loss or damages as a result of a failure to comply with the Act, or an order of the Restrictive Trade Practices Commission or a court, could sue the person who had failed to comply. Offences included conspiracy, bid-rigging, discriminatory pricing, and misleading or false advertising. Consumers and corporations alike could use these provisions.[296]

Two years later, in March 1977, the government proposed further amendments to the CIA, including provisions specifically for class actions. The provisions not only allowed people to sue as a class for damages sustained as a result of competition-related offences, but also provided a detailed guide as to the procedural and substantive rules governing such class actions.[297] This was the first time any comprehensive class actions legislation had been introduced in Canada.[298] Consumer and Corporate Affairs Canada Minister Anthony C. Abbott[299] announced that the Act's framework for class actions would include the following:[300]

Reference: Letter from H Allan Leal to Simon Chester, Counsel, MAG Policy Development Division, November 10, 1976, B380537, *supra* note 255.

[294] AG Reference, *supra* note 292 at 1.

[295] RSC 1970, c C-23.

[296] Government of Canada, "Class actions: recent developments in Canada" (1978) 4 Commonwealth Law Bulletin 128 at 144 [Recent Developments].

[297] *Ibid* at 128.

[298] *Ibid* at 146.

[299] This was the same Anthony Abbott who had opposed class actions in a *Globe and Mail* editorial just five years previously, in September 1972 (Abbott article, *supra* note 259).

[300] Consumer and Corporate Affairs Canada news release, Ottawa, March 16, 1977, with accompanying Backgrounder [CCAC news release and CCAC backgrounder], in Ontario Law Reform Commission files, Nov 1976 - Dec 1982, Project name: class actions, RG 4-66, BA77, Box No B319672, Archives of Ontario [B319672]. See also Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada, Second Stage* (Ottawa: Supply and Services Canada, 1977) at 73-77 [DCCA Proposal].

- Requirement for certification, including whether the proceedings were brought in good faith and appeared to have merit;
- Plaintiffs who were unsuccessful on certification, on an interlocutory motion or at an individual issues trial would have costs awarded against them; however, no-way costs rules would apply at a common issues trial;
- Counsel fees would be paid out of individual damage awards on a pro-rata basis;
- Where a court refused to certify an action, the Competition Policy Advocate could bring a substitute action on behalf of class members, and damages would be paid to the Federal Treasury to prevent the unjust enrichment of the defendant;
- Jurisdiction would initially vest with the Federal Court, but the Superior Courts of the provinces could be empowered to hear such cases once agreement had been reached with the provincial Attorneys General.

Certification would not be denied based solely on the fact that an action involved individual damages or separate contracts; class members would be included in the class unless they opted out; and notice at any stage of the action would be optional and within the court's discretion.[301] In addition, leave of the court would be required for discontinuance, abandonment or settlement.[302] The Act would be renamed the *Competition Act*.

The class actions proposals for the new *Competition Act* were based substantially on a report written for Consumer and Corporate Affairs Canada.[303] The recommendations on costs for the new *Competition Act* were particularly interesting. The proposals and the report assumed that giving plaintiffs immunity for costs at the common issues trial would remove the financial deterrent to bringing class actions.[304] However, they failed to consider that the certification stage, especially where (as in this case) there was a *prima facie* assessment of the merits, could be just as cost prohibitive for plaintiffs. This was a sign of Canada's inexperience with class actions at this point. The new Rule 23 in the US

[301] Recent Developments, *supra* note 296 at 145.
[302] DCCA Proposal, *supra* note 300 at 74.
[303] CCAC backgrounder, *supra* note 300 at 2; DCCA Proposal, *ibid*, at 73. See also NJ Williams and J Whybrow, *A Proposal for Class Actions under Competition Policy Legislation* (Ottawa: Department of Consumer and Corporate Affairs, 1976) [Whybrow].
[304] Whybrow, *ibid*; DCCA Proposal, *ibid*, at 77; Williams 1975, *supra* note 8 at 52, 63, 86-87.

(where parties bore their own costs) had only been in existence for just over a decade, and class action legislation had not yet been enacted in Québec. There was very little indication that certification would one day become the main battleground in class actions. Canada still had a lot to learn.

The reaction to the class actions proposals for the new *Competition Act* was indicative of the later debate that was to rage over the *Class Proceedings Act*. The press was mostly positive about class action reform, but lukewarm as to the provisions of the *Competition Act*. Criticisms were directed towards the restrictions on class actions (for example, limitation periods and the inability to sue for breach of implied warranty and defective products),[305] and other provisions of the Act, such as the wide and arbitrary powers given to the Competition Board.[306] The Canadian Consumer magazine encouraged its readership to lobby their provincial governments for class actions reform instead.[307] Jeff Lyons, class counsel in *Naken*, stated that the certification requirements were too restrictive and that the legislation as a whole made "too many concessions to big business."[308] Consumer advocates and the press mostly agreed.[309]

For its part, "big business" strongly opposed the proposals. The Canadian Chamber of Commerce called for the complete deletion of the provisions on class and substitute actions.[310] It disagreed with the findings of the Whybrow Report and the legislation that there was a pressing need or public demand for widespread civil enforcement of the Act's provisions.[311] It took particular issue with the costs proposals, stating that making defendants pay their own costs whatever the outcome was

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[305] Canadian Press, "Ottawa bill clears way for class action suits", *Toronto Star* (March 17, 1977) [Star article March 1977], B380543, *supra* note 160; unknown author, "Class Actions", *Canadian Consumer* (August 1977), p 36 (at 38, 41) [Canadian Consumer], in Policy Development Division Counsel correspondence files, Class Actions – Miscellaneous Material, 1977-1981, RG 4-40, CA226, Box No B248633, Archives of Ontario [B248633 – Miscellaneous Material].

[306] Editorial, "Competition Act can be improved", *Toronto Star* (March 18, 1977), B4, B380543, *supra* note 160.

[307] Canadian Consumer, *supra* note 305 at 41.

[308] Star article March 1977, *supra* note 305. See also J Lyons, "Ottawa's new class action legislation still lacks teeth", *Toronto Star* (March 25, 1977), B4, cited in Canadian Consumer, *ibid*, at 41.

[309] Canadian Consumer, *ibid*, at 40. See also Editorial, "Consumer action bill 'not tough enough'", *Montreal Star* (March 17, 1977), A1&2; Editorial, "Give consumers better class actions law", *Toronto Star* (March 28, 1977), both cited in Canadian Consumer, *ibid*, at 41.

[310] The Canadian Chamber of Commerce, Submission on Bill C-42, The *Competition Act*, to the House of Commons Standing Committee on Finance, Trade and Economic Affairs, June 2, 1977 (at 2 and 5), B380538, *supra* note 290.

[311] *Ibid* at 3.

"iniquitous" and as a result "a powerful weapon has been added to the 'legal blackmail' arsenal"; instead of discouraging frivolous suits, the costs provisions would make class actions "a vehicle for harassment."[312] The Chamber submitted that, if class and substitute actions were to be permitted, then the actions should be on an opt-in basis and traditional costs rules should apply.[313] The Independent Petroleum Association objected to "[t]he prejudice against business underlying the Act", and stated that "class actions in the United States of America have proved to be highly beneficial to lawyers and of little use to anyone else."[314] Like the Chamber, it took issue with the costs provisions of the Act,[315] stating they were consistent with "the philosophy that business, being per se undersirable [sic], should be penalized more heavily than others."[316] It too recommended total deletion of the sections on class and substitute actions.[317]

Other business interests, however, were a little less categorical in their opposition. While the Canadian Manufacturers' Association (CMA) stated that substitute actions should not be allowed, it would permit class actions if they were limited to prevent abuse.[318] It particularly objected to the possibility of aggregate damages assessments,[319] although, surprisingly, it made no submissions on the issue of costs. The Retail Council of Canada similarly called for the scrapping of the substitute actions provisions, and stated that class actions "involving large classes who have individually suffered small losses [are] anomalous, unfair to defendants and should not be permitted."[320] However, it acknowledged that class actions had limited value in certain circumstances,[321] provided that certain protections were built-in. These included a requirement to opt in, to

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[312] *Ibid* at 4.
[313] *Ibid* at 5.
[314] Independent Petroleum Association of Canada, Submission on Bill C-42, The *Competition Act*, to the House of Commons Standing Committee on Finance, Trade and Economic Affairs, June 8, 1977 (at 1), B380538, *supra* note 290.
[315] *Ibid* at 2.
[316] *Ibid*.
[317] *Ibid* at 3.
[318] Canadian Manufacturers' Association, Submission on Bill C-42, The *Competition Act*, to the House of Commons Standing Committee on Finance, Trade and Economic Affairs, June 2, 1977 (at 1-2), B380538, *supra* note 290.
[319] *Ibid* at 2-3.
[320] Retail Council of Canada, Submission on Bill C-42, The *Competition Act*, to the House of Commons Standing Committee on Finance, Trade and Economic Affairs, June 7, 1977 (at 3, 6-7), B380538, *supra* note 290.
[321] *Ibid* at 3, 13.

individually prove damages, and the application of traditional costs rules,[322] as well as a stringent and mandatory requirement for notice.[323]

The legal profession also objected to the class actions section of the *Competition Act*, because class actions would involve procedural and substantive changes to the law, and a wider review of the subject, as well as consultations with the provinces, was required.[324] More importantly, the Canadian Bar Association also voiced a concern that was held by many in the bar and the wider population,[325] and which posed a cultural and philosophical barrier to the institution of class actions in general – that the *Competition Act* would lead to an undermining of the power of the democratically elected legislature:

> To the extent that class action damage suits might in time become the predominant method of enforcement of the [*Competition Act*], the direction of public policy in this area of the law may be taken to a substantial degree out of the hands of law enforcement officers and Ministers of the Crown and placed in the hands of aggressive and innovative plaintiffs' counsel and the courts, which appears to have been the experience in the United States.[326]

The concerns of the bar and the business community were made even clearer in the oral submissions to the Standing Committee on Finance, Trade and Economic Affairs. The Vice-President for Canadian Pacific submitted that the provisions on class and substitute actions were "certainly over-kill. More than that, we certainly do not know of any real basis that would indicate that that kind of provision is necessary at this time… [it] should be completely deleted."[327] As in its written submission, the Canadian Chamber of Commerce stated that the benefits of class actions had not been proven and that, on the

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[322] *Ibid* at 3, 8-11.
[323] *Ibid* at 8.
[324] Canadian Bar Association, Submission on Bill C-42, The *Competition Act*, to the House of Commons Standing Committee on Finance, Trade and Economic Affairs, June 7, 1977, at 2 [CBA Competition Submission], B380538, *supra* note 290.
[325] See, for example, the following opinion editorial on the introduction of an Environmental Rights Bill: "Smith's idea fatally flawed", *Toronto Star* (December 6, 1979) [Star December 1979], B380543, *supra* note 160. The opposition to judicial activism will be covered in more detail in the section on the *Charter* later in this chapter.
[326] CBA Competition Submission, *supra* note 324 at 6-7.
[327] Bill C-42, The *Competition Act*, Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Finance, Trade and Economic Affairs, June 2 and 9, 1977 (Mr. Maxwell, Vice-President and General Counsel, Canadian Pacific) [*Competition Act* oral hearings], B380538, *supra* note 290.

contrary, the US experience showed it to be "a circus".[328] These business groups were not reassured when Robert Bertrand, the Assistant Deputy Minister of Competition Policy, made it clear that they did not have to fear frivolous suits because protection would be provided by the certification test in the Act.[329] The business groups responded by stating that the main deterrence to frivolous suits were traditional costs rules, and they expressed their concern that the Act was departing from these rules in the context of class actions.[330] They also reiterated their desire that the mechanism, if enacted, be on a strictly opt-in basis,[331] otherwise class actions could be used as a "club against corporate defendants" and would "end up clogging the courts."[332] The Standing Committee recommended amendments to the class actions provisions, including a requirement that the plaintiff demonstrate that a certain proportion of the class supported her claim, as well as restrictions on damages.[333]

It was the Proceedings of the Standing Senate Committee on Banking, Trade and Commerce,[334] however, which sounded the death knell of the *Competition Act*'s class action provisions. While the advocates for class actions had been active in the preparation of the legislation and in the media, it was the business interests that predominated at the Senate Committee hearings. Representatives of Imperial Oil and Dominion Foundries and Steel (Dofasco) made submissions regarding the "legalized blackmail" and "undesirable temptation to have litigation" posed by class actions.[335] They asserted that representative plaintiffs would not be truly representative of the class, who would not even be well-informed enough to make a claim, and even the Committee Chair agreed that to think otherwise would be "a pious hope".[336] The business groups strongly submitted that traditional costs rules should apply to class actions, and if the government

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[328] *Ibid* (RF Booth, Chairman, Executive Council, Canadian Chamber of Commerce).
[329] *Ibid* (Robert Bertrand of the Department of Competition Policy, and Mr Gray of the Standing Committee on Finance, Trade and Economic Affairs).
[330] *Ibid* (Robert Law, General Counsel, Canadian Tire Corporation Ltd).
[331] *Ibid*.
[332] *Ibid* (Alasdair McKichan).
[333] B Wildsmith, "An American Enforcement Model of Civil Process in a Canadian Landscape" (1980) 6 Dalhousie Law Journal 71 at 91 [Wildsmith].
[334] Bill C-42, The *Competition Act*, Minutes of Proceedings and Evidence of the Standing Senate Committee on Banking, Trade and Commerce [Senate Committee hearings], B319672, *supra* note 300.
[335] *Ibid*, June 15, 1977 (HG Batt, QC, Associate General Counsel, Imperial Oil Limited); June 29, 1977 (HG Wilson, Secretary, Dofasco).
[336] *Ibid*, June 15, 1977 (Senator Hayden, Chair of the Senate Committee); June 29, 1977 (Wayne McCracken, Legal Counsel, Dofasco).

thought plaintiffs should be subsidized, it should provide a public fund for that purpose.[337]

The business groups referred frequently to the US experience with class actions, and, from the Senators' response, this appears to have been the most persuasive part of their submissions. Dofasco obtained an opinion letter from a Buffalo-based law firm that had worked in this area.[338] The firm supported the submissions made by the business interests, describing its experience with US federal class action procedures as "horrible".[339] It provided statistics demonstrating the substantial increase in the courts' caseload following the enactment of the new Rule 23,[340] and stated that the Rule had been plagued by the fact that there was no meaningful standard for certification, so that broad classes would be certified and would drive defendants to settle even unmeritorious actions.[341] In light of this dire warning from the US, the Senators asked the business groups why they accepted class actions at all – to which they responded that "we accept the inevitable."[342]

The business community's serious reservations persuaded the Senate Committee to recommend that the class actions section of the *Competition Act* be deleted.[343] In the alternative, if the section were to be retained, then the Senate Committee recommended that traditional costs rules should apply and that representative plaintiffs should put up security for costs. The Committee cynically reasoned that these costs rules would not form an insuperable barrier to class actions, because plaintiffs would probably be bankrolled by a consumer organization or a class actions lawyer.[344]

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[337] *Ibid*, June 15, 1977 (HG Batt, QC, Associate General Counsel, Imperial Oil Limited). This is one of the first times a public fund is mentioned in the historical record; such a fund would be incorporated into the Québec class action legislation the following year.
[338] *Ibid*, June 29, 1977 (Letter to Senate Committee from Joechle, Fleischmann & Mugel (JFM), reproduced in Senate Committee minutes in full).
[339] *Ibid* (Letter to Senate Committee from JFM).
[340] *Ibid* (Letter to Senate Committee from JFM). For example, between 1967 and 1971, the number of class actions filed in the Federal District Court for the Southern District of New York increased four-fold, and more than half the actions commenced in 1966 were still pending in 1971.
[341] *Ibid* (Letter to Senate Committee from JFM).
[342] *Ibid*, June 29, 1977 (John G Sheppard, Executive Vice President – Financial, Dofasco).
[343] Interim Report of the Standing Senate Committee on Banking, Trade and Commerce, Section 18: Class Actions, July 6, 1977, B319672, *supra* note 300.
[344] *Ibid.*

Unfortunately for advocates of class actions, the Senate Committee's recommendations carried the day.[345] On November 18, 1977, a watered-down version of the *Competition Act* was introduced in the legislature[346] in order "to head off an angry confrontation with Canada's business community".[347] However, even that version of the Act drew heavy fire from business.[348] The entire statute eventually died on the Order Paper prior to the general election in 1979, and the next Progressive Conservative government did nothing to revive it.[349] Class action reform would not be debated again in the legislature until well into the next decade.

D. The Report of the Williston Committee

Nevertheless, the device was being discussed in many other contexts in the intervening period. In 1980, the Civil Procedure Revision Committee released its report on the revision of the rules of court.[350] Chaired by Walter Williston, a Bay Street QC,[351] the Committee had begun its work in December 1975[352] and was directed by Attorney General McMurtry to simplify the procedure and reduce the number of Rules in order to decrease costs and delay.[353] McMurtry had mentioned the Williston Committee's work in his reference to the OLRC in 1976, but had decided that a subject as complex as class

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[345] These advocates included Simon Chester at the Policy Development Division. Chester wrote to his colleague at the Ministry of the Attorney General, enclosing the minutes of the Senate Committee hearings pertaining to class actions (*supra* note 334), stating that they were "for our 'Know your Enemies – Who Killed C-42' file" (Letter from Chester, September 27, 1977, B319672, *supra* note 300).

[346] Wildsmith, *supra* note 333 at 91-92. This new version of the Bill required that the representative plaintiff provide proof that a certain portion of the class supported the action, and that the claims of the class were likely to be large enough to justify the cost in administering them. It also removed the substitute action provisions. See also J Ziegel, "Consumer has little muscle in court", *Toronto Star* (November 1, 1978), B380543, *supra* note 160.

[347] J Honderich, "Trust-buster's powers limited under new bill", *Toronto Star* (November 18, 1977) B7, B380543, *ibid.*

[348] Report of the Standing Senate Committee on Banking, Trade and Commerce on the Subject Matter of Bill C-13, *Debates of the Senate*, Vol 125, No 91, June 29, 1978, pp 1004-1020, cited in W Stanbury, "Half a Loaf: Bill C-29, Proposed Amendments to the Combines Investigation Act" (1985) 10:1 The Canadian Business Law Journal 1 at 6 [Stanbury].

[349] Stanbury, *ibid*, at 6.

[350] WB Williston, *Report of the Civil Procedure Revision Committee* (Toronto: Ministry of the Attorney General, 1980).

[351] Williston was an early proponent of contingency fees in Ontario: see Williston Contingency Fees, *infra* note 365.

[352] WB Williston, "Revising the Ontario Rules of Practice – The Work of the Civil Procedure Revision Committee" (1977) 1 Advocates' Quarterly 18 at 18.

[353] *Ibid* at 21-22.

actions merited separate study.[354] For the same reason, after the OLRC commenced its study, McMurtry asked the Committee to stop its work on a class actions rule.[355]

While the final Williston Report contained no reform of the existing Rule 75 on representative actions, the Committee's draft of the class actions rule is revealing. The Williston Committee recommended, among other things, a certification test (but not on the merits),[356] notice within the discretion of the court,[357] and the ability to award aggregate damages.[358] However, it contained no provisions for opting-out (or in),[359] or for costs, in which case traditional costs rules would have continued to apply. The rule is fairly skeletal and reflected the preliminary nature of the Committee's work on the subject. The Committee knew enough, however, to conclude in its final Report that, "we are convinced that the present procedure concerning class actions is in a very serious state of disarray."[360] This phrase would be picked up time and again by advocates seeking to reform the law on class actions.[361]

E. Private Members' Bills on Class Actions

Two of these advocates attempted to bring about reform by way of three Private Members Bills (PMBs), all of which were worded exactly the same. NDP MPP Patrick Lawlor introduced the first two bills in 1977[362] and 1980,[363] and Mel Swart (also NDP) introduced the third in 1982.[364] None of them progressed past first reading.

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[354] AG Reference, *supra* note 292.
[355] Letter from Williston to Derek Mendes da Costa, OLRC Chair, enclosing draft class actions rule, April 26, 1979 [Draft class actions rule], B380537, *supra* note 255. A new section on class actions had recently been added to the *Ontario Rules of Practice* to reflect recent judicial interpretations of Rule 75: G Watson *et al*, *Canadian Civil Procedure Cases and Materials*, 2nd ed (Toronto: Butterworths, 1977) at 5-82 to 5-110, reviewed by G Stewart, "Book Reviews" (1977) 56 Canadian Bar Review 545.
[356] Draft class actions rule, *ibid*, at 1.
[357] *Ibid* at 2.
[358] *Ibid* at 4.
[359] However, a judgment could not be enforced against a class member without leave of the court: *ibid* at 5.
[360] As quoted in GD Watson, *Holmested and Watson: Ontario Civil Procedure*, vol 2 (looseleaf service) (Toronto: Carswell, 1984) at 12-13.
[361] See, for example, the numerous Policy and Cabinet Submissions drafted by Michael Cochrane, cited in Chapter 4.
[362] Bill 12 (Private Member's Bill, Mr Lawlor), *An Act to Provide for Class Actions*, 4th Sess, 30th Leg, Ontario, March 31, 1977, B380543, *supra* note 160.
[363] Bill 30 (Private Member's Bill, Mr Lawlor), *An Act to Provide for Class Actions*, 4th Sess, 31st Leg, Ontario, March 27, 1980, B380543, *supra* note 160. Patrick Lawlor was later commissioned by the Attorney General to undertake a study on group defamation, which included a section on recourse in the

The bills contained a certification requirement, including a requirement that it is *prima facie* in the interests of the class that the action be brought as a class proceeding. They also stated that individual damages or separate contracts were not to be an impediment to certification. Notice would be within the discretion of the court, and class members would have a right to opt out. Cases could not be settled or discontinued without court permission. Other than these provisions, however, the bills were very bare indeed. They said nothing about rights of discovery or how damages were to be determined, and they were silent on costs (meaning that traditional costs rules would apply). Given these deficiencies, it is likely that these bills would have done little to encourage class actions or clear up the confusion in the case law, even if any of them had been passed.

F. Class Actions Legislation in Québec

As noted in the previous chapter, in 1978 Québec became the first province in Canada to enact class actions legislation. This was a major boost to the movement for reform in Ontario, as the advocates of class actions could now point to an example other than the United States (a jurisdiction that Canada had been historically reluctant to emulate on this matter). The authors of the OLRC Report relied heavily upon the Québec experience as an example of how class actions could work, as did the Attorney General's Advisory Committee. Although the Québec courts were initially restrictive in their interpretation of class actions, they eventually began to interpret the device more liberally, and this helped prepare the ground for reform in Ontario.

However, although the Québec experience demonstrated how class actions could work outside the US, there were still several barriers to class action reform in Ontario, and the breaking down of those barriers would require a change in the legal culture. One of them was contingency fees, another US device to which the Ontario bar was historically averse.

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courts by way of a class action: P Lawlor, *Group Defamation: Submission to the Attorney General* (Toronto, March 1984) [Defamation Submission].

[364] Bill 122 (Private Member's Bill, Mr Swart), *An Act to Provide for Class Actions*, 2d Sess, 32nd Leg, Ontario, May 21, 1982, B380543, *supra* note 160.

G. The Debate on Contingency Fees

Contingency fees were regarded with hostility and suspicion by many of the business groups and others involved in the class actions debate, such that they were seen as "legal leprosy".[365] An agreement to charge fees on the contingency that the lawyer won or settled the case was traditionally seen as champerty (where a plaintiff pursues a lawsuit in her own name in return for sharing any eventual award with her lawyer) and maintenance (where, for improper motives, a person assists someone else with a lawsuit in which the person has no interest).[366] They were also forbidden by statute in Ontario, pursuant to the *Solicitors Act*[367] and *An Act Respecting Champerty*.[368] However, there was some evidence in the later part of the 20th century that lawyers were pursuing cases on a *de facto* contingency basis, only collecting their fees from the client once a case had been resolved successfully.[369]

To fully understand the debate, however, the term "contingency fee" must be clarified, as there are several ways in which such fees can be calculated:

i) Fee as a percentage of the client's net recovery;
ii) Fee based on hourly billing;
iii) Fee based on hourly billing, multiplied by a certain number agreed in advance (a "multiplier") in order to reflect the risk assumed by the lawyer.

It is apparent that the *de facto* contingency basis which was largely accepted in Ontario in the later 20th century was a simple fee based on hourly billing (lawyers simply collected their fee once the litigation was successfully resolved).[370] During the course of the contingency fee debate that began in the late 1960s in Ontario, some commentators expressed support for a "controlled" contingency fee, *ie* the third option above, with the

[365] WB Williston, "The Contingent Fee in Canada" (1968) 6 Alberta Law Review 184 at 184 [Williston Contingency Fees].
[366] P Girard, "The making of the Canadian legal profession: a hybrid heritage" (2014) 21:2 International Journal of the Legal Profession 145 at 160 [Girard]; Williston Contingency Fees, *ibid*, at 184-187.
[367] RSO 1960, c 378, s 59. They were also prohibited by the Rules of Professional Conduct: Williston Contingency Fees, *ibid*, at 190.
[368] RSO 1897, c 327. See also Girard, *supra* note 366 at 161.
[369] Girard, *ibid,* at 163.
[370] This type of arrangement was also known as a "speculative action": Williston Contingency Fees, *supra* note 365 at 197-198: "It is clear that there is nothing wrong in a proper case with a solicitor undertaking litigation when he known that he will not get paid unless the action is successful."

added requirement of court approval.[371] Because of the perceived excesses of their US counterparts, very few in the legal profession were in favour of the first option – a fee as a percentage of the client's net recovery – at least until the 1980s.[372] When commentators referred to classic US-style contingency fees, it was invariably the first option to which they were referring.[373]

The prevalence of contingency fees in the US was a major reason why they were regarded with such repugnance in Ontario.[374] Courts decried the "'American Ambulance-Chaser' [which] has become a visible factor in so called professional life."[375] Law reform advocates assured their opponents that Ontario was not a "California North",[376] full of "bounty-hunter lawyers looking … [for] a fat contingent fee"[377] because such fees were not permitted there. Even newspapers sympathetic towards class actions bore headlines stating, "Don't give lawyers a cut" and opposing US-style contingency fees.[378] The Canadian Bar Association – Ontario (CBA) stated that, "contingent fee systems are typically American and sprang from a legal system which did not have court costs or Legal Aid."[379]

The CBA also took the position, as many other opponents did, that contingency fees would compromise the integrity of the legal profession because "a lawyer becomes a litigant rather than an officer of the court"[380] and the lawyer would be put in a position of

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[371] See, for example, D Dewees, J Prichard and M Trebilcock, *Class actions as a regulatory instrument* (Toronto: Ontario Economic Council, 1980). This was also the option put forward by the OLRC Report, *supra* note 2.
[372] Williston Contingency Fees, *supra* note 365 at 184. The LSUC's approval of contingency fees in 1988 is detailed in Chapter Four.
[373] Williston Contingency Fees, *ibid*, at 188, 198-199. See also Canadian Bar Association (Ontario) and The Public Interest Research Centre, *Report on Class Actions*, Submission to the Hon R McMurtry QC, Attorney General of Ontario, November 1983, at 38 [CBA/PIAC Report], in Policy Development Division Counsel correspondence files, Class Actions - Canadian Bar Association - brief - File #1, 1982-1991, RG 4-40, CA226, Box No B248633, Archives of Ontario [B248633-CBA].
[374] Although it does not explain why Ontario was the last Canadian province to allow them: Girard, *supra* note 366 at 161.
[375] *Re Solicitor* (1907), 14 OLR 464, cited in Williston Contingency Fees, *supra* note 365 at 190.
[376] DW Slater, *Final report of the Ontario Task Force on Insurance*, vol 1 (Toronto: Ministry of Financial Institutions, 1986) at 53, cited in Benidickson, *supra* note 248 at 651. However, Slater pointed out that there was every indication that Ontario could become a "California North" in the foreseeable future, due to the continuing expansion and extension of liability.
[377] Trebilcock 1972, *supra* note 255 at 2.
[378] Editorial, "Don't give lawyers a cut", *Toronto Star* (March 24, 1980), B380543, *supra* note 160.
[379] Report of the Professional Organizations Committee of the CBA, Submission to the Ministry of the Attorney General Professional Organizations Committee, April 30, 1979, B380537, *supra* note 255.
[380] *Ibid* at 84.

conflict with his or her client.[381] The overall position of the CBA was that the drawbacks of contingent fees outweighed their advantages.[382] The Attorney General himself was opposed to any change in the law,[383] and as a result the Law Society of Upper Canada decided not to conduct an in-depth study of the issue,[384] having received "considerable" correspondence almost all of which was opposed to contingency fees.[385] Finally, in April 1980, the Professional Organizations Committee recommended that, "[t]here should be no relaxation of the current prohibition of contingent fees as a payment mechanism for legal services in Ontario."[386]

Even into the 1980s, therefore, there was staunch and widespread opposition to the introduction of contingency fees in Ontario. The issue was to prove a major point of contention in the continuing debate on class actions, as well as in the eventual deliberations of the Attorney General's Advisory Committee.[387]

H. The *Charter* and its Impact on Legal Culture

Not all opposition to class actions was purely pragmatic or self-interested. Some of the opposition was also on the basis of principle. A significant concern of business interests and other opponents was the discretion and case management power that the device gave to judges. Commentators observed that class actions legislation would take power out of the hands of the democratically-elected legislature and place it in the hand of the judiciary. They stated that the class action was not "merely a new adjudicative procedure.

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[381] *Ibid* at 86.
[382] *Ibid* at 84.
[383] LSUC Minutes of Convocation, April 23, 1976, 175 at 178 (Report of the Special Committee on Contingent Fees), B380537, *supra* note 255.
[384] *Ibid*.
[385] *Ibid* at 176.
[386] L Fox, "Ban on contingency fees remains in Ontario", *Ontario Lawyers Weekly* (August 12, 1983), p 5, in Policy Development Division Counsel correspondence files, Class Actions, 1988-1990, RG 4-40, Box No B502275, Archives of Ontario. Larry Fox was a Legal Research Officer who worked on the OLRC Report, *supra* note 2 (especially with regard to costs) and was later instrumental in setting up the Class Proceedings Fund. His article was cautiously in favour of contingency fees.
[387] The adoption of contingency fees in the context of the CPA, however, was to open up the way for their adoption generally: Girard, *supra* note 366 at 161.

It is highly exceptional in character … and it is quite possible to see in it … a 'serious judicial usurpation of the functions of the legislature.'"[388]

This was a concern that was not limited to class actions. It also related to other statutes that gave judges a high level of discretion, such as the proposed Environmental Rights Bill outlined above. The power this Bill would have given to the courts was remarked upon with concern even by the Toronto Star, traditionally a more left-leaning newspaper:

> Judges would be given legislative powers … This clashes with a primary principle of democracy: That laws can only be made by popularly elected legislators, and that they are implemented by government ministers who are directly accountable to those legislators. The function of the courts and their judges is to arbitrate disputes over what the law is and to determine fact. It is not to make the law.[389]

Of course, the main focus of fears about judicial activism in the late 1970s and early 1980s was the *Canadian Charter of Rights and Freedoms*.[390] Historically, Canadian courts had not been nearly as activist as their American cousins; while the American courts played a unique role created by their constitutionally-entrenched Bill of Rights, prior to 1982 the Canadian courts had had no such role (and in fact the highest court in Canada had, until 1949, been in England).[391]

However, with the advent of the *Charter* in 1982, the courts began to have a role not simply in interpreting law but in articulating fundamental values, and the legal culture of Canada took one step closer to that of the United States.[392] Indeed, after a few years, legal academe, the bar and the public in general came not only to acknowledge that the judiciary was taking on a legislative function, but also to accept and perhaps even welcome it.[393] The class action simply fit conveniently into this contemporary judicial

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[388] Glenn, *supra* note 40 at 271. See also Submission of the Canadian Manufacturers' Association to Ministry of the Attorney General, December 1982, at 2-3 [CMA 1982], in Policy Development Division Counsel correspondence files, Class Actions – General – File # 1, 1985-1987, RG 4-40, Box No B248633, Archives of Ontario [B248633 – General File #1].
[389] Star December 1979, *supra* note 325.
[390] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].
[391] Wildsmith, *supra* note 333 at 118-120.
[392] Bogart 1984, *supra* note 46 at 287.
[393] Glenn, *supra* note 40 at 272; Bogart 2007, *supra* note 20 at 34.

role,[394] as a more activist judiciary (together with changes to the classic two-party adversarial model of litigation that *Charter* litigation began to entail)[395] was an essential ingredient of the class action device.[396] The *Charter*, therefore, caused many of the more philosophical arguments against class actions to fall by the wayside.

This marked change in legal culture began in 1982, the same year the OLRC Report was released. With the *Charter* still in its infancy, however, the ground was not yet sufficiently prepared for the OLRC Report to take root. It was released into a world that still clung to traditional modes of litigation and a conservative role for the judiciary, and therefore, to a significant extent, fell on deaf ears.

I. The OLRC Report

Six long years after the Attorney General referred the subject of class actions in November 1976, the OLRC released its Report. There appear to have been no public consultations during this time, except for one advertisement in the Ontario Reports inviting submissions,[397] and very few announcements or public statements regarding the project. As far as the outside world was concerned, nothing was heard until June 1982 when the Attorney General tabled the OLRC Report in the Ontario legislature.[398] Any momentum that the movement for class action reform had had when the Report was commissioned had been lost by the time it was released. There is very little explanation as to why the Report took so long,[399] and why, when it was finally released, it was 880

[394] Glenn, *ibid.*
[395] For example, many of the cases on public interest standing, detailed above, involved either the Bill of Rights or the *Charter*. See also Bogart 1987, *supra* note 46 at 669.
[396] Bogart 2007, *supra* note 20 at 2-3.
[397] Class Actions Project – Advertising for Briefs, January 19, 1977 (the advertisement appeared in various newspapers), B380543, *supra* note 160.
[398] Hansard, June 24, 1982, *supra* note 1.
[399] The OLRC did not even meet on the subject of class actions until June 5, 1978, nearly two years after it received the AG Reference: Memorandum from Patricia Richardson, OLRC Counsel, to OLRC Members re: Class Actions, June 29, 1978, B380538, *supra* note 290. However, it is also clear from this memorandum that a fair amount of material had been written and researched by that time.

pages of unnecessarily long and repetitive "dense legal prose"[400] that likely discouraged many less well-resourced groups from commenting on it.[401]

Despite the warm reception the Report received, therefore, it is very unlikely that most of the people praising it had read it in its entirety. Attorney General McMurtry praised it as "the culmination of [a] massive project of research and scholarship [that] has reviewed every aspect of the law relating to class actions" and a major contribution to the class actions debate.[402] Academics stated that it "deserves to become a basic reference work on the subject"[403] and that it "demands the attention of all procedural reformers."[404] Consumer advocates and the wider public welcomed the Report's call for class action reform in Ontario.[405] However, Andrew Roman, head of the Public Interest Advocacy Centre who was later to sit on the Attorney General's Advisory Committee, stated that, "the OLRC's proposals for reform were not as persuasive as its research."[406]

Not only was the OLRC Report so long that it was virtually unreadable for most people,[407] but its template for class actions reform departed substantially from the traditional model of litigation, so much so that the business community and the legal profession strongly opposed many of its recommendations. The Report's draft legislation

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[400] E Roseman, "Class actions are needed, commission report says", *Globe and Mail* (July 7, 1982), p 9 [Roseman]; Editorial, "Facilitate class actions", *Toronto Star* (June 28, 1982), A12 [Facilitate]. Both articles can be found in B380537, *supra* note 255.

[401] Letter from WL Hetherington, Chairman, Ontario Division of the Canadian Manufacturers' Association, to the Honourable R Roy McMurtry, QC, September 15, 1983, at 1 [CMA Letter 1983], in Policy Development Division Counsel correspondence files, Class Actions – Correspondence, RG 4-40, CA226, Box No B248633, Archives of Ontario [B248633 Correspondence]; Memorandum to File from Peter Bernhardt, Student-at-Law, re: Meeting February 8, 1983 with representatives of the Canadian Manufacturers' Association, February 11, 1983, at 1 [Bernhardt Memo February 11], Policy Development Division Counsel correspondence files, Class Actions - Consultations, 1983-1988, CA226, RG 4-40, Box No B502275, Archives of Ontario [B502275 – Consultations].

[402] Hansard, June 24, 1982, *supra* note 1.

[403] B DuVal, "Book Review: Ontario Law Reform Commission *Report on Class Actions*" (1983) American Bar Foundation Research Journal 783 at 783.

[404] T Cromwell, "An examination of the Ontario Law Reform Commission Report on Class Actions" (1983) 15 Ottawa Law Review 587 at 587 [Cromwell].

[405] Roseman, *supra* note 400; Facilitate, *supra* note 400.

[406] A Roman, "Class Actions in Canada: The Path to Reform?" (1988) Advocates' Society Journal 28 at 28 [Roman article 1988]. See also Cromwell, *supra* note 404 at 9-12.

[407] The final product was nevertheless a significant improvement on the draft, which was more than 2,000 pages long: Draft OLRC Report (March 1982 Minister's Copy), Table of Contents, in Ontario Law Reform Commission files, Nov 1976 - Dec 1982, Project name: class actions, RG 4-66, BA77, Box No B380546, Archives of Ontario [B380546].

adopted a procedure similar to that of Rule 23 in the US,[408] but in addition it made several quite controversial recommendations, including the following:

- The Attorney General was to be given notice of every class action brought in the province, with a right to intervene in any case that raised a matter of public interest, and a discretion given to the court to allow the AG to act as the representative plaintiff in certain circumstances;[409]

- A certification requirement that included a preliminary merits test, which would only certify those actions "brought in good faith with a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class";[410]

- The certification test would also allow the court to determine whether the representative plaintiff had competent legal representation that was adequate to protect the interests of the class;[411]

- Another part of the onerous certification test would involve a "cost-benefit" test, which would be different from the "superiority" test (also a requirement); this would allow the court to embark on a wide-ranging enquiry into whether the impact of the litigation on the administration of justice would be outweighed by the compensatory or deterrent value of the suit (the draft legislation gave very little other guidance to the courts in this regard);[412]

- Class members would not be allowed to opt out without leave of the court;[413]

- Traditional costs rules would not apply to class actions – no costs would be awarded to any party (unless it would be unjust to deprive the successful party of costs; in the event of vexatious, frivolous or abusive conduct; and in the case of interlocutory proceedings); traditional costs rules would apply to individual proceedings;[414]

- A modified contingency fee arrangement would be allowed, to be approved by the court; a lawyer's fee would come out of any recovery to the class;[415] and

[408] OLRC Report, *supra* note 2 at 307.
[409] *Ibid* at 307-308.
[410] *Ibid* at 309-324.
[411] *Ibid* at 354-374.
[412] *Ibid* at 411-417.
[413] *Ibid* at 485-491.
[414] *Ibid* at 704-709.
[415] *Ibid* at 709-739. This would not be an "American-style" contingency agreement that would involve a percentage of recovery, but a modified contingency fee along the lines of option (iii) on page 64, *supra*.

- Aggregate damages could be awarded, and any unclaimed residue of a damages award could be distributed in a way that would benefit uncompensated class members, or could even be forfeited to the Crown.[416]

In addition, the OLRC specifically rejected the concept of a publicly financed Fund to assist plaintiffs in class actions, because the start-up costs would be too high and the only experience of such a Fund was in Québec, where it had only been running since 1978.[417] The Attorney General invited interested parties to make submissions regarding the OLRC Report,[418] and the business community was very quick to take him up on his offer.

These groups were unanimous in their opposition to class action reform that departed from the traditional model of litigation,[419] stating that any changes should merely be to the existing Rules of Civil Procedure and not involve an entirely new statute.[420] They stated that the OLRC had acted outside the bounds of its mandate by making policy decisions.[421] Others resurrected the "legalized blackmail" epithet, stating that the social costs of class actions far outweighed their benefits.[422] They also raised fears that class actions would impact their sector specifically, expanding liability, adding to costs, reducing competition and leading to overly risk-averse practices.[423] Some business opponents were particularly critical of the fact that the Report had been written

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[416] *Ibid* at 519-603.
[417] ST Goudge, "Working Paper on Costs" (OLRC, March 1980), at 35-36, B380538, *supra* note 290. Goudge was at the time a partner at Cameron, Brewin & Scott, along with Ian Scott who would later oversee the introduction of class action legislation as Attorney General: Scott, *supra* note 56 at 133. In addition, two of the Legal Research Officers who worked on the OLRC Report, Larry Fox and Ann Merritt, both ended up working on the implementation of a class actions Fund once it had been recommended by the Attorney General's Advisory Committee in 1990.
[418] Hansard, June 24, 1982, *supra* note 1.
[419] CMA 1982, *supra* note 388 at 1, 4; HJ Hemens *et al*, *A Discussion Memorandum on Class Actions for the Ontario Law Reform Commission*, 1978, at 56 [McMillan Binch Report], CMA File on Class Actions, 1978-1983, RG 4-40, LEG-2-24-5, Box No B381441, Archives of Ontario. The McMillan Binch Report was drafted by five lawyers from McMillan Binch (essentially representing the interests of their numerous corporate clients) who had opposed the class action provisions of the proposed *Competition Act*, two of whom had also worked with the Canadian Manufacturers' Association (at 1-2). See also W Macdonald and J Rowley, "Ontario Class Action Reform: Business and Justice System Impacts – A Comment" (1984) 9 Canadian Business Law Journal 351 [Macdonald and Rowley].
[420] CMA 1982, *ibid*, at 4; CMA Letter 1983, *supra* note 401 at 2; McMillan Binch Report, *ibid*, at 59-65. This was a manifestation of what Marcus calls the "adjectival" conception, which holds that class actions are purely procedural and should not depart from traditional rules of civil procedure: *supra* note 44, at 4.
[421] McMillan Binch Report, *ibid*, at 10.
[422] Submission of the Institute of Chartered Accountants of Ontario with respect to Class Actions, enclosed with letter from JL MacInnis, ICAO President, to R McMurtry, May 6, 1983, at 2-3 [CA Brief], B502275 – Consultations, *supra* note 401.
[423] *Ibid* at 4-5.

largely by academics with little practical experience of the legal system,[424] with the Canadian Manufacturers' Association stating that "the Commission has departed from attempting to develop a workable procedure to address real world issues. Rather it has succumbed to some form of academic perfectionism which will not correct real world problems but only complicate them."[425]

Overall, the business groups took issue with the following recommendations of the OLRC:

- No-way costs: the business groups all maintained that traditional costs rules should apply to class actions,[426] and some even stated that plaintiffs' groups should be made to put up security for costs;[427]

- Contingency fees were strongly opposed by all the interest groups, largely on ethical grounds and the fact that such fees would give lawyers a financial incentive to encourage litigation;[428]

- Opting-out: all the business groups stated that class actions should be on a strictly opt-in basis, to avoid the spectre of indeterminate classes, and to avoid binding the rights of unwilling class members;[429]

- Aggregate damages: the business groups unanimously opposed the OLRC's proposal to allow aggregate damages (or "fluid recovery"), on the basis that this compromised defendants' procedural rights;[430]

- Common interest: the submissions from the business groups stated that class actions should only be permitted when there was a common interest, such as

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[424] *Ibid* at 8-9.
[425] Submission by the Canadian Manufacturers' Association to the Honourable R Roy McMurtry, QC, on Ontario Law Reform Commission Report on Class Actions (OLRC Report), September 1983 [CMA Submission 1983], B248633 – General File #1, *supra* note 388.
[426] CA Brief, *supra* note 422 at 6-8; CMA Letter 1983, *supra* note 401 at 3; McMillan Binch Report, *supra* note 419 at 54.
[427] CMA 1982, *supra* note 388 at 3-4; CMA Submission 1983, *supra* note 425 at 30-36; letter from E Merkur, Chairman, the Legislative Committee of the Urban Development Institute, to P Richardson, OLRC Counsel, April 27, 1977, at 2 [UDI Submission], B380543, *supra* note 160.
[428] CA Brief, *supra* note 422 at 6-8; CMA 1982, *ibid*, at 2; CMA Letter 1983, *supra* note 401 at 3; CMA Submission 1983, *ibid*, at 30-36; McMillan Binch Report, *supra* note 419 at 44-45, 54.
[429] CMA 1982, *ibid*, at 1; CMA Letter 1983, *ibid*, at 3; CMA Submission 1983, *ibid*, at 22; McMillan Binch Report, *ibid*, at 53; UDI Submission, *supra* note 427 at 1.
[430] CMA 1982, *ibid*, at 2-3; CMA Letter 1983, *ibid*, at 3; CMA Submission 1983, *ibid*, at 36-37; UDI Submission, *ibid*, at 2.

identical contracts, between members of the class;[431] individual damages should be tried in individual actions;[432]

- Certification test: the business groups did not want certification to involve an assessment of the merits, because then they would be forced to reveal their defence strategy to the plaintiffs;[433]

- Notice: all of the business groups recommended mandatory post-certification notice to every member of the class, in order to enable them to opt in if they wished;[434]

- Finally, there was all-round opposition to the involvement of the Attorney General in class actions, other than as an intervener and with leave of the court.[435]

It was not only the business groups that opposed several of the OLRC's key recommendations. Even those who were sympathetic to the case for reform found the OLRC's draft legislation overly complex, setting so many hurdles in the way of a prospective plaintiff as to "make it improbable that anyone in Ontario would ever commence a class action."[436] The Report appeared to be the product of divided minds, a prospect that the Committee itself foresaw as early as 1979.[437] In the final report, the Chairman himself wrote a reservation, dissenting on significant aspects of the OLRC Report including the vital subject of costs (he opposed the no-way costs proposal and contingency fees because they treated plaintiffs and defendants unequally).[438] The Commission's previous Vice Chairman, GA Gale, who had retired due to ill health,

[431] CMA 1982, *ibid*, at 3; McMillan Binch Report, *supra* note 419 at 39-40, 52; UDI Submission, *ibid*, at 1.
[432] CMA 1982, *ibid*, at 3; CMA Letter 1983, *supra* note 401 at 2-3; CMA Submission 1983, *supra* note 425 at 13-14; McMillan Binch Report, *ibid*, at 64-65.
[433] CMA Submission 1983, *ibid*, at 11; McMillan Binch Report, *ibid*, at 59-60.
[434] CMA Letter 1983, *supra* note 401 at 3; CMA Submission 1983, *ibid*, at 17-18, 20, 24; McMillan Binch Report, *ibid*, at 61-62.
[435] CMA 1982, *supra* note 388 at 2-3; CMA Letter 1983, *ibid*, at 3; CMA Submission 1983, *ibid*, at 36-37.
[436] Roman article 1988, *supra* note 406.
[437] Letter from Richard A Bell, OLRC Commissioner, to Derek Mendes da Costa, OLRC Chairman, re: Class Actions, March 20, 1979, B380543, *supra* note 160: "[W]hat I suspect is that philosophically and otherwise, we are divided".
[438] OLRC Report, *supra* note 2 at 851-854 [Chairman's Reservations]; Draft OLRC Report (March 1982 Minister's Copy), Chairman's Reservations, B380546, *supra* note 407. Mendes da Costa also found the chapter on Costs and Benefits unpersuasive and unduly guided by the American experience; he disagreed with active case management and a role for the activist judge; he thought that opting-out should be a right and should not require leave of the court; he disagreed with *cy-près* awards; and he thought that undistributed aggregate awards should be returned to the defendant.

disagreed with the costs recommendations for the same reasons, a fact acknowledged at the very beginning of the Report itself.[439]

The CBA/PIAC Report was particularly critical of the OLRC Report because of its equivocal nature. The CBA/PIAC were somewhat supportive of the OLRC's recommendations. They agreed that no-way costs rules were necessary in order to make class actions economically realistic for plaintiffs.[440] They therefore recommended a modified no-way costs rule, where the judge could retain her discretion to award costs, but would take various factors (such as the conduct of the parties) into account in doing so.[441] They too rejected the idea of a publicly-supported Fund.[442] However, the CBA/PIAC also opposed some of the OLRC's proposals, stating that certification should require plaintiffs to demonstrate a "reasonable probability of success",[443] notice should be mandatory,[444] the Attorney-General should have no special role in class actions,[445] and that contingency fees should not be allowed on ethical grounds.[446] The Submission of the Advocates' Society was also critical on the issue of costs, opposing the OLRC's recommendations on no-way costs and contingency fees, although it did support the idea of a public fund for class actions.[447]

Very few people wholeheartedly supported the OLRC's recommendations.[448] The media coverage of the Report's release evinced wide public support for class action reform. However, the news articles rarely went into detail about the Report's actual

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[439] OLRC Report, *supra* note 2, acknowledgements page.
[440] CBA/PIAC Report, *supra* note 373 at 42.
[441] *Ibid* at 30-31, 61.
[442] *Ibid* at 32-37. Interestingly, the original majority report recommended traditional costs and a public Fund; this was changed in order to make the report unanimous following John Holding's dissenting report: Class Action Committee Minority Report by John D Holding, QC, September 1983 [CBA Minority Report], B248633-CBA, *supra* note 373. The CMA was also in support of a Fund, combined with traditional costs rules: CMA Submission 1983, *supra* note 425 at 30-36.
[443] *Ibid* at 61.
[444] *Ibid* at 62.
[445] *Ibid*.
[446] *Ibid* at 37-41.
[447] Submission of the Advocates' Society on the Report of the Ontario Law Reform Commission on the Reform of Class Action Legislation in Ontario, February 1984, at 17-22, in Policy Development Division Counsel correspondence files, Class Actions – Advisory Council to Advocates' Society Submission, RG 4-40, Box No B319671, Archives of Ontario.
[448] There is only one letter in the archival record asking the Attorney General to implement the OLRC draft legislation without change: J Ziegel, Professor of Law at the University of Toronto (a consumer advocate who had supported the OLRC Consumer Report, *supra* note 262) to McMurtry, March 1, 1983, B380537, *supra* note 255.

recommendations.[449] They focused instead on the well-known examples of mass wrongs referred to by the ORLC,[450] which had awakened the public consciousness to the concept of group injury and group litigation in previous years. These included the Re-Mor and Astra Trust investment scandal, as well as the Mississauga Train Derailment.[451] The Re-Mor and Astra Trust scam involved the collapse of several financial institutions, leaving more than 300 investors with losses of approximately $6 million. Legal proceedings were subsequently commenced, including several class actions, which alleged that the Ontario government had been negligent in its licensing of Re-Mor.[452] The scandal prompted numerous calls for law reform, including reform of the Ontario *Securities Act*.[453]

The Mississauga Train Derailment occurred on November 10, 1979, when a train carrying several tankers of explosive and flammable chemicals derailed and subsequently exploded, leading to a chlorine leak that necessitated the evacuation of 250,000 people for six days. The damages in terms of lost income and business profits were estimated at $80-100 million.[454] Roy McMurtry, Attorney General and Solicitor General at the time of the derailment and when the OLRC Report was released, was commended for his response as Chair of the Emergency Response Committee.[455] The response of Canada Pacific Railway in terms of compensating the victims, however, was not as impressive. CP only made payouts to approximately half the people evacuated, and even they had to sign releases in exchange for compensation, with the Law Society of Upper Canada

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[449] Roseman, *supra* note 400; R Speirs, "Ontario report asks for class action law", *Globe and Mail* (June 25, 1982), p 1, B380537, *supra* note 255. See also Editorial, "Remove that bottleneck", *Kitchener-Waterloo Recorder* (July 6, 1982); Editorial, "Class action legislation must keep up with times", *Guelph Daily Mercury* (June 28, 1982); D Collins, "Class action lawsuit process will never be perfect: experts", *Ottawa Citizen* (June 26, 1982); Editorial, "Make class actions easier", *Toronto Star* (July 12, 1984); all these articles can be found in B380543, *supra* note 160.

[450] This is largely because those events were the focus of the Canadian Press story, which regional newspapers such as the Hamilton Spectator and the London Free Press simply reprinted or rewrote: Canadian Press (June 24, 1982), B380537, *supra* note 255.

[451] It also included environmental disasters such as the mercury contamination of fish in the Wabigoon-English river system, which led to the poisoning of members of two First Nations bands in Northern Ontario. The group actions that ensued were settled for $16.6 million by way of the *Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, SC 1986, c 23.

[452] OLRC Report, *supra* note 2 at 97-99.

[453] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 32nd Parl, 2nd Sess (January 20, 1983) (Jim Breithaupt), online: <http://www.ontla.on.ca/web/house-proceedings/house_detail.do?locale=en&Date=1983-01-20&Parl=32&Sess=2&detailPage=/house-proceedings/transcripts/files_html/20-JAN-1983_L187.htm>.

[454] OLRC Report, *supra* note 2 at 91.

[455] S Grange, *Report of the Mississauga railway accident inquiry* (Ottawa: Supply and Services Canada, 1980), cited in McMurtry, *supra* note 56 at 271-276.

establishing an emergency legal clinic to advise claimants.[456] The consequent coverage in the press expressed frustration at the unwillingness of the insurance companies to pay claims and the fact that full compensation was not forthcoming from the train companies, as well as the logistics of coordinating the hundreds of lawsuits that were filed.[457]

In light of incidents such as this and the consequent delays in getting compensation to the numerous victims, the media and the public began to favour class action reform as a mechanism for addressing mass claims. However, none of the news articles show a detailed grasp of the OLRC Report's recommendations. Given the later support for the Report of the Attorney General's Advisory Committee – which was quite different from that of the OLRC – it is likely that the media would have supported the concept of reform even if the recommendations had been somewhat different.

Upon tabling the OLRC Report in the legislature, the Attorney General stated that, "[t]he government will be studying the report with interest".[458] However, apart from a couple of submissions from business groups that were met with a token response,[459] there appears to have been very little activity in the MAG for the better part of a year. Finally, in February 1983, the Ministry was jolted into action by a decision from the Supreme Court of Canada that effectively ended the common law evolution of class actions in Ontario.

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[456] OLRC Report, *supra* note 2 at 91-92; Canadian Press, "Claims to pile up next as result of derailment", *Montreal Gazette* (November 19, 1979), p 7, Google Newspaper Archives <https://news.google.com/newspapers?id=w2UxAAAAIBAJ&sjid=nqQFAAAAIBAJ&pg=4104%2C3700674>. One group of Mississauga residents retained Jeffery Lyons, the lawyer who represented the plaintiffs in the *Naken* action: D Dowling, "Mississauga Aftermath: Legal Settlements Could Take Years", *Financial Post* (November 1979) [Aftermath], B380543, *supra* note 160.

[457] Aftermath, *ibid*; P Rickwood, "Insurance unlikely for evacuation losses", *Toronto Star* (February 1, 1980); N Louttit, "Battle of Mississauga: The next step is up to the courts", *Toronto Star* (undated); Z Kashmeri, "128 firms, 735 people suing over derailment", *Globe and Mail* (April 16, 1981), p 1; K. Makin, "Derailment suits to be heard together", *Globe and Mail* (September 24, 1982), p 3; all these articles can be found in B380543, *supra* note 160.

[458] Hansard, June 24, 1982, *supra* note 1.

[459] Letter from McMurtry to DW Montgomery, CMA, January 18, 1983, B502275 – Consultations, *supra* note 401.

J. *Naken* and the Supreme Court of Canada

Hopes were high for the Supreme Court of Canada's decision in *Naken*.[460] As detailed in the previous chapter, the case had moved through the lower levels of court until the Court of Appeal for Ontario had decided that it could proceed. There were hopes that the Supreme Court of Canada would uphold that decision, confirming at last that class actions for damages under Rule 75 could proceed in Ontario.

Those hopes were dashed. The plaintiffs had attempted to fit their claims within the "same interest" requirement of Rule 75 by placing a flat limit on individual damages ($1,000 per class member)[461] and, in response to the judgment of the Court of Appeal, limiting the class to owners who responded to and relied on GM's advertisements.[462] Justice Estey, writing for the Court, held that this was insufficient to enable the action to be conducted under Rule 75. He held that the class members had varying contractual arrangements with the defendant, giving rise to different claims in contract. These differences mean that the "same interest" requirement was not met even though some of the contracts were similar and they related to the same model of car (*ie* 1971-1972 Firenzas).[463]

Justice Estey stated that the differences between class members meant that they would each have to prove that they had entered a unilateral contract with the defendant, and each would have to prove the damages arising from the breach of that contract.[464] This would involve a long and complex procedure and a "new and distinct method of proceeding" that was simply beyond the scope of Rule 75, or indeed any of the Rules of Civil Procedure.[465] Rule 75 did not provide for the assessment of damages arising from different circumstances; costs, especially with respect to non-parties; the involvement of non-parties in pre-trial procedures; the effect of a class action on class members' own

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[460] *Naken*, *supra* note 23.
[461] *Ibid* at 76.
[462] *Ibid* at 77. However, no amended statement of claim had yet been delivered, despite the Court of Appeal's order: *General Motors of Canada Ltd v Naken et al*, Appellant's Factum, at para 7, *Naken* Records, Supreme Court of Canada Archives [*Naken* Appellant's Factum].
[463] *Naken*, *ibid*, at 103-104. See also *General Motors of Canada Ltd v Naken et al*, Respondent's Factum, at paras 10-14, *Naken* Records, Supreme Court of Canada Archives.
[464] *Naken*, *ibid* at 104; *Naken* Appellant's Factum, *supra* note 462 at paras 14-15.
[465] *Naken*, *ibid*, at 104.

rights of action; and the effect of the *Statute of Limitations* on class and individual proceedings.[466]

Justice Estey referred to the detailed and comprehensive legislation that allowed for class actions in other jurisdictions, and compared it with the sparseness of Rule 75.[467] He also picked up on the comments in the OLRC Report regarding the procedural inadequacy and "skeletal nature" of Rule 75,[468] as well as the comments from the Court of Appeal for Ontario to the same effect.[469] Reviewing the jurisprudence, Justice Estey concluded that previous actions under Rule 75 had been permitted because either they claimed damages as a class (*ie* damages that could be awarded to the entire class without the need for individual assessments), or claimed a common interest in a statutory right.[470]

He concluded that the *Naken* action could not be framed as a class action under Rule 75, but had to proceed as a joined action involving the named plaintiffs.[471] A rule consisting of thirty words could not be used as a base from which to launch such a complex and uncertain proceeding.[472] While class actions might be a desirable device in the modern market place, "[t]hese … are matters of policy more fittingly the subject of scrutiny in the legislative rather than the judicial chamber."[473]

In its judgment in *Naken*, the Supreme Court of Canada clearly stated that class actions could not proceed under Rule 75 and that, if such actions were to be allowed in Ontario, they would instead have to be permitted by legislation.[474] The ball was back in the court of the Ministry of the Attorney General. The Attorney General was subsequently quoted in several news reports stating that class actions was a priority for his Ministry,[475] that there was now a stronger impetus to introduce class actions

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[466] *Ibid* at 93-94; 96-102; 104-105.
[467] *Ibid* at 78, 88-92.
[468] *Ibid* at 93, citing the OLRC Report, *supra* note 2 at 76.
[469] *Ibid.*
[470] *Ibid* at 79-88; 94-96; 98. The jurisprudence on class actions reviewed in *Naken* is covered in Chapter 2.
[471] *Ibid* at 105.
[472] *Ibid.*
[473] *Ibid* at 102.
[474] As a result, very few class actions were litigated in Ontario in the decade between the *Naken* decision and the proclamation into force of the CPA on January 1, 1993. For a list of those actions, see Bogart 1987, *supra* note 46 at 683-684 and accompanying notes. The cases that distinguished *Naken* and allowed class actions to proceed were, for the most part, either those involving a common fund (*eg Swift Canadian Co Ltd v Alberta Pork Producers Marketing Board*, 1984 ABCA 175) or those involving a statutory right (*eg Sparling et al v Royal Trustco Ltd et al*, 1984 CanLII 2040 (ON CA)).
[475] Hansard June 17, *supra* note 3.

legislation,[476] and that he hoped it would be possible to bring forward legislative proposals within the next year.[477] That was also the hope of the general public as expressed in the media. Newspaper reports expressed disappointment in the Supreme Court's judgment, and particularly focused on the injustice of the fact that large groups of consumers and other wronged groups (such as victims of the Mississauga train derailment) would now have little recourse.[478] Some suspected that the government's hesitancy to act on the OLRC Report was due to the influence of big business.[479]

The MAG began consulting with interested groups on the same day that *Naken* was released. Simon Chester, Counsel to the Policy Development Division at the MAG, met with the Canadian Manufacturers' Association on February 8, 1983,[480] rightfully acknowledging that the *Naken* decision "may … heighten public awareness of the class action issue."[481] While the CMA was in favour of a "balanced mechanism" to enable class actions, they were of the position that this could be achieved by an amendment to the Rules of Civil Procedure; yet they also told the MAG that class actions would entail substantive changes that would dramatically affect the economy of the province. Chester saw this position as inconsistent, because substantive changes to the law could not be made by the Rules Committee.[482] Furthermore, the CMA's position that class actions should only be allowed on an opt-in basis and where damages were identical, with discovery rights and the requirement for security for costs from all class members, was,

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[476] M Strauss, "Supreme Court bars Firenza buyers from launching a class-action suit", *Globe and Mail* (February 9, 1983), pp 1-2 [Strauss], B380537, *ibid.*

[477] Letter from Chester to DW Montgomery, Director, Government Relations and Legislation, CMA, February 9, 1983 [Chester to CMA February 1983], B502275 – Consultations, *supra* note 401; "Class Action Reform: Notes for an Address to the Canadian Bar Association (Ontario) Council," by Andrew Roman, Executive Director, Public Interest Advocacy Centre, June 10, 1983, at 3 [Roman address], B248633-CBA, *supra* note 373.

[478] Strauss, *supra* note 476 at 2; J Ziegel, "Class action dealt a legal blow", *Globe and Mail* (March 29, 1983), p 7 [Ziegel Globe and Mail]; Editorial, "10 Years is Enough", *Kitchener-Waterloo Record* (March 1983); Editorial, "We need class-action suits", *Toronto Star* (February 10, 1983); S Thorne, "Court decision undermines use of class action suits", *Halifax Mail Star* (February 25, 1983), p 14; all these articles can be found in B380537, *supra* note 255. See also Editorial, "Make class actions easier", *Toronto Star* (July 12, 1984), B380543, *supra* note 160.

[479] Ziegel Globe and Mail, *ibid*.

[480] Chester to CMA February 1983, *supra* note 477; Norm Stewart, who would later sit on the Attorney General's Advisory Committee as CMA representative, was at this meeting.

[481] *Ibid*.

[482] *Ibid*, citing the case of *Circosta v Lilly*, [1967] 1 OR 398; Bernhardt Memo February 11, *supra* note 401 at 1; Memorandum to S Chester, Counsel, from Peter Bernhardt, Student-at-Law, re: Assessment of the preliminary brief on class actions from the Canadian Manufacturers' Association, February 14, 1983, at 1 [Bernhardt Memo February 14], B502275 – Consultations, *supra* note 401.

by its own admission, "unduly restrictive"[483] and "little more than a system of 'permissive joinder'."[484] By the MAG's assessment, the CMA's proposals on costs and discovery were, "even more prohibitive than the procedures presently in place,"[485] and the other proposals differed little from the current law, with a prohibition on individual damages and separate contracts.[486] This first meeting with the CMA on the subject of class actions reform was not promising; essentially the CMA was acknowledging the need for limited reform, while being resistant to the changes such reform would entail.

Following the *Naken* decision, however, the MAG had to make some formal announcement about reform, in response to the Supreme Court's hint that legislation was required to bring about class actions in Ontario. McMurtry made this announcement on June 17, 1983.[487] He regarded class action reform as "a high priority. I would expect to be discussing these issues … with my cabinet colleagues in the early autumn, with a view to possibly bringing first reading legislation before the House by the end of the year."[488] McMurtry expressed his commitment to reform and to "develop[ing] progressive and effective legislation".[489] The only issue was the form this legislation would take.[490]

In the wake of this announcement, Chester next turned to the Canadian Bar Association, anticipating (correctly) that it might be somewhat more open to class action reform than the CMA,[491] given its positive take on the class proceeding provisions of the ill-fated *Competition Act*.[492] His invitation to the CBA to comment on the OLRC Report,[493] coupled with McMurtry's formal announcement, led to the release of the joint report between the CBA and the Public Interest Advocacy Centre, detailed above.[494] This

[483] Bernhardt Memo February 14, *ibid*, at 1.
[484] Bernhardt Memo February 11, *supra* note 401 at 2; Bernhardt Memo February 14, *ibid*, at 4.
[485] Bernhardt Memo February 14, *ibid*, at 4.
[486] *Ibid* at 2.
[487] Hansard June 17, *supra* note 3.
[488] *Ibid*, J-173.
[489] *Ibid*, J-175.
[490] *Ibid*.
[491] For some reason, the MAG was not as responsive to the Institute of Chartered Accountants of Ontario regarding its CA Brief (*supra* note 422), possibly because the MAG suspected the meetings with that group would be similar to the meetings with the CMA: Letter from McMurtry to JL MacInnis, President, ICAO, June 9, 1983, and letter from A Skinner to McMurtry, July 7, 1983, both of which can be found in B502275 – Consultations, *supra* note 401.
[492] CBA Competition Submission, *supra* note 324.
[493] Letter from Chester to GDE Adair, Chair, Litigation Committee of the Canadian Bar Association (Ontario), March 18, 1983, B248633-CBA, *supra* note 373.
[494] CBA/PIAC Report, *supra* note 373.

report, while critical of many of the OLRC's recommendations, was supportive of class actions reform in general. The CBA and the PIAC supported the MAG in its view that specific legislation, rather than a mere tinkering with the Rules, was necessary for reform.[495] They were also of the view that class actions were economically incompatible with the traditional costs rules in Ontario.[496] The release of the CBA/PIAC Report in December 1983 was accompanied by a fair amount of publicity in favour of class action reform.[497] The MAG was successfully shoring up its position, and was creating a climate in which it could potentially introduce class actions legislation.

However, it never actually did so. In fact, there was very little activity in the MAG following the release of the CBA/PIAC Report. There was some discussion of class actions in the business and academic communities.[498] The Advocates' Society released its report in February 1984 that, as noted above, strongly opposed the OLRC's recommendations on no-way costs and contingency fees. There was some discussion the following month between Chester and his direct superior, Doug Ewart (Director of the Policy Development Division at the MAG) regarding the CBA/PIAC Report,[499] and Chester also began drafting a Policy Submission that was completed by June 1985.[500] In terms of related legislation, there was talk in the legislature of enacting statutes that would enable certain groups – namely, employees seeking pay equity[501] and members of

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[495] Roman address, *supra* note 477 at 2; Interview with Andrew Roman, on Metro Morning Radio in Toronto (host: Stan Carew), December 13, 1983 [Roman Interview], B248633-CBA, *supra* note 373.
[496] Roman address, *ibid*, at 8 and 11; Roman Interview, *ibid*. This view became more widespread with the news of various costs awards against plaintiffs who had tried to bring class actions and failed: see, for example, *Palmer v Nova Scotia Forest Industries* (1983), 2 DLR (4th) 397 (SCTD), in which approximately $250,000 in costs was awarded against the 15 plaintiffs: "Ruling Shakes Spray Plaintiffs", *Halifax Mail-Star* (September 16, 1983), p 1. Both the judgment and the news article are cited in J Bankier, "The Future of Class Actions in Canada: Cases, Courts and Confusion" (1984) 9 Canadian Business Law Journal 260 at 278.
[497] Roman Interview, *supra* note 495; P Chisholm, "A-G planning class action statute", *Ontario Lawyers' Weekly* (December 12, 1983), in Policy Development Division Counsel correspondence files, Class Actions – Draft Policy Submission file # 2, 1982-1985, RG 4-40, Box No B248501, Archives of Ontario [B248501 – Draft Policy Submission file #2].
[498] Numerous articles by academics and practitioners were published in scholarly journals following the *Naken* decision. For example, in 1984, the Canadian Business Law Journal devoted a special edition (volume 9) to class actions.
[499] Memorandum from S Chester to D Ewart, re: Canadian Bar Association – Joint Committee on Class Actions, March 22, 1984, B502275 – Consultations, *supra* note 401.
[500] S Chester, Policy Development, Ministry of the Attorney General, Policy Submission: Class Actions Act, June 26, 1985 [Chester Paper], B248501 – Draft Policy Submission file #2, *supra* note 497.
[501] Pursuant to *Bill 141, An Act to amend the Employment Standards Act*, groups of employees would be able to enforce the equal pay provisions by way of a class action. Ontario, Legislative Assembly, Official

defamed groups[502] – to bring class actions. However, the Attorney General made no further formal statements on the OLRC Report, and no class actions legislation was introduced. Indeed, in the debates on the pay equity legislation, certain MPPs complained about the "long wait for class action legislation by the Attorney General"[503] and stated they had little confidence that the government would ever enact such legislation.[504]

The delay may have been caused by business groups' strong opposition to class action legislation in the form put forward by the OLRC, which would have stymied any political will on the part of the Conservative government to implement the OLRC draft Act. More likely, both these factors delayed the introduction of any legislation, following which Premier Bill Davis announced in October 1984 that he would be stepping down after more than a decade in office. This announcement led to the short-lived premiership of Frank Stuart Miller and eventually a general election in May 1985. Following that election, the minority Conservative government was defeated in a no-confidence motion by an unofficial Liberal-NDP alliance on June 26, 1985. This saw the entry into power of a government that was much more sympathetic to class actions, and in time, would show itself to have the political will to bring about reform.

K. Conclusion

In 1970, class actions were virtually unknown in Ontario. A decade and a half later, they had become firmly implanted in the legal and political culture, as well as the public consciousness. They did not win favour with everyone and there was controversy over precisely what form they would take. However, the rise of consumer and environmental activism, the debate over the *Competition Act*, and the enactment of class actions legislation in Québec, meant that, by the early 1980s, they were actively under discussion and no longer seen as a uniquely American device. This process was accelerated by the

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Report of Debates (Hansard), 32nd Parl, 4th Sess (May 8, 1984) (Marion Bryden and Richard Johnston), online: <http://www.olip.ontla.on.ca/hansardeissue/32-4/l039.htm> [Hansard May 8]. The Bill did not progress beyond second reading.

[502] On March 30, 1984, the Attorney General tabled the results of a study conducted by NDP MPP Patrick Lawlor on group defamation, including legal recourse for defamed groups: Ontario, Legislative Assembly, Official Report of Debates (Hansard), 32nd Parl, 4th Sess (March 30, 1984) (Roy McMurtry), online: <http://www.olip.ontla.on.ca/hansardeissue/32-4/l009.htm>; Defamation Submission, *supra* note 363.

[503] Hansard May 8, *supra* note 501 (Richard Johnston).

[504] *Ibid* (Marion Bryden).

release of the OLRC Report and the *Naken* decision. While the Report heightened public awareness of class actions and indicated to lawyers, politicians and the public at large that class actions in Ontario were possible and even perhaps desirable, *Naken* sent a strong message that reform could only come about through legislation.

This put pressure on the MAG to introduce such legislation. The fact that it never did was a wasted opportunity. Perhaps the conditions were not quite right: the labyrinthine provisions and unrealistic recommendations of the OLRC Report, the staunch opposition to contingency fees, and the fact that the *Charter* had not yet permeated the legal culture, meant that the ground was not ready for the seed and vice versa. With the change of government, however, an Attorney General was appointed who had a strong commitment to access to justice combined with unsurpassed political savvy. Perhaps more than any other factor, class actions came about in Ontario when they did because of Ian Scott.

Chapter 4
The Report of the Attorney General's Advisory Committee on Class Action Reform (1985-1993)

A. Ian Scott's early years as Attorney General (1985-1988)

On June 18, 1985, after more than four decades in power, the provincial Progressive Conservative government was defeated in a vote of no confidence. In its place and with the support of the NDP, David Peterson's Liberals formed a minority government.[505] When the government was sworn in on June 26, Ian Scott was appointed Attorney General. Scott had helped to negotiate the accord with the NDP that made the Liberal victory possible and was one of Peterson's right-hand Ministers, part of an inner circle that had an important influence on the Premier.[506] Peterson ran his Cabinet informally, often bypassing formal channels of communication and allowing his Ministers to make submissions to Cabinet without prior approval.[507] He gave Scott a free hand in the running of the Ministry of the Attorney General[508] and supported all of his major decisions.[509]

Driven, ambitious and a master tactician,[510] Scott would be instrumental in implementing the government's reform agenda. He had a disproportionate influence on the government's work,[511] regularly reviewing the Cabinet submissions of other Ministries and putting forward his views on them, or requiring Cabinet colleagues to consult with him before publicly opining on certain subjects.[512] Not only was Scott an excellent negotiator,[513] but he was also a fearsome debater who never lost the cross-

[505] The Liberals and the NDP agreed to cooperate for a two-year period, during which the Liberals promised not to call an election, and the NDP promised not to treat a defeat in the house as a confidence measure. The two parties also agreed on a list of policies that had been in both their manifestos: Scott, *supra* note 56 at 121.
[506] *Ibid*, at 120, 143-144.
[507] *Ibid*, at 129, 143.
[508] *Ibid*, at 140, 203.
[509] *Ibid*, at 126, 203.
[510] AC Member Interview, *supra* note 12.
[511] Cochrane Interview 1, *supra* note 7.
[512] *Ibid*; Scott, *supra* note 56 at 144, 156; interview with Douglas Ewart, then Director of the Policy Development Division (and Michael Cochrane's direct superior) at the Ministry of the Attorney General, April 26, 2016 [Ewart Interview].
[513] Scott, *ibid*, at 120.

examination style he had developed as counsel.[514] Disagreeing with him was not a pleasant experience, and he used this power of persuasion to get his policies through Cabinet.[515]

At his right hand[516] stood Michael Cochrane, a young lawyer in the Policy Development Division, one of the chief sections of the MAG.[517] Called to the Bar just five years previously, Cochrane had arrived at the Ministry a couple of weeks before Scott. The two men equalled each other in energy, ambition and a desire to bring about law reform in numerous areas. Both possessed the key to any successful career in law: a seemingly endless capacity for work. Scott and Cochrane demonstrated an uncanny ability to persuade and, where persuasion failed, to get people where they wanted them through swift manoeuvring, political savoire-faire and sleights of hand at the negotiating table. Cochrane made full use of Scott's openness to policy ideas and his desire to rapidly advance the government's progressive agenda, often drafting statutes over the course of a weekend so they could be introduced as soon as possible.[518] Cochrane facilitated Scott's reform agenda in areas such as consumer rights and environmental protection; but one of his greatest achievements was class action reform.

Despite Cochrane's statements to the contrary,[519] class actions do not seem to have been high on the agenda of the new Attorney General.[520] This is not surprising: in their first term of office, the Liberals were also busy bringing in full funding for Catholic schools, banning extra billing by Ontario's doctors, approving the Darlington nuclear power plant, introducing pay equity, addressing aboriginal rights, dealing with the issue of abortion and abortion clinics, and participating in the Meech Lake Accord,[521] among numerous other changes. Class action reform had been effectively in limbo since the Supreme Court's decision in *Naken*, and continued to be so for a few years after the

[514] Ewart Interview, *supra* note 512; interview with Peter Woolford (representative of the Retail Council of Canada on the Attorney General's Advisory Committee), April 29, 2016 [Woolford Interview]; Scott, *ibid*, at 79.
[515] Ewart Interview, *ibid*; Woolford Interview, *ibid*.
[516] AC Member Interview, *supra* note 12.
[517] Scott, *supra* note 56 at 130.
[518] *Ibid* at 128-129, 134; Cochrane Interview 1, *supra* note 7; Cochrane Interview 2, *supra* note 4.
[519] Letter from Cochrane to Julian Polika, Director, Crown Law Office – Civil, August 8, 1985, stating that a class actions bill is one of Ian Scott's priorities for the upcoming session of the legislature, B248633 – General File #1, *supra* note 388.
[520] Ewart Interview, *supra* note 512.
[521] Scott, *supra* note 56 at 145.

change of government. In fact, the Ministry of the Attorney General did not take any public action on the issue until the middle of 1988.

Nevertheless, Cochrane began working in the background as soon as Scott was appointed. On that same day in June 1985, Cochrane received a draft policy submission from his predecessor, Simon Chester. That submission laid out the various options for class action reform, and provided the basis for Cochrane's early work on the issue. Chester's submission considered the OLRC Report and its most controversial recommendations. He observed, and Cochrane was to find out before long, that the thorniest issue in bringing about any kind of consensus on class actions was the issue of costs. Chester summarized the conclusions of many commentators when he noted that reform would be futile if traditional costs rules continued to apply.[522] However, while the submission touched on the OLRC recommendation of a no-way costs rule, as well as contingency fee arrangements and assisting plaintiffs with their costs by way of a government-financed Fund, it stopped short of making any recommendations on costs.

Using this unfinished policy submission as a basis, Cochrane began to conduct his own research into class actions.[523] He emphasized what he saw as a "consensus" that the existing rules of procedure were defective with regard to class actions, from the Williston Committee that noted the "disarray" in the state of the jurisprudence, to the Supreme Court in *Naken* that stated that Rule 75 could not be read to permit class proceedings in Ontario. This emphasis on consensus, and minimizing of the novel and controversial nature of class actions, was to be a recurring theme in Cochrane's writing and discussions on the subject.

Nevertheless, Cochrane could not deny that an attempt to change the status quo would be met with opposition from several camps. Outlining the positions of the Canadian Manufacturers' Association (CMA) and the Institute of Chartered Accountants (who opposed significant reform), as well as that of the Canadian Bar Association and

[522] Chester Paper, *supra* note 500 at 32.
[523] While the Policy Development Division was originally tasked with drafting a class actions bill, Cochrane was instead asked to draft a policy submission presenting various options: letter from Cochrane to Doug Ewart and Craig Perkins, August 8, 1985, with handwritten notes (undated) from Ewart regarding the policy submission, B248633 – General File #1, *supra* note 388.

Public Interest Research Centre[524] (who wanted reform, but on different terms than outlined in the OLRC Report), Cochrane found that there was no common ground between the interest groups, and that change in any form would offend at least some of them.[525] Nevertheless, because Scott considered access to justice a priority, some change had to happen.[526] Cochrane's commitment to change was further exemplified in his drafting, in 1985 or early 1986, of what would eventually become the CPA.[527] The amount of opposition he faced, however, meant he had his work cut out for him.

The CMA reiterated its opposition shortly after Scott became Attorney General. Norman Stewart, Director of Government Relations for General Motors Canada and Chair of the CMA Subcommittee that submitted its earlier report to Roy McMurtry, wrote to Scott on November 7, 1985. Stewart was the business community's most vocal and active opponent of class actions, and remained the major voice of those interests even as he later sat on the Attorney General's Advisory Committee, influencing the considerations of other members of the Committee and ensuring that the reform was as conservative as possible. In 1990, in the middle of the Advisory Committee's drafting process, Stewart was to become Vice President of Government Relations and General Counsel at Ford Canada. As detailed above, both GM and Ford had been the subject of class actions in Ontario for alleged manufacturing defects in their vehicles.

In his letter to Scott, Stewart pointed out that all of the submissions he had seen concluded that the OLRC's draft legislation should not form the basis for a statute. He offered to discuss the OLRC Report, but hoped that Scott had no intention of introducing class action legislation.[528] Scott agreed that there was very little common ground among the groups that submitted briefs, and that Rule 12 was inadequate for the purposes of a

[524] The Public Interest Research Centre (PIRC) was at this time the research arm of the Public Interest Advocacy Centre (PIAC): PIAC, *25 Years Representing the Public Interest* (Ottawa: PIAC, 2001), online: <http://www.piac.ca/wp-content/uploads/2014/11/25years.pdf>, at 10.
[525] Cochrane handwritten notes August 28, 1985, at 18 [Cochrane handwritten notes], B248633 – General File #1, *supra* note 388.
[526] *Ibid* at 19.
[527] "Master Redraft: Class Actions" is a photocopy of the OLRC draft Act, with Cochrane's handwritten annotations. According to those annotations, the draft Act was to come into force in 1986. Policy Development Division Counsel correspondence files, Class Actions – Background Papers 1, 1983-1990, RG 4-40, Box No B501822, Archives of Ontario [B501822 – Background Papers].
[528] Letter from Stewart to Scott, November 7, 1985, B248633 – General File #1, *supra* note 388.

class action.[529] For the time being, however, he was keeping the issue under review.[530] In the meantime, Cochrane continued to look into the possibility of reform.

The main battleground, as far as Cochrane could see, was the issue of costs. He knew that the OLRC and other observers had found costs to be both the most serious and the most controversial single issue confronting class actions reformers.[531] However, without costs reform, class actions legislation would be pointless.[532] Cochrane noted the dilemma whereby traditional costs rules could deter plaintiffs with meritorious suits, but the absence of such rules would be unfair to successful defendants. Scott also acknowledged that the issue of costs was a significant barrier to class action reform.[533]

The various interest groups also had widely diverging views on this issue.[534] As noted in Chapter 3,[535] the representatives of corporate interests as well as the Advocates' Society opposed no-way costs, while most interest groups rejected the concept of contingency fees. The CBA/PIAC favoured a modified costs rule, but did not support a public fund for class actions (while the Advocates' Society did support such a fund). Opinions on costs differed not only between the various groups, but also were in stark contrast to the OLRC recommendations of no-way costs, contingency fees and no public funding. If class action reform was going to take place at all, Cochrane had to find a compromise between these positions that would be palatable to all concerned.

By June 1986, Cochrane's review of the class action debate was largely complete.[536] However, despite his observations on costs,[537] he made no recommendations

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[529] Letter from Scott to Stewart, November 26, 1985, B248633 – General File #1, *ibid*.
[530] *Ibid.* More than a year later, in December 1986, Scott told the House that, "I have been looking at the class action problem", but did not anticipate that a solution would be available for the House's consideration before the late spring of 1987: Ontario, Legislative Assembly, Official Report of Debates (Hansard), 33rd Parl, 2nd Sess (December 3, 1986) (Ian Scott), online: <http://www.olip.ontla.on.ca/hansardeissue/33-2/l074.htm>.
[531] Cochrane handwritten notes, *supra* note 525 at 14.
[532] Memorandum from Cochrane to Scott, March 5, 1986, at 14, B248633 – General File #1, *supra* note 388.
[533] Letter from Allan Hutchinson to Scott, March 24, 1986; letter from Scott to Hutchinson, April 2, 1986, both in B248633 – General File #1, *ibid.*
[534] They laid out these views in briefs that they had previously submitted to Roy McMurtry (and re-submitted to Ian Scott when he became Attorney General), which were summarized in an April 23, 1986 research memo to Cochrane: B502275 – Consultations, *supra* note 401.
[535] Chapter 3, *supra*, at 70-71.
[536] AG Policy Development Submission, June 8, 1986, B248633 – General File #1, *supra* note 388. The submission appears to have been finalized on August 6, 1986. Cochrane's submission borrowed heavily from Chester's. An exception is Chester's recommendation that the court screen counsel for adequacy of representation; Cochrane rejected such an approach, on the basis that it raised numerous awkward

on this issue – with one exception. The submission did recommend that a Fund be established for public financing of class action litigation, along the lines of the *Fonds d'aide aux recours collectifs* in Québec.[538] This was an important development, as the OLRC Report had rejected this idea, and little further exploration had been done on the issue. Cochrane's recommendation showed that the Fund was once again among the range of options open to the MAG,[539] and it would later prove to be an important tool in orchestrating a compromise. For now, however, Ewart told Cochrane that he had significant difficulties with the concept of a Fund, and wanted to leave that question open for the Attorney General's consideration.[540]

Despite the completion of its review, progress at the MAG on the issue of class actions continued to be sluggish. Class actions received some attention in the Legislature in December 1986, when a Private Member's Bill was introduced, calling for an Environmental Bill of Rights that included the right of citizens to sue on a class basis for environmental pollution.[541] However, this Bill was not passed until 1993, after the *Class Proceedings Act*.

There was also a brief flurry of activity at the beginning of 1987 when Cochrane learned, in a call from Arthur Stone (head of the Uniform Law Conference of Canada (ULCC)), that New Brunswick was considering the introduction of class actions legislation.[542] Encouraged by the fact that reform was gaining traction elsewhere in Canada, Cochrane sought to have class actions put on the agenda of the 1987 ULCC Conference. He also wrote to Basil Stapleton, head of New Brunswick's Law Reform Commission and Provincial Policy Development Division (and, that year, Chairman of

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questions, and also that the Court could sanction counsel by awarding costs against her personally under Rule 57.07. In addition, the plaintiff would have recourse against his own counsel through a professional negligence action.

[537] *Ibid* at 47.

[538] *Ibid* at 59. Cochrane was later in touch with Yves Lauzon, Director General of the Fonds in Québec, regarding the details of the Fonds: letter from Lauzon to Cochrane, August 7, 1986; letter from Cochrane to Lauzon, August 21, 1986, both in B248633 – General File #1, *supra* note 388.

[539] See also Memorandum from Cochrane to Scott, March 5, 1986, at 15-16, B248633 – General File #1, *ibid.*

[540] Draft policy submission from Cochrane to Ewart, May 1, 1986, with handwritten note (undated) from Ewart, stating his concerns regarding the Fund, in B248633 – General File #1, *ibid.*

[541] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 33rd Parl, 2nd Sess (December 10, 1986) (Ruth Grier), online: <http://www.olip.ontla.on.ca/hansardeissue/33-2/l078.htm>.

[542] Memo to File from Michael Cochrane, January 15, 1987, in Policy Development Division Counsel correspondence files, Class Actions – Draft Policy Submission file # 1, 1986-1989, RG 4-40, Box No B248501, Archives of Ontario [B248501 – Draft Policy Submission file #1].

the Uniform Law section of the ULCC), in order to discuss the push for reform.[543] However, despite Cochrane's expressed intentions,[544] he did not present a paper. The ULCC's discussion of class actions was delayed until the summer of the following year,[545] when the Ontario MAG's activity on the issue would begin to accelerate significantly following the general election.[546]

Until then, there were two further developments that informed the debate on reform, although neither of them was due to action on the Attorney General's part.[547] The first, in July 1987, was the Legislative Review Project (LRP) of the Ministry of Consumer and Commercial Relations.[548] The LRP reviewed existing consumer protection mechanisms with a view to drafting a comprehensive Consumer Protection Code. In its section on "Procedural Mechanisms", the report addressed class actions. It noted the strength and divergence of opinions on the issue, developments in other jurisdictions such as the US and Québec, as well as the history of the debate in Ontario. It noted the pros and cons of class action reform in Ontario, before specifically recommending that class actions be made available. It further recommended that contingency fees be allowed in order to facilitate class actions and other procedural remedies.[549]

Various interest groups responded to the report by submitting briefs to the Ministry of Consumer and Commercial Relations. The submissions were overwhelmingly from the business community, a pattern that would be continued into later consultations on class actions reform, and which likely reflected the fact that these organizations were

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[543] Letter from Cochrane to Stapleton, January 16, 1987 (not in file, but referred to in letter from Stapleton to Cochrane dated February 11, 1987, in B248633 – General File #1, *supra* note 388).
[544] Letter from Cochrane to Stapleton, February 18, 1987, in B248633 – General File #1, *ibid*.
[545] Uniform Law Conference of Canada, Proceedings of the Sixty-Ninth Annual Meeting, held at Victoria, British Columbia, August 1987, at 27, 316-17, online: <http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1987ULCC0069.pdf>. Cochrane was one of the Ontario Commissioners from 1985-1989: see MG Cochrane, "Class Action Reform in Ontario: A Breakthrough", July 1989, at 1 [Breakthrough], in Policy Development Division Counsel correspondence files, Class Actions – Articles by Cochrane, 1988-1989, CA226, RG 4-40, Box No B248633, Archives of Ontario [B248633 – Cochrane Articles].
[546] The Liberal-NDP accord expired at the end of May 1987, and the Liberals called an election at the end of July: Scott, *supra* note 56 at 170.
[547] In a letter to Ewart dated August 6, 1987, Roman reminded Ewart of the briefs he had sent to the Attorney General on behalf of the CBA/PIAC, and observed that, "Since that time, everything appears to have stalled" in B248633 – General File #1, *supra* note 388.
[548] G Crossman, *Consumer Remedies and Government Redress* (Toronto: Legislative Review Project, Ministry of the Attorney General, 1987) [LRP Report].
[549] *Ibid* at 15-23.

better resourced than those on the other side of the debate. The only brief from the pro-consumer side of the debate was from the Consumers' Association of Canada, which enthusiastically supported the introduction of class actions.[550] The other briefs from the business community objected to the LRP Report's recommendations on costs. They opposed the introduction of contingency fees on the basis that such fees would encourage litigation and line lawyers' pockets.[551] There was also opposition to any change to the traditional costs rules, which were seen to perform a gatekeeping function to screen out unmeritorious actions.[552]

There was some concession among the business interests that minor changes were needed to the current Rules in order to allow for more class actions,[553] as long as successful defendants would be able to recover their costs.[554] However, those groups were generally against broad-based reform.[555] They stated that more consultations were needed before introducing consumer protection legislation containing a class actions mechanism,[556] because there was still no consensus regarding class actions reform in Ontario.[557] There was clearly significant opposition to overcome in any effort toward such reform. When Scott began consultations the following year, it was agreed that the previous LRP work on class actions would be overtaken by the work of the Ministry of the Attorney General.[558]

The second development related to contingency fees. As many observers had already noted, change was needed on the issue of costs if class proceedings legislation was to be useful; contingency fees were a key part of this. Until the late 1980s, and as can

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[550] Brief of the Consumers' Association of Canada on the LRP Report, at 32-33, in B501822 – Background Papers, *supra* note 527.
[551] Letter from the Canadian Advertising Foundation on the LRP Report, at 3-4; Brief of the Canadian Federation of Independent Business on the LRP Report, at 13 [CFIB Brief]. Both briefs are in B501822 – Background Papers, *ibid.*
[552] Submission of the Canadian Manufacturers' Association on the LRP Report, at 23 [CMA Brief]; brief of the Retail Council of Canada at 10 [RCC Brief]. Both briefs are in B501822 – Background Papers, *ibid.* See also CFIB Brief, *ibid*, at 14.
[553] CMA Brief, *ibid*, at 23; RCC Brief, *ibid*, at 10.
[554] RCC Brief, *ibid*, at 10.
[555] CMA Brief, *supra* note 552 at 23.
[556] CFIB Brief, *supra* note 551 at 15.
[557] Submission of the Board of Trade of Metropolitan Toronto (now the Toronto Region Board of Trade) on the LRP Report, at 13, in B501822 – Background Papers, *supra* note 527.
[558] Class Actions: Meeting with Business Interests (Preparation Note from Cochrane to Scott), March 23, 1989, at 2, in Policy Development Division Counsel correspondence files, Class Actions – Briefing Note, 1983-1990, CA226, RG 4-40, Box No B501822, Archives of Ontario [B501822 – Briefing Note].

be seen from the above-noted submissions to Roy McMurtry and the briefs on the Legislative Review Project, contingency fees were opposed by many (if not most) lawyers in Ontario as unethical and an encouragement of unnecessary litigation.[559] Public opinion perceived the concept as an American import that would enable greedy lawyers to line their pockets at the expense of litigants.[560]

However, in May 1988, after studying the issue for just over a year, the Law Society of Upper Canada's Special Committee on Contingency Fees reported to Convocation.[561] They recommended the adoption of contingency fees, primarily because they would increase access to justice for the middle class. The Special Committee found that contingency fees were permitted in every province except Ontario, with no instances of abuse reported to the provincial law societies, and with contingency fees being used very little in those provinces (with the exception of British Columbia and Alberta). The committee found no evidence that those provinces had seen an increase in unmeritorious lawsuits since the introduction of contingency fees. They further concluded that the system was already in *de facto* use in many instances in Ontario. The Special Committee recommended to Convocation that it approve in principle the introduction of contingency fees in Ontario, and the AG was asked to amend the *Solicitors Act* accordingly.[562]

A major point of controversy on the costs issue was now much less controversial. With the recommendation from the Law Society, class action reformers could now support the idea of contingency fees without looking like they were trying to import yet another American concept.[563] Yet numerous controversies, especially on the issue of costs, remained. Even as the LSUC considered the issue of contingency fees, Scott, Cochrane and the MAG were working behind the scenes on a plan to bring about consensus on those other issues.

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[559] See, for example, CBA/PIAC Report, *supra* note 373 at 37.
[560] The debate on contingency fees is covered in detail in Chapter 3.
[561] Minutes of Convocation of the Law Society of Upper Canada, May 27, 1988, in Policy Development Division Counsel correspondence files, LSUC Contingency Fees – Report of the Sub-Committee, 1988, CA226, RG 4-40, Box No B449218, Archives of Ontario.
[562] K Makin, "Ontario law society withdraws opposition to contingency fees", *Globe and Mail* (June 22, 1988), A1-2, in Policy Development Division Counsel correspondence files, Contingency Fees – Consumers' Association of Canada, 1988, RG 4-40, Box No B827067, Archives of Ontario.
[563] For example, in his later "Path to Reform" paper presented to the Uniform Law Conference in August 1988, Cochrane stated that, "[t]he Law Society of Upper Canada is expected to release a report favouring contingency fees in the near future" (at 82), in B248501 – Draft Policy Submission file #1, *supra* note 542.

B. Preparing the Way for Reform

The Ontario general election on September 10, 1987 saw the Liberals returned to power with their first majority government in half a century. With this resounding mandate, Scott and his Ministry could begin work on class action reform in earnest. Shortly before the election, Ewart wrote to Richard Chaloner, Deputy Attorney General, asking him to review Cochrane's draft policy submission, in order to have it approved by the Ministerial Cabinet Committee, and then submit a draft to Scott for consideration for the fall legislative agenda.[564]

Before any kind of consensus could even begin to build, however, the legal profession and the wider public had to be re-introduced to the concept of class actions. The OLRC Report had been released six years previously, but the sheer length of the Report meant that it had not been widely read or its specific recommendations commented upon.[565] Any momentum that it had built had long since dissipated. Even the *Naken* decision was five years old. The Australian Law Reform Commission (ALRC) had released a report in June 1988 that recommended class action reform, including the unusual recommendation that there be no certification requirement whatsoever (it stated that frivolous suits would instead be discouraged through the maintenance of traditional costs rules).[566] However, the report does not seem to have had much immediate impact on the debate in Canada.[567] In the summer of 1988, the Ministry of the Attorney General therefore had to start preparing the ground for a debate on class actions.

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[564] Memorandum from Ewart to Chaloner, September 4, 1987, in Policy Development Division Counsel correspondence files, Class Proceedings – Bill 28 and 29, 1990-1993, CR, RG 4-40, Box No B703283, Archives of Ontario [B703283 – Bill 28 and 29].
[565] Letter from Stewart to Scott, November 7, 1985, in B248633 – Miscellaneous Material, *supra* note 305.
[566] ALRC Report, *supra* note 206 at 8-9, 11-12.
[567] The ALRC Report was later considered by the Attorney General's Advisory Committee, as one of its members, Andrew Roman of the CBA/PIAC, had been a consultant to the ALRC. Roman referred frequently to the ALRC Report in his submissions to the Committee and elsewhere (see, for example, Roman article 1988, *supra* note 406). The ALRC Report was also considered in the briefing documents that Cochrane wrote for the initial consultations with stakeholders in December 1988: in B248633 – Miscellaneous Material, *supra* note 305.

There was still a wide variety of opinions and many misconceptions about class actions in the legal and business community.[568] To suddenly announce an intention to introduce legislation, as Roy McMurtry had done following the release of the OLRC Report, would be to encounter the same inertia and outright resistance. Scott therefore broke the ground at an Access to Justice Conference in June 1988, held in Toronto and organized by the Attorney General. The conference took place over three days, with the workshop on "Group Claims/Collective Rights" being last on the agenda.[569] Nevertheless, the workshop was a significant first step in the fight for reform.

The Chair was Jacques Dufour of the Québec Fonds (an acknowledgement that costs was to be a central issue in the reform debate). The panelists were Basil Stapleton of the New Brunswick Law Reform Commission (who had already expressed his commitment to reform) and Kevin Doucette of the Consumers' Association of Canada (a natural ally of the class action cause, as exhibited in his presentation at the workshop). The only panelist who represented the case against wide-ranging reform was Margaret McNee, a young lawyer from McMillan Binch.[570] However, even McNee acknowledged that the possibilities of bringing a class action were severely constrained by the existing Rules of Civil Procedure and case law, and her presentation implied that some reform was needed.

The discussion, which was largely about the funding of class actions, ended with the following conclusion:

> The workshop formed a consensus that class actions should be more readily available in appropriate cases. Similarly, public funding of class actions should be provided where meritorious claims might otherwise be commenced.[571]

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[568] Cochrane briefing note, September 9, 1987, in Policy Development Division Counsel correspondence files, Class Actions – Background Papers 2, 1981-1989, CA226, RG 4-40, Box No B502275, Archives of Ontario.
[569] Access to Justice Conference, *supra* note 25.
[570] *Ibid*; Access to Justice Workshop Report, Tuesday, June 21, 3:30pm: Group Claims/Collective Rights [Access to Justice Workshop Report], in Policy Development Division Counsel correspondence files, Class Actions – Access to Justice Conference, 1988, CA226, RG 4-40, Box No B502275, Archives of Ontario. McMillan Binch had submitted a brief to Roy McMurtry, and subsequently Ian Scott, on the OLRC Report (McMillan Binch Report, *supra* note 419).
[571] Access to Justice Workshop Report, *ibid*, at 4.

The word "consensus" should be regarded with caution. Scott and Cochrane were to use the word throughout the class actions consultation process, even when little or no consensus actually existed.[572] In addition, both men were later to report the conclusions of this workshop as being resoundingly in favour of wholesale reform, when such was not the case[573] (even though the vast majority of attendees were from organizations that would have held a pro-class actions stance).[574] Nevertheless, it is apparent that some common ground had begun to take shape on the subject.

The next step was to get the buy-in of the other provinces by way of the Uniform Law Conference of Canada, a process that Cochrane had begun the previous year (although in fact the ULCC had been discussing the subject of class action reform for many years before that). Cochrane was due to present at the conference in early August 1988, and as the basis of this presentation he used his Policy Development Submission from August 6, 1986.[575] Where Cochrane's submission recommended that class action reform be undertaken, however, he changed the first draft of his ULCC paper to appear somewhat more neutral so that, for example, all language on "recommendations" was removed.[576] Cochrane also inserted a disclosure that the views expressed were his own and not those of the Government of Ontario.[577] Nevertheless, the paper still contained Cochrane's conclusion that "the case for class action reform has been made."[578]

This was not acceptable for Doug Ewart, Director of the Policy Development Division at the MAG. Putting forward the option of class actions reform at the ULCC was one thing; stating that reform was a foregone conclusion was quite another. The debate had only just begun again publicly, and it was too soon to risk any perception that

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[572] See, for example, letter from the head of the Canadian Bar Association - Ontario to Scott, dated January 21, 1989: "Michael Cochrane has indicated that there has been a consensus but as far as C.B.A.O. is concerned there is not" (in B248633 Correspondence, *supra* note 401).
[573] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 34th Parl, 2nd Sess (June 29, 1989) (Ian Scott), online: <http://hansardindex.ontla.on.ca/hansardeissue/34-2/l034.htm>; Cochrane 1993, *supra* note 27 at 2. It should be noted, however, that Cochrane was not actually in attendance at this conference.
[574] Access to Justice Conference, *supra* note 25, list of attendees at workshop on Group Claims/Collective Rights.
[575] AG Policy Development Submission, August 6, 1986, in B248501 – Draft Policy Submission file #1, *supra* note 542.
[576] MG Cochrane, "Class Actions: A Discussion Paper", in B248501 – Draft Policy Submission file #1, *ibid*.
[577] "Class Actions: A Discussion Paper", *ibid*, at cover page.
[578] *Ibid* at 86.

the MAG had already made up its mind. Ewart stated as much in his handwritten changes to the first draft of Cochrane's ULCC paper:[579]

> Particularly near the beginning there are a number of conclusions and/or statements of opinion. I feel that these should be deleted before the paper goes out. Even with your disclosure the press could still [find] that a policy advisor to the AG had concluded that class action reform was essential etc. etc. The ULC is not worth the risk.

As a result of Ewart's comments, the final draft of the ULCC paper contained no pro-reform conclusion. Nevertheless, the title of the paper ("A Path to Reform") made Cochrane's sympathies clear. Once the ULCC conference was over, Cochrane created a further version of his "Path to Reform" paper in January 1989,[580] which was essentially identical to the first draft, and included the original conclusion that "the case for class action reform has been made." This was clearly Cochrane's own personal conviction, if not a wider conviction throughout the Ministry of the Attorney General.[581]

The case for reform was also articulated at the ULCC conference by Andrew Roman of the Public Interest Advocacy Centre, who had acted as a consultant to the Australian Law Reform Commission in formulating its draft class actions bill. Roman's key recommendations stemmed from the content of the ALRC draft bill; no certification requirement, and public funding of class actions. He argued that these represented a less radical departure from traditional litigation than the US or Québec model.[582]

As a result of Cochrane's and Roman's papers, the ULCC referred the matter back to the Ontario Commissioners for a further report and draft Act for discussion the next year.[583] Again, however, this conclusion was much less resounding than Cochrane later reported it to be. In a Cabinet submission the following year, Cochrane stated that the 1988 ULCC had approved a detailed set of proposals for class action reform, and that

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[579] *Ibid* at cover page.
[580] January 30, 1989, in B248501 – Draft Policy Submission file #1, *supra* note 542.
[581] Scott's sympathies were also for reform at this time. He stated to the ULCC that class action reform was a topic "close to my heart": Notes for Remarks by the Honourable Ian Scott, Attorney General of Ontario, to the Closing Banquet, 1988 Uniform Law Conference Meeting, August 11, 1988, at 10 [Scott ULCC], in Policy Development Division Counsel correspondence files, Class Actions – Communications Plan, 1988-1990, MGC, RG 4-40, Box No B501822, Archives of Ontario [B501822 – Communications Plan].
[582] AJ Roman, "Class Actions in Canada: The Path to Reform?" for the ULCC 1988, *supra* note 26 at 103.
[583] ULCC 1988, *ibid*, at 28.

the proposed remedy would provide a model suitable for adoption by other Canadian provinces.[584] Given that the Ontario Commissioners had not even produced a further report or draft Act yet, let alone had it approved by the ULCC, one wonders precisely what "proposed remedy" Cochrane had in mind. Certainly his own paper articulated numerous different proposals, and Roman's paper sharply disagreed with Cochrane's suggestion on certification. Even Ian Scott acknowledged the preliminary state of the ULCC's discussions on class actions in his closing remarks to the conference.[585] Once again, Cochrane painted a picture of consensus and certainty where little existed.

Nevertheless, the ULCC and Access to Justice conferences were important events that began building a momentum towards reform, or at least a discussion about reform. While Cochrane painted an over-optimistic picture of the conclusions reached at these conferences, they did serve as a signal to the Bar, business interests and the public that class actions were firmly on the Attorney General's agenda.

C. Initial Consultations (1988-1989)

The Attorney General built on this momentum by conducting initial consultations with those who would be most affected by reform. These consultations began in earnest on December 2, 1988, when Ian Scott met with representatives of numerous organizations to brief them on the possibility of class action legislation.[586] The documents circulated to these organizations show that the Attorney General had made up his mind on the need for reform, and that the only question now was what shape that reform would take.

A second consultation took place on December 22, when Cochrane met with various stakeholders,[587] including the Consumers' Association of Canada (CAC), the

[584] Cabinet Submission, March 20, 1989 [March 20 1989 Cabinet Submission], in Policy Development Division Counsel correspondence files, Class Actions – Final Cabinet Submissions, 1989, CA226, RG 4-40, Box No B248633, Archives of Ontario.
[585] Scott ULCC, *supra* note 581 at 10.
[586] Letter from Gang of Four to Scott, January 20, 1989, at 1, in B248633 Correspondence, *supra* note 401. Cochrane does not appear to have been at this meeting, because he did not meet Stewart (who was at the meeting) until December 22: letter from Stewart to Cochrane, December 7, 1988, in B502275 – Consultations, *supra* note 401.
[587] Meeting between Cochrane and stakeholders, December 22, 1988, handwritten minutes by Michael Cochrane [Meeting Dec 22 1988], in B502275 – Consultations, *supra* note 401. Additional groups were also consulted informally: Briefing note by Michael Cochrane, January 6, 1989, at 1, and attached list [Briefing Note January 6 1989] (in B502275 – Consultations, *supra* note 401), which lists the same groups to which the January 10, 1989 materials were circulated (see below).

Advocates' Society, and the group known colloquially in Queen's Park as the "Gang of Four".[588] The "Gang of Four" consisted of the Canadian Manufacturers' Association (CMA), the Retail Council of Canada (RCC), the Ontario Chamber of Commerce (OCC) and the Canadian Federation of Independent Business (CFIB). The CMA was a policy, lobbying and public relations group for manufacturers across Canada. It was arguably the biggest of the Four, with seven regional divisions, 33 local branches and a full-time staff of more than 100. Its members represented approximately 75 per cent of Canada's manufacturing output.[589]

The RCC represented grocery and general merchandise retail stores in Canada. It existed to inform the government on the latter's policy objectives, and played more of a technical advisory role than a lobbying role.[590] Its spokesperson for the class actions consultations with the MAG was Peter Woolford, who was responsible for government relations and public policy at the RCC. Woolford had just joined the RCC, having been a senior public servant in economic and fiscal policy for the federal government, and knew very little about class actions.[591] The third member, the OCC, lobbied on behalf of tens of thousands of business people throughout Ontario,[592] and it was represented in the class actions consultations process by Robert Anderson. Anderson was General Counsel at Procter & Gamble Inc.,[593] and worked with Stewart and Woolford on other consultations after the Attorney General's Advisory Committee.[594]

The fourth member of the Gang of Four was the CFIB, which represented small businesses across Canada[595] and regularly polled its members in order to formulate

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[588] The original Gang of Four was a political faction of four officials from the Chinese Communist party, which came to prominence during the Cultural Revolution and controlled the major organs of the Communist party during the last years of the Revolution. Clearly, the use of this epithet for the major business interests at Queen's Park was not entirely respectful. Nevertheless, it will be used as a convenient shorthand for the group for the remainder of this thesis.
[589] CMA Letter 1983, *supra* note 401.
[590] Interview with Peter Woolford, September 27, 2016 [Woolford Interview 2].
[591] *Ibid.*
[592] Website of the Ontario Chamber of Commerce, online: <http://www.occ.ca>.
[593] Letter from Anderson to Cochrane, January 18, 1990, in B248633 Correspondence, *supra* note 401 [Anderson letter].
[594] J David, *The Public Consultations of the Competition Bureau: Building Bridges to Consumers* (Montréal: Option consommateurs, 2003), online: Option consommateurs < http://option-consommateurs.org/documents/principal/fr/File/rapports/competition/concurr_eng_oc0603.pdf> at 8.
[595] The CFIB currently represents 109,000 small business owners across Canada, although there is little information in the archival record regarding its status at the time of the class actions consultations: website

positions on which to lobby the government.[596] Its representative in the consultation process was Judith Andrew, Director of Provincial Affairs and later Director of Provincial Policy at the CFIB,[597] who had previously pursued a management career in the banking industry.[598] All of the Gang of Four representatives had worked together earlier that year, meeting weekly on government consultations involving revisions to the Ontario *Consumer Protection Act*.[599] They therefore had a close working relationship and went into the class action consultations as a fairly tight-knit unit on behalf of the business community.[600]

In advance of the December 22 meeting, Stewart forwarded to Cochrane a copy of the CMA brief that he had submitted to Roy McMurtry in 1983.[601] According to this brief, the CMA favoured "opt-in" class actions;[602] on the other hand, the CAC and the Advocates' Society favoured the "opt-out" option.[603] The Gang of Four appears to have been willing to consider the opt-out route, provided it remained within the court's discretion, and provided that the court could narrow the class and concretize damage claims at an early stage.[604] There was also agreement between the parties regarding post-certification notice (in favour) and the role of the Attorney General (no special role).[605]

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of the Canadian Federation of Independent Business, online: <http://www.cfib-fcei.ca/english/about-us/canada/178-about-us.html>.

[596] Office of the Commissioner of Lobbying of Canada, Registration, CFIB, online: OCLC <https://lobbycanada.gc.ca/app/secure/ocl/lrs/do/vwRg;jsessionid=IpiW6Gs41UQJ9McNjQ6Yme5W.app-ocl-01?regId=500543&cno=4590>. In January 1989, the CFIB conducted a poll of its members, asking "[s]hould the justice system in Canada allow for "class action" law suits?" Of 142 respondents, 54 per cent said "yes", while a further 18 per cent were "undecided": CFIB Mandate, January 1989 [CFIB Poll], in Policy Development Division Counsel correspondence files, Class Actions – Cabinet Submission, 1987-1990, CA226, RG 4-40, Box No B501822, Archives of Ontario [B501822 – Cabinet Submission].

[597] AGAC Report, *supra* note 6 at 3.

[598] Government of Canada, Canada Employment Insurance Commission (CEIC), Commissioner for Employers: Judith Andrew, online: CEIC <http://www.esdc.gc.ca/en/ei/commissioner_employers.page>.

[599] Woolford Interview 2, *supra* note 590. The revised Act was eventually passed in 1990: *Consumer Protection Act*, RSO 1990, c C-31.

[600] Interestingly, however, Peter Woolford states that it was more of a "Gang of 3", with Judith Andrew remaining something of an outsider due to the "political" nature of the CFIB and the personality dynamics of the group: Woolford Interview 2, *ibid.*

[601] Letter from Stewart to Cochrane, December 7, 1988, in B502275 – Consultations, *supra* note 401.

[602] Meeting Dec 22 1988, *supra* note 587 at 1, in B502275 – Consultations, *ibid*. For a definition of "opt-in" and "opt-out" class actions, see Chapter 1, *supra*, at 14.

[603] Meeting Dec 22 1988, *ibid*, at 1.

[604] *Ibid* at 2.

[605] *Ibid* at 3. Scott appears to have accepted this submission, despite the fact that he had personally intervened in numerous actions throughout his tenure as Attorney General: see the terms of reference for the Attorney General's Advisory Committee, *infra*, which state explicitly that there will be no special role

Various options for *cy-près* distribution and costs were also discussed, but no agreement was reached.[606] Nevertheless, the simple act of sitting around a table and talking to each other, as well as the points of tentative agreement that were reached, led to further understanding between the various factions that was to come in useful during the meetings of the Attorney General's Advisory Committee that were to take place the following year: indeed, the same parties and, for the most part, the same people were involved in both. This was an encouragement to Scott and Cochrane, as were concurrent developments in other provinces[607] and the rising tide of public opinion.[608]

True to form, however, Cochrane overestimated the goodwill that had been built up by these meetings. On January 4, 1989, he wrote to the various interest groups in order to confirm what was discussed at the December 1988 meeting, and stated that, if further consultations were not possible before the introduction of a Bill, he would welcome their comments on any proposed draft legislation.[609] He observed shortly afterwards in a briefing note that the stakeholders were willing to talk about the shape of reform, instead of whether reform itself was desirable.[610] Cochrane enthused that, "[t]his is the closest Ontario has ever come to having a concensus [sic] among major interest groups on what class action reform should look like,"[611] although importantly he noted that the group had not come to a specific conclusion with respect to costs.[612] This last issue was to prove a

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for the AG in class actions. However, the Attorney General would still be able to apply for intervener status as in a normal action.

[606] Meeting Dec 22 1988, *ibid*, at 3-4.

[607] In January 1989, Alberta's Committee on Fair Dealing in Consumer Savings and Investments released its report entitled, *A Blueprint for Fairness* (Edmonton: Consumer and Corporate Affairs Alberta, 1989), online: <https://archive.org/details/blueprintforfair00albe> [Blueprint]. This report was a response to the collapse of various financial institutions in Alberta throughout the 1980s. It recommended the creation of a *Consumer Savings and Investment Information Act*, which would include a civil right of action on a class basis for breaches of the Act, with government allowed to participate (at 55). The report's recommendations were never implemented, although it did receive some coverage in the media: M Fisher, "Alberta urged to read the riot act to reeling financial services industry", *Globe and Mail* (January 17, 1989), B1 and B4, in B248501 – Draft Policy Submission file #1, *supra* note 542. Michael Cochrane also mentioned the Blueprint in his later Cabinet Submission, although this was simply to note that the Blueprint had recommended class action reform for consumers: March 20 1989 Cabinet Submission, *supra* note 584.

[608] CFIB Poll, *supra* note 596.

[609] Letter from Cochrane to Class Action Consultation Members, January 4, 1989 [Jan 4 1989 letter], in Policy Development Division Counsel correspondence files, Class Actions – Business Consultation, 1989, CA226, RG 4-40, Box No B501822, Archives of Ontario [B501822 – Business Consultation].

[610] Briefing note January 6 1989, *supra* note 587 at 1.

[611] *Ibid* at 3.

[612] *Ibid* at 2.

major sticking point, both in getting the groups to the table for further negotiations, and in coming to any kind of eventual consensus.

Cochrane's over-optimism with regard to these consultations is in stark contrast to the stakeholders' perception of them. Just the day before he wrote his briefing note, the Gang of Four met with the Premier in regard to the Legislative Review Project and told him that they did not want class action legislation introduced.[613] Five days after that, Cochrane wrote to the "Class Action Consultation Members", again asking them to confirm their "consensus" on the basic structure of a class action remedy.[614] In response, the Gang of Four voiced their discontent directly to Ian Scott,[615] stating that Cochrane was mistaken in assuming they were supportive of a new class action law.[616] They criticized the consultative process as unfocused and incapable of leading to workable legislation,[617] stating that it was premature because they saw no current need for class actions reform.[618] While they expressed willingness to take part in appropriate consultations, as well as the possibility and need for consensus, they listed several questions that had to be answered as a condition of their participation. These largely related to the need or demand for class actions legislation in Ontario given the alternatives available; whether the MAG was prepared to make it a priority relative to its numerous other initiatives; and the costs of the new law and by whom those costs would be borne.

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[613] Letter from Gang of Four to Ian Scott, March 15, 1989, at 1, in Policy Development Division Counsel correspondence files, Class Proceedings – Correspondence, 1990, CA226, RG 4-40, Box No B248501, Archives of Ontario [B248501 – Correspondence].

[614] Letter from Cochrane to Class Action Consultation Members, January 10, 1989, in B248633 Correspondence, *supra* note 401. Cochrane's ULCC 1988 paper was enclosed with this letter, as was a "Class Action Consultation Paper" that he had authored, setting out the various viewpoints on class actions as well as the experience of other jurisdictions. The consultation paper concluded that, "the case for reform has been made … The real question for consideration is which model is best suited to the needs of litigants in Ontario" (at 12). The letter was sent to all the members of the future Attorney General's Advisory Committee, as well as Robert Prichard (the Dean of the University of Toronto Faculty of Law), Jim O'Grady (of the Ontario Federation of Labour), Susan Ursel at Mary Cornish & Associates (for the Women's Legal Education and Action Fund (LEAF)), Jim Breithaupt (Chair of the Ontario Law Reform Commission), and Raj Anand (Chair of the Ontario Human Rights Commission, and previously a colleague of Ian Scott's at the law firm of Cameron, Brewin & Scott).

[615] Letter from Gang of Four to Scott, January 20, 1989, at 2, in B248633 Correspondence, *ibid.*

[616] *Ibid* at 4.

[617] *Ibid.*

[618] *Ibid* at 1.

The other stakeholders clearly shared the concerns of the Four. They wasted no time in writing to Cochrane to set the record straight, and their responses indicated that the consensus he sought was still a long way off. Janet Yale, General Counsel at the CAC,[619] disagreed strongly that unsuccessful plaintiffs should pay the costs of notice (her recollection was that a public fund would pay the costs of notice up-front, and a review of Cochrane's notes from the December 22 meeting shows her to be correct).[620] She further wrote that she had not agreed on the return of unclaimed damages awards to the defendant[621] (this issue was to be a major bone of contention which would almost prevent the formation of the Advisory Committee), and that, as Cochrane had previously observed, no-way costs were essential to encouraging meritorious class actions.[622]

On the same date, Andrew Roman of the Public Interest Advocacy Centre (who had not been able to attend the December 1988 meetings) wrote to Cochrane and Scott to question why such "non-issues" as opting-in/opting-out had been put before the consultation members as the focus for discussion.[623] Roman stated that there were only two issues to discuss: the economic barriers to class actions (*ie* costs) and the legal barriers (*ie* certification), both of which had to be removed to facilitate class actions.[624] He urged Cochrane not to tell Scott that there was a consensus on the basic structure of a class action remedy.[625]

Similarly, JD Grenkie, the President of the Canadian Bar Association – Ontario (CBA), wrote to Ian Scott on January 21, 1989, stating that his organization was pleased that class action reform was back on the Ministry's agenda. The MAG saw the CBA as one of the natural representatives of the legal profession,[626] and had been in touch with it regarding class actions since the late 1970s when the *Competition Act* was being debated. As the CBA had noted in its previous submissions to the Ontario government, it wanted to make its views known before that government became committed to a policy on class

[619] Letter from J Yale to Cochrane, January 13, 1989, at 1 [Yale], in B502275 – Consultations, *supra* note 401.
[620] Meeting Dec 22 1988, *supra* note 587 at 3.
[621] Yale, *supra* note 619 at 1; Jan 4 1989 letter, *supra* note 609 at 4.
[622] Yale, *ibid*, at 2.
[623] Letter from Roman to Cochrane, January 13, 1989, at 1-2, in B501822 – Business Consultation, *supra* note 609.
[624] *Ibid* at 2.
[625] *Ibid.*
[626] Interview with Michael Cochrane, September 26, 2016 [Cochrane Interview 3].

actions, especially given the possibility that other provinces could follow Ontario's lead on the issue.[627] The CBA was therefore eager to take part in the resurrected consultations. However, it disagreed strongly with Cochrane's indication that there was a consensus.[628] Grenkie also felt that further study and consultation was required before any Bill could be prepared.

A couple of weeks later, and also in response to Cochrane's January 10 letter, Rino Stradiotto of The Advocates' Society (TAS) too expressed concern about the consultation process.[629] He stated that the views he had expressed to date were solely his own, and that the view of TAS could only be obtained by having one of its committees review draft legislation and then report to the Board of Directors, who would then canvass the TAS membership before providing the MAG with input.[630] Again, the MAG was keen to obtain the views of TAS, seeing it as another strong representative of the legal profession[631] that had previously made submissions on the class actions issue.[632] TAS would eventually appoint a member to sit on the Advisory Committee on its behalf, in the form of its Vice-President Terrence O'Sullivan, who was also a partner at McMillan, Binch.

As far as there was any consensus, it was clearly that further consultations were required. There was certainly no general agreement that the case for reform had been made, as Cochrane seemed to imply. Nevertheless, Ian Scott decided that the time for debate on the reform question was over: he wanted stakeholders to move on and discuss the shape of a class actions remedy that was going to become law whether they liked it or not. He replied to Grenkie and the Gang of Four by stating that a powerful case for reform had already been made by the Supreme Court's decision in *Naken*, the OLRC Report, and the recent experience in Québec and the US, as well as mass incidents such as the Mississauga train derailment.[633] He re-iterated Cochrane's position that there was a

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[627] CBA/PIAC Report, *supra* note 373 at 3.
[628] Letter from CBA President to Scott, January 21, 1989, in B248633 Correspondence, *supra* note 401.
[629] Letter from Rino Stradiotto to Cochrane, February 7, 1989, in B248633 Correspondence, *ibid.* Stradiotto was a well-known and widely-respected insurance defence litigator.
[630] Geoffrey Adair of the CBA wrote to Cochrane saying essentially the same thing: letter from Adair to Cochrane, January 18, 1989, in B501822 – Business Consultation, *supra* note 609.
[631] Cochrane Interview 3, *supra* note 626.
[632] *Supra* note 447.
[633] Letter from Scott to Grenkie, February 21, 1989; letter from Scott to Gang of Four, February 23, 1989; both letters are in B248633 Correspondence, *supra* note 401.

general consensus on the direction of reform, although further consultations were likely to take place. It was time to "seriously apply our minds to the shape of the reform."

The message from Scott was clear: you cannot stop reform from happening, but you can help determine its shape. This was even more alarming to the Gang of Four than Cochrane's January 10 letter. They told Scott that his personal support for class action reform contradicted the Premier's statement to them that he did not want any initiatives that would encourage litigation.[634] They criticized Scott's reliance on the OLRC Report, saying that a number of groups (including the CMA) had been critical of its conclusions, which at any rate were now seven years old. Finally, they demanded answers to their previous questions before they would be willing to take part in further consultations.[635]

Scott and Cochrane faced an uphill battle in getting the various interest groups together to discuss the shape of reform, and there were issues that would prove contentious on all sides. It was the Gang of Four, however, who would be the most difficult to persuade. Simply to get them to the table, Scott and Cochrane made significant compromises that would have long-term effects for class actions in Ontario.

D. Building the Attorney General's Advisory Committee

Following the initial round of consultations, Cochrane prepared a Cabinet Submission.[636] Although it was signed by Scott, it was based heavily upon Cochrane's earlier policy development submission of June 1986. This later version was updated with developments such as the ULCC conference of 1988 and the Law Society's approval of contingency fees, as well as the results of the initial consultations. Cochrane provided a characteristically over-optimistic description of these results, stating that there was widespread agreement that reform was needed,[637] and that consensus was possible along the lines recommended in the submission.[638] Of course, there was no agreement of the sort, and it was certainly not clear that a consensus was possible according to Cochrane's

[634] Letter from Gang of Four to Ian Scott, March 15, 1989, at 1, in B248501 – Correspondence, *supra* note 613.
[635] *Ibid* at 1.
[636] March 20 1989 Cabinet Submission, *supra* note 584.
[637] *Ibid* at 1.
[638] *Ibid* at 3.

proposals.[639] The feedback from the consultations demonstrated that the following recommendations were particularly controversial:[640]

- Class actions should require court approval before they proceed (certification), with the certification test including a preliminary merits assessment;
- The traditional costs rules should be amended to provide:
    - A no-way cost rule (because the role of normal costs rules in discouraging improperly brought actions would instead be performed by the threshold test at the certification stage);[641]
    - A modified, court-supervised contingency fee arrangement; and
    - Cost-sharing among successful class members, whereby fees and disbursements owed to class counsel would be deducted from any class recovery.[642]

The aim of Cochrane's submission was to secure Cabinet approval for consultation with the Attorney General's Advisory Committee, as well as the terms of reference for that consultation (as listed in the Proposal and Recommendation section).[643] Given that major stakeholders such as the Gang of Four had not even agreed to further consultations yet, let alone the terms of that consultation, a Cabinet Submission was almost certainly premature. Indeed, the next three months would see a number of changes that would render the Proposal and Recommendation section (and therefore the terms of reference) inaccurate.[644]

These changes were made primarily to get the Gang of Four onto the Attorney General's Advisory Committee. Scott and Cochrane met with the representatives of the

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[639] *Ibid* at 3.
[640] *Ibid.*
[641] *Ibid* at 17.
[642] Interestingly, the Proposal and Recommendation section makes no mention of the Fund, even though it had been discussed during initial consultations.
[643] The idea of negotiating the content of the legislation by way of a committee of stakeholders with pre-determined terms of reference was an idea that Cochrane had put to Scott: Cochrane Interview 2, *supra* note 4.
[644] Despite these changes, the Cabinet Minute of June 21, 1989 [Cabinet Minute], which approved consultation with the Attorney General's Advisory Committee, reproduced Cochrane's Proposal and Recommendation section verbatim: in Minutes of Cabinet Meetings, 1989, 1/89 to 45/89, RG 75-14, Box No B834837, Archives of Ontario.

Four on March 23, 1989.[645] At that meeting, Scott made it clear to the Four that class action reform was going to take place, in all likelihood according to five terms of reference that he presented to the group[646] (these terms essentially mirrored the Proposal and Recommendation section of the March 20 Cabinet Submission, and included the provision on no-way costs).[647] The draft terms of reference were left with the Gang of Four for their consideration.[648] A few days later, however, they made their response quite clear when the President and General Manager of GM Canada, George Peapples, met with the Premier.[649] He stated that the questions posed by the Gang of Four in its January 20 letter to Scott had not been answered, and that he could not therefore support the introduction of class action legislation. He urged Peterson not to allow Scott to publicly announce his intention to introduce such legislation.[650]

The Gang of Four was clearly not in favour of the terms proposed by Scott and Cochrane on March 23, or of the general idea of reform at all. Nevertheless, less than a week later, Scott was putting those very same terms before the Cabinet Committee on Justice, stating that all parties to the consultations had generally endorsed them.[651] He further told the CCJ that he intended to announce, by the end of May, the introduction of class actions legislation based on those terms, with a committee to advise on the drafting.

It is unclear quite what Scott and Cochrane were hoping to achieve in overstating the support for class actions in this way. They may well have been hoping that, by the end of May, the Gang of Four would be persuaded to come to the table, either because they genuinely wanted reform, or because events would otherwise move ahead without

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[645] Class Action Consultation Advisory Committee: Agenda and Draft Terms of Reference, March 23, 1989 [Terms of Reference March 23 1989]. This meeting is also referred to in a letter from Cochrane to the Gang of Four dated March 28, 1989 [Letter March 28 1989]. Both documents can be found in Policy Development Division Counsel Correspondence Files, Class Actions – Advisory Committee Minutes and Notes, 1989-1990, MGC, RG 4-40, Box No B502275, Archives of Ontario [B502275 AGAC Minutes].
[646] Terms of Reference March 23 1989, *ibid*; Letter March 28, 1989, *ibid*; Class Actions: Meeting with Business Interests (Preparation Note from Cochrane to Scott), March 23, 1989, at 2, in B501822 – Business Consultation, *supra* note 609.
[647] March 20 1989 Cabinet Submission, *supra* note 584 at 3.
[648] Letter March 28 1989, *supra* note 645 at 3.
[649] This meeting is mentioned in a subsequent letter from Peapples to the Premier, dated March 31, 1989, on which Scott was copied [Peapples Letter March 31 1989], in B502275 AGAC Minutes, *supra* note 645.
[650] *Ibid* at 2.
[651] Cabinet Committee on Justice, Report, Meeting No J6/89, April 6, 1989, at 7, in B502275 AGAC Minutes, *supra* note 645. Cochrane was also present at the meeting.

them (Scott's indication that he wanted to make a public announcement[652] may also have been intended to force the Four's hand). It does seem apparent that Scott was prepared to move forward with class action reform no matter what the outcome of the consultations.

The Gang of Four, however, continued to show their reluctance on the issue of reform. They wrote to Scott on April 11, 1989, expressing a willingness to continue discussions focused upon a set of agreed upon principles, such as the five terms of reference that were discussed at the March 23 meeting. However, they insisted that further consultations were necessary so they could better understand the potential impact of reform,[653] and that, before such consultations were completed, they were unable to publicly reject or support the introduction of a class action remedy.[654] Cochrane still had a long way to go in achieving the consensus he was aiming for.

He acknowledged as such in a briefing note drafted in response to the Gang of Four's April 11 letter.[655] The note details the requests made in the April 11 letter (no rejection or support of a class action remedy; continuation of consultations with the MAG, with the five terms of reference as the possible focus; and suspension of other class action initiatives, such as those contained in the *Environmental Bill of Rights* and the ULCC model legislation), as well as what the MAG itself wanted (the Gang of Four's endorsement of the five principles, or at least their neutrality; and their participation in the Attorney General's Advisory Committee).[656] Cochrane then demonstrated the mediation skills that were to prove so useful in breaking the logjam on class action reform. He suggested a way out of the impasse: the MAG would announce class action reform along the lines of the five principles, with the Gang of Four joining the Advisory Committee; in return, the Four could remain neutral on the need for reform, and the ULCC draft legislation as well as the class action remedy in Bill 13 (the *Environmental Bill of Rights*) would be suspended pending further consultations.[657] Cochrane drafted a

[652] Peapples Letter March 31 1989, *supra* note 649 at 2.
[653] Letter from Gang of Four to Scott, April 11, 1989, in B502275 AGAC Minutes, *supra* note 645.
[654] *Ibid.*
[655] It is unclear whether the briefing note was directed to Ewart, Scott or both. Cochrane briefing note, April 1989 [April 1989 Briefing Note], in B502275 AGAC Minutes, *supra* note 645.
[656] This is one of the earliest documents in which the term "Advisory Committee" is used. April 1989 Briefing Note, *ibid.*
[657] *Ibid.*

press release incorporating this possible solution,[658] which is very close to what eventually happened – with one important exception. Later changes to the press release reflect changes to the five terms of reference, with the provision for no-way costs disappearing entirely.

In the meantime, the Gang of Four was not the only group that needed to be brought on side. Around the middle of April 1989, the environmental and consumer groups began expressing their frustration at the compromises that appeared to have been made. In particular, they wanted the content of the certification test and the issue of unallocated damage awards to be open for discussion (while the business groups wanted these issues to be determined in advance of any further consultations, and indeed felt they had a specific commitment from the Attorney General in this regard).[659] This had created an impasse that prevented the announcement on reform and the beginning of consultations.[660]

Cochrane suggested a number of options to break this new impasse, including maintaining the commitment to the business interests and beginning consultations without the environmental groups, or conducting the consultations without any private groups at all (their views would instead be represented by the relevant ministries, such as the Ministry of the Environment). The preference was clearly to maintain the commitment to the business groups, while giving a concession to the environmental groups. Cochrane recommended that Scott make one final offer to all the groups on a "take it or leave it" basis, stating that there would be a presumption that unclaimed damage awards would be returned to defendants, with the consultation group to discuss any exceptions to this rule (for example, in environmental cases). Consultations would

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[658] Draft press release dated April 13, 1989. Another draft of this press release, which is substantially similar but with minor wording changes, is dated April 17, 1989. Both documents can be found in B502275 AGAC Minutes, *supra* note 645.

[659] "Class Actions Consultation – Options", by MG Cochrane [Options], in B502275 AGAC Minutes, *ibid*. This is undated, but appears to have been written in mid-April 1989 because it mentions the suspension of the class actions remedies in the *Environmental Bill of Rights* and the ULCC draft legislation, which occurred at the beginning of April. Consumer groups also did not agree to the return of unclaimed monies to the defendants, as evidenced by Janet Yale's letter to Cochrane, *supra* note 619 at 1.

[660] Options, *ibid.* It is not entirely clear when the Attorney General was supposed to have made the commitment to the business groups on the content of the certification test and undistributed damage awards; there is no other documentation of this in the archival record.

begin immediately.[661] This is the option that the MAG ultimately pursued, and Cochrane communicated it to the consultation group on April 18, 1989.[662] Clearly there was some urgency to the matter, because the Gang of Four informed Cochrane immediately that they would have a response to him by April 21.[663]

Once again, however, Scott and Cochrane overplayed their hand. Before any of the consultation groups had a chance to respond the April 18 letter, the Attorney General (with Cochrane) appeared before the Cabinet Committee on Economic Policy (CCEP) to discuss the Cabinet Submission of March 20, 1989.[664] Scott announced before the Cabinet Committee that the Gang of Four would cooperate with a public announcement on new class actions legislation.[665] On the basis of Scott's representations, the CCEP agreed to recommend to Cabinet (concurrently with the CCJ Report of April 6, 1989)[666] that class actions should be brought about in Ontario, in the manner outlined in the Cabinet Submission of March 20 and the five principles put to the Gang of Four on March 23 (including the provision for no-way costs).[667]

Of course, the Gang of Four had never indicated that they would cooperate with an announcement on class actions reform. The Four heard about Scott's announcement before the CCEP and immediately wrote to Premier Peterson, copying all other Cabinet Ministers (presumably to draw their attention to the inaccuracy of Scott's representations to them). They expressed their "dismay" at this recent development,[668] and tersely stated that Scott should have waited for their response to Cochrane's April 18 letter.[669] Frustrated with Scott's attempts to force them into his consultation process, they reiterated their previous reservations about class action reform. They flatly denied that they supported the establishment of a process to develop class action legislation, that their

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[661] *Ibid* at 2.
[662] This letter does not appear to be in the archival record, but is mentioned in a letter from the Gang of Four to Premier Peterson dated April 21, 1989, in B502275 AGAC Minutes, *supra* note 645.
[663] *Ibid* at 1.
[664] Cabinet Committee on Economic Policy, Report, Meeting No E7/89, April 20, 1989 [CCEP April 20 1989], in B502275 AGAC Minutes, *supra* note 645; March 20 1989 Cabinet Submission, *supra* note 584.
[665] CCEP April 20 1989, *ibid*, at 2.
[666] Cabinet Committee on Justice, Report, Meeting No J6/89, April 6, 1989, in B502275 AGAC Minutes, *supra* note 645.
[667] CCEP April 20, 1989, *supra* note 664 at 2-3.
[668] Letter from Gang of Four to Premier Peterson, April 21, 1989, at 1 [Peterson Letter April 21 1989], in B502275 AGAC Minutes, *supra* note 645.
[669] Peterson Letter April 21 1989, *ibid*, at 1.

negotiations with Scott had been concluded, or that they were prepared to publicly support the introduction of legislation.[670]

The Four further objected to Scott's actions and his proposed consultation process as a whole, stating that it was highly unusual. Technically, there was no formalized consultation process for legislation in Ontario; the process was, and still is today, within the discretion of the Minister and subject to Cabinet approval.[671] Nevertheless, the Four were accustomed to pre-legislative consultation processes such as the one they were involved in with the Ministry of Consumer and Commercial Relations, regarding the Legislative Review Project (LRP),[672] whereby groups would meet and discuss, sometimes around pre-agreed terms of reference. The Four pointed out that there was no precedent for Scott's proposed consultation process,[673] which involved the following:[674]

- An up-front public announcement that reform would be taking place;
- The public announcement would name a group of organizations which would be discussing the shape of reform; and
- The announcement would include the key terms of reference, not up for negotiation, around which discussions would focus.

Such a process would not allow the Four to negotiate on the subject of reform itself, and would leave them limited flexibility on the shape of that reform, having made a public commitment that would imply their support for a number of highly contentious issues that had not yet been resolved. They would be unable to publicly criticize a bill that would result from any process of which they had been a part. In other words, they would be backed into a corner. The Four described this approach as "totally unreasonable."[675]

Nevertheless, as the Gang of Four had previously stated, they were willing to continue discussions with various interested groups (just as they were doing with the

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[670] *Ibid* at 1.
[671] Legislative Research Service, *How an Ontario Bill Becomes Law: A Guide for Legislators and the Public* (Government of Ontario: Legislative Assembly of Ontario, 2011), online: <http://www.ontla.on.ca/lao/en/media/laointernet/pdf/bills-and-lawmaking-background-documents/how-bills-become-law-en.pdf>, at 8 and 12.
[672] Peterson Letter April 21 1989, *supra* note 668 at 2.
[673] *Ibid.*
[674] *Ibid.*
[675] *Ibid.* This was, of course, Scott's intention in pursuing a consensus for reform.

LRP) and senior MAG staff, on the need for class action reform in Ontario, provided there would be no public announcement.[676] Following those discussions, if the participants agreed, then further consultations would take place around key terms of reference. The Gang of Four stated that some of the terms of reference put forward by Scott and Cochrane at their meeting on March 23 (other than the certification requirement and no special role for the AG) "would require some amendment in order for us to agree to begin a consultative process".[677]

The Four and the MAG were still quite far apart. However, on April 25, 1989, the two parties met. While there are no minutes of this meeting, the correspondence exchanged by the parties afterwards shows that significant concessions were made on both sides.[678] Scott and Cochrane got their public announcement that consultations would take place around certain key terms of reference. However, those key terms changed from those contained in the Cabinet Submission of March 20 and the five principles put to the Gang of Four on March 23. The major concession made by Scott and Cochrane to the business interests was on the issue of costs.

The five terms of reference previously put to the Four, and approved by the CCEP and CCJ, stated that the ordinary rules with respect to costs would be replaced with a no-way costs rule.[679] However, in its letter of May 11, 1989, the Gang of Four refused to allow the issue of costs to be included in the terms of reference, stating that the Attorney General's public announcements on class actions should be silent on the issue.[680] The Four strongly reiterated their position that existing cost rules should be retained for class actions, as no-way costs rules would encourage frivolous suits.[681] Dropping the issue of costs from the terms of reference was a significant concession by the MAG. Without a

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[676] *Ibid.*
[677] *Ibid.*
[678] Letter from Gang of Four to Scott, May 11, 1989 [Scott May 11 1989], in B502275 AGAC Minutes, *supra* note 645.
[679] Terms of Reference March 23 1989, *supra* note 645; March 20 1989 Cabinet Submission, *supra* note 584.
[680] Scott May 11 1989, *supra* note 678 at 2. In fact, an earlier draft of this press release, dated April 27, 1989, explicitly states that "[t]he remedy will include … existing cost rules" (draft press release from Gang of Four to Scott, April 27, 1989). Given that this draft press release was found in Cochrane's papers (B502275 AGAC Minutes, *supra* note 645), it is safe to assume that the Four had sent the press release to Cochrane for his comments, and Cochrane had taken out the provision on existing costs rules, recommending, as a middle way, that the press release remain silent on the issue.
[681] Scott May 11 1989, *ibid*, at 6-8.

public acknowledgement that any class action remedy would include a no-way costs rule, the Attorney General's Advisory Committee was free to come to any conclusion it wished. This would be an issue on which the business interests would eventually win, and having it removed from the terms of reference was a crucial first step.

The Four also made an important suggestion as to what the consultation process would look like. Having protested in their April 21 letter that there was no precedent for Ian Scott's consulting mechanism, the Four made a suggestion of their own that was also very unusual. They proposed that if the participants reached a consensus, then they should take part in the drafting of the legislation.[682] It was unusual for participants in pre-legislative consultations to be actively involved in the drafting of any eventual Bill. Normally, legislative counsel would draft the Bill, using the Advisory Committee report as only one of many guidance documents.[683] The Four were asking for a level of control over the drafting process that was unprecedented. They used Scott's desire for consensus to secure that level of control – if they gave Scott his consensus, they wanted to make sure that it would be reflected in the legislation.

While the Gang of Four was meeting with the Ministry to discuss its terms for consultation, Cochrane was also trying to keep the consumer and environmental groups happy. On May 1, 1989, Cochrane wrote to Rollie Thompson, Chair of the Regulated Industries Program at the Consumers' Association of Canada, to finalize the terms of reference with him.[684] These terms contained no mention of costs – presumably the result of Scott and Cochrane's meeting with the Gang of Four a few days prior. This proved less of a concern for the CAC than the issues of a high bar at certification and the return of undistributed damage awards to defendants. While Thompson eventually signed off on

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[682] *Ibid* at 3.

[683] Memo from D Revell, Chief Legislative Counsel, to Ewart, February 27, 1990 [Revell Memo], in Policy Development Division Counsel Correspondence Files, Class Actions – Drafting Instructions, 1989-1990, MGC, RG 4-40, Box No B248633, Archives of Ontario [B248633 – Drafting Instructions].

[684] Letter from Cochrane to Thompson, May 1, 1989 [Thompson May 1 1989], in B502275 AGAC Minutes, *supra* note 645. In the end result, Thompson was unable to sit on the Attorney General's Advisory Committee due to cuts to CAC funding. In July 1989, a few days before the first meeting of the Committee, the Consumers' Association of Canada asked Edward Belobaba to represent them. Belobaba had worked with Ian Scott when he was in private practice at Cameron, Brewin & Scott (which in 1983 merged into Gowling, Strathy & Henderson), the firm to which Scott returned after retiring from the legislature in 1992. The two appeared on several cases together, including *Bhinder v CN*, [1985] 2 SCR 561; and *Giouroukos v Cadillac Fairview Corp*, [1986] 2 SCR 707, leave information: <http://www.scc-csc.ca/case-dossier/info/counsel-procureurs-eng.aspx?cas=18182&pedisable=true>.

the finalized press release and terms of reference,[685] he implied that the CAC's "serious misgivings" about those issues could lead it to leave the Committee altogether.[686]

The Canadian Environmental Law Association (CELA) and Energy Probe, both represented by Toronto lawyer David Poch, had similar concerns. While CELA accepted Scott's invitation to take part in the Attorney General's Advisory Committee, it did so only on certain conditions – including that certification must be discussed in the most general terms possible, and that the issue of unallocated funds was to be left open for discussion. CELA also expressed concern about costs and funding, saying that both issues should be open for discussion by the Attorney General's Advisory Committee.[687]

However, it was the issue of the return of undistributed damage awards to the defendants that was the dealbreaker for the environmental groups, because they did not want to see unclaimed damage awards (a fairly likely scenario in the environmental context, where damages were often widespread but difficult to document, or awards too small to bother claiming) revert to the defendants, thereby unjustly enriching them after they had already been found liable.[688] The dispute on this point had been threatening the entire idea of the AG Advisory Committee since at least early April 1989.[689] On May 5, 1989, Michael Cochrane met with CELA and Energy Probe representatives, again to try to break the impasse.[690] He confirmed that the only real sticking point for them was the return of undistributed damage awards.[691] Cochrane reiterated that the business groups felt they had a commitment from the Attorney General on this point and were unlikely to back down.[692] Even Cochrane, however, could not persuade the environmental groups to change their position. On May 8, Poch wrote to Cochrane to inform him that they had already conceded that certification would be part of any class actions remedy; they were

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[685] Letter from Scott to Attorney General's Advisory Committee, May 12, 1989, in B502275 AGAC Minutes, *supra* note 645.
[686] Letter from Thompson to Scott, May 17, 1989, in B502275 AGAC Minutes, *supra* note 645.
[687] Memo from John Moffet (Executive Assistant to Ian Scott) to Doug Ewart, May 2, 1989; motion of the CELA Board of Directors, May 2, 1989. Both documents are in B502275 AGAC Minutes, *supra* note 645.
[688] Letter from Poch to Cochrane, May 8, 1989 [Poch May 8 1989], in B502275 AGAC Minutes, *supra* note 645.
[689] Options, *supra* note 659.
[690] This meeting is documented in a letter from Cochrane to the CELA/Energy Probe representatives, dated May 8, 1989, in B502275 AGAC Minutes, *supra* note 645.
[691] *Ibid* at 1.
[692] *Ibid* at 1-2.

unwilling to back down on the issue of unclaimed damages.[693] At some point, Cochrane must have taken this issue back to the Gang of Four to see if they were willing to compromise in any way. Fortunately, they were willing to consider, for environmental cases, an exception to the principle of returning unclaimed damage awards to the defendants.[694] The consultation process was back on track.

On May 12, 1989, Ian Scott wrote to the members of what was to become the Attorney General's Advisory Committee: the Canadian Federation of Independent Business, the Canadian Manufacturers' Association, the Retail Council of Canada, the Ontario Chamber of Commerce,[695] the Consumers' Association of Canada, the Canadian Environmental Law Association, the Advocates' Society, the Canadian Bar Association, Energy Probe, and the Insurance Bureau of Canada. It is unclear why women's groups such as the Legal Education and Action Fund (LEAF) were not invited to sit on the Committee. Cochrane had written to numerous women's groups in March 1989, asking them for their opinions on the use of a potential class action remedy for advancing the rights of women.[696] A member of the Committee later reported that he or she had been receiving calls from women's groups who felt their interests were not represented. In response, Cochrane noted that he had offered to meet with members of LEAF "but nothing had come of it."[697] Whether it was inertia on the part of women's groups, or an unwillingness to include them as full members of the Committee, is unknown. It may be that women's groups were not invited because the business interests had asked Scott in their May 11, 1989 letter that the Committee be restricted to the 10 organizations listed

[693] Poch May 8 1989, *supra* note 688.
[694] Scott May 11 1989, *supra* note 678 at 2.
[695] As noted previously, these four organizations were colloquially referred to at Queen's Park as the "Gang of Four".
[696] Letters from Cochrane to Sherene Razack (Professor at University of Toronto), Mary Lou Fassell (Counsel for the Barbra Schlifer Clinic, a women's legal clinic), and Joan Bercovitch (Legal Policy Analyst at the Status of Women Canada), dated March 16, 1989, in Policy Development Division Counsel Correspondence Files, Class Actions – Women's Interests, 1987-1989, CA226, RG 4-40, Box No B248501, Archives of Ontario. The MAG had also received input from the Ontario Women's Directorate, which had emphasized the importance of notice and no-way costs for making the remedy as accessible to women as possible: letter from Naomi Alboim, Assistant Deputy Minister, OWD, to Richard Chaloner, March 29, 1989, in B501822 – Cabinet Submission, *supra* note 596.
[697] The Attorney General's Advisory Committee on Class Actions, Minutes of November 23, 1989, at 16 [AGAC Minutes Nov 23 1989], in B502275 AGAC Minutes, *supra* note 645.

above, "particularly as [the Committee] already represents a diversity of interests."[698] It seems that many women later disagreed that the Committee was truly that diverse.

In writing to the members of the Committee, Ian Scott confirmed that, "a consensus has been reached concerning the basic parameters of the consultation" and that Michael Cochrane was to chair the group.[699] The terms of reference listed in Scott's letter, and the enclosed draft press release, both reflected the outcome of months of negotiation between the Ministry and the various groups:[700]

(i) The remedy was to have a structured certification procedure, although the precise content of that procedure (such as a preliminary consideration of the merits of the case) was open for discussion;

(ii) The remedy would be an "opt-out" model whereby class members who did not opt out of the action would be automatically bound by it;

(iii) Notice would be given after certification, unless the court otherwise ordered;

(iv) There would be a controlled contingency fee arrangement;

(v) There would be no special role for the Attorney General;

(vi) Undistributed damage awards would be returned to defendants, with the possible exception of environmental cases;

(vii) The remedy should treat plaintiffs and defendants in a fair and equitable manner, and impose no unnecessary burdens on the courts.

While this list contained some important concessions from the business groups (such as the use of contingency fees and the opt-out model), those groups also prevailed on important issues such as a certification test, no special role for the Attorney General and the return of undistributed damage awards. In the ensuing discussions of the Attorney General's Advisory Committee and the subsequent hammering out of the legislation, it was the voice of the Gang of Four that was to prevail over that of the consumer and environmental groups.

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[698] Scott May 11 1989, *supra* note 678 at 9; Cochrane Interview 1, *supra* note 7.
[699] Letter from Scott to Attorney General's Advisory Committee (AGAC), May 12, 1989, at 1 [Scott May 12 1989], in B502275 AGAC Minutes, *supra* note 645.
[700] *Ibid* at 2.

The Attorney General's May 12 letter stated that any participant was free to leave the consultation if dissatisfied with the process.[701] However, at some point it was made clear to the members of the Committee that their conclusions had to be unanimous in order for their recommendations to be carried forward into legislation.[702] As if to emphasize the requirement for consensus, Scott asked the prospective members of his Advisory Committee for their sign-off to indicate their acceptance of the terms of reference and the draft press release.[703] Most of the Committee members signed off without substantive comment.[704] However, as noted above, the Consumers' Association of Canada signed off on the terms of reference and press release, while indicating its "serious misgivings" on the issues of a high bar at certification and the return of undistributed damage awards to defendants in non-environmental cases.[705] Even after agreement on the terms of reference, unanimity between the Committee members seemed a long way off.

None of these issues were reflected, however, in the Cabinet Minute of June 21, 1989, that authorized the Attorney General to continue consultations on the subject of class actions reform.[706] That Minute contained exactly the same terms of reference that had been listed in Cochrane's March 20 Cabinet Submission. It had not been amended to reflect the agreements that had since been reached between the parties – there was no mention in the Cabinet Minute of the return of undistributed damage awards. The Cabinet Minute was specific on the elements of the certification test (including a preliminary merits assessment), while the agreement between the parties was clearly to keep the elements of certification open for discussion.[707] There was no indication in the Cabinet Minute that other class action initiatives, such as that contained in the ULCC model legislation, would be suspended.[708] Finally, on the issue of costs, the parties had agreed to

[701] *Ibid* at 3.
[702] Cochrane Interview 1, *supra* note 7; AC Member Interview, *supra* note 12.
[703] Scott May 12 1989, *supra* note 699 at 4.
[704] For example, Rino Stradiotto of The Advocates' Society simply informed Scott that the TAS representative on the committee would be its Vice-President, Terrence O'Sullivan of McMillan, Binch. Letter from Stradiotto to Scott, May 15, 1989, in B502275 AGAC Minutes, *supra* note 645.
[705] Letter from Thompson to Scott, May 17, 1989, in B502275 AGAC Minutes, *supra* note 645.
[706] Cabinet Minute, *supra* note 644, signed by RD Carman, Secretary of the Cabinet.
[707] Scott May 12 1989, *supra* note 699 at 2.
[708] *Ibid* at 3.

publicly remain silent on that issue.[709] In the Minute, however, Cabinet explicitly stated that the ordinary rules with respect to costs should be replaced with a no-way costs rule.[710] The instructions from Cabinet were directly at odds with the agreements the Attorney General had made with the various interest groups with whom he had consulted. In announcing the establishment of the Attorney General's Advisory Committee on June 29, 1989, along with its terms of reference, Ian Scott was therefore acting outside the bounds of his Cabinet mandate.

The Cabinet Minute was also much more equivocal on the manner in which the new remedy would be implemented. Whereas Cochrane's March 20 Submission stated that the new class action remedy should be provided by statute,[711] Cabinet simply agreed that, once the consultations were concluded, the report should be brought forward for approval and further consideration as to how to incorporate it in statutory form.[712] The Cabinet Minute contained no agreement that legislation would be introduced following the completion of the report of the Attorney General's Advisory Committee.

Scott's Statement to the Legislature and in the Press on June 29 that a consultation process was about to take place, and that the government would introduce legislation at the end of that process,[713] was, therefore, another step too far.[714] The Secretary of the Cabinet, Robert Carman, pointed out this inconsistency to Richard Chaloner, the Deputy Attorney General. Carman stated that the Cabinet Minute deliberately did not include the recommendation of the CCJ that a new comprehensive class action remedy be implemented by statute, as the Minute "reflects the different views held respecting the

[709] Scott May 11 1989, *supra* note 678 at 8. See also Ministry of the Attorney General News Release, "Attorney General Announces Class Action Reform", June 29, 1989 [News Release June 29 1989], which contains no mention of costs rules: in B248633 – Cochrane Articles, *supra* note 545.
[710] Cabinet Minute, *supra* note 644 at 1-2.
[711] March 20 1989 Cabinet Submission, *supra* note 584 at 3.
[712] Cabinet Minute, *supra* note 644 at 3.
[713] News Release June 29 1989, *supra* note 709. See also Ontario, Legislative Assembly, Official Report of Debates (Hansard), 34th Parl, 2nd Sess (June 29, 1989) (Ian Scott), online: <http://hansardindex.ontla.on.ca/hansardeissue/34-2/l034.htm>.
[714] Michael Cochrane made the same overstep in his article entitled "Class Action Reform in Ontario: A Breakthrough" (*supra* note 545), which appears to have been written shortly after Scott's Statement to the Legislature.

introduction of class action legislation."[715] Scott's announcement that legislation would be introduced therefore went beyond the bounds of the Cabinet Minute.[716]

Carman urged Chaloner to ensure that, once the Attorney General's Advisory Committee had completed its work, its report should be discussed in the CCJ and Cabinet for approval before proceeding to the Cabinet Committee on Legislation.[717] In other words, any report produced by the Advisory Committee could not immediately go to Legislative Counsel for drafting a Bill and then the Cabinet Committee on Legislation for approval. It would have to go through a second round of Cabinet approval in order to ensure that the report complied with Cabinet's instructions (as reflected in the Minute of June 21, 1989), and to determine whether, and in what form, the provincial government wanted to introduce a draft Bill.

This is what eventually happened[718] but, thanks to the work of Scott and Cochrane who wanted to see the Advisory Committee's Report changed as little as possible prior to introduction as a draft Bill, the process was largely a formality. In the meantime, Chaloner defended Scott's actions by stating that the only way the MAG could secure the support of the business groups was by promising that class actions would only be available through one comprehensive statute – so that in that regard, there would be nothing to fear from potential consumer or environmental legislation.[719] This was clearly not anticipated by the Cabinet Minute. However, Chaloner assured Carman that any draft legislation would be put to the appropriate Cabinet committees and Cabinet for review.

While this is not quite what Carman was looking for, he seems to have been placated by Chaloner's assurances because the two men do not appear to have corresponded further on the subject. It is likely that the matter was not taken further because of Scott's relationship with Premier Peterson; any breach of Cabinet confidence

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[715] Memorandum from RD Carman to Richard Chaloner, July 25, 1989, at 1, in Policy Development Division Counsel correspondence files, Class Proceedings cabinet minutes & submissions 1990, 1989-1990, MGC, RG 4-40, Box No B248501, Archives of Ontario [B248501 – Cabinet Minutes].
[716] *Ibid* at 2.
[717] *Ibid* at 2.
[718] See "Briefing Note: Class Action Reform", drafted by Cochrane at the end of October 1989, in B501822 – Briefing Note, *supra* note 558. This note acknowledged that the Attorney General had to bring the AGAC Report back before Cabinet for specific authorization to draft legislation (at 1).
[719] Memorandum from Chaloner to Carman, August 22, 1989, at 2, in B248501 – Cabinet Minutes, *supra* note 715.

such as this would be for Cabinet to sanction,[720] and no sanctions would have occurred without the Premier's say-so. It was almost certainly Scott's influence, therefore, that enabled him to bypass the democratic process and surreptitiously change the Advisory Committee's terms of reference.

The work of the Attorney General's Advisory Committee on Class Action Reform therefore proceeded as planned, with Michael Cochrane as Chair. Informally at least, the mandate of the Committee was to come up with a unanimous report regarding the shape of a class actions remedy for Ontario.[721] In order to secure this unanimity, significant concessions would be made that would affect class actions in Ontario for decades to come.

E. The Report of The Attorney General's Advisory Committee

The Committee met for the first time on July 18, 1989. It met approximately every two to three weeks up to December 1989, when it began finalizing its report, and then on numerous occasions thereafter. The Committee members spent much of their time together hammering out the relatively non-controversial parts of an Act that had been drafted by Michael Cochrane and MAG staff.[722] The discussions did not revolve around whether class action reform was desirable – the terms of reference made clear that such reform would definitely take place – but its shape. As a result, there was little if any discussion of developments that had swayed government and public opinion towards the enactment of reform over the past decade, such as the Mississauga train derailment and other events that gave rise to mass claims.[723] The focus instead was on precedents in

[720] Interview with Parliamentary Legislative Assistant, August 25, 2016.
[721] Cochrane, *supra* note 7; AC Member Interview, *supra* note 12.
[722] The Attorney General's Advisory Committee on Class Actions (AGAC), Minutes of September 7, 1989, at 11 [AGAC Minutes Sept 7 1989]; AC Member Interview, *ibid*. Andrew Roman's draft Act was also considered by the Committee. While these draft Acts are not contained in the archival record, they are likely based on Cochrane and Roman's papers from the ULCC 1988 conference (*supra* note 26); Cochrane's ULCC paper had been circulated as "Class Actions – A Breakthrough" to Committee members before they met (*supra* note 545).
[723] Cochrane Interview 3, *supra* note 626; email correspondence with Advisory Committee member, September 26, 2016; Woolford Interview 2, *supra* note 590. Other events giving rise to potential mass claims included the investment scandals that plagued the financial industry throughout the 1980s, such as those involving the Crown, Seaway and Greymac Trusts. Surprisingly, given the pervasiveness of securities class actions for misrepresentation in Ontario today, the Committee members interviewed state that these scandals were not even mentioned in their discussions.

other jurisdictions (particularly Québec), the briefs submitted to the government by various Committee members, and how much the Ontario bill should borrow from those sources.

There were several points of sharp disagreement between the Committee members, largely on the issues of costs and certification.[724] With regard to both issues, CBA representative Andrew Roman[725] had certain materials circulated a few days after the initial meeting. These included his draft Bill prepared for Consumer and Corporate Affairs Canada (which did not include a certification requirement), and the joint CBA/PIAC brief (which argued for a departure from the traditional costs rules).[726] On the other side of the debate, the law firm of McMillan, Binch submitted a memo to the Committee articulating the business community's negative perception of the current government and its pursuit of "social advance".[727] The memo also argued against any departure from traditional costs rules.[728] As in the US, the philosophical divide was between those who saw class actions as advancing social goods (such as consumer and environmental rights), and those who saw class actions as merely a procedural device that should not depart from established rules of court.[729] Clearly the two sides were still sharply divided on crucial issues, particularly costs and certification.

The initial meeting appears to have consisted of a general discussion of the terms of reference, as well as setting an agenda for the remainder of the Committee's work.[730] However, this work had barely begun when an article in the *Financial Post* threatened to derail the participation of the business groups. The August 28 article implied that the business interests were in support of a class action remedy, an impression that the Gang

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[724] While all the minutes of the July-December 1989 meetings (other than the first meeting) are in the archival record, only those minutes discussing the more controversial points will be referred to.
[725] Roman was not only General Counsel to the PIAC, but had also been Chair of the CBA's Special Committee on Class Actions, which had produced the CBA/PIAC Report: *supra* note 373 at 4.
[726] Letters from Roman to Cochrane, with enclosures, July 21, 1989 and August 9, 1989. Both these letters can be found in B501822 – Business Consultation, *supra* note 609.
[727] Discussion Memo re: Ontario Class Action Consultative Process, August 16, 1989, at 1 [McMillan Binch Memo], in B501822 – Business Consultation, *supra* note 609. The memo was written by WA Macdonald and JW Rowley, who had written an article in 1984 criticizing the OLRC Report, while recommending conservative reforms to the current Rules to permit certain class actions: Macdonald and Rowley, *supra* note 419.
[728] McMillan Binch Memo, *ibid*, at 6.
[729] Marcus, *supra* note 44 at 4-11.
[730] Letter from Cochrane to AGAC Members, July 13, 1989, in B502275 AGAC Minutes, *supra* note 645. The archival record appears to contain no minutes of this initial meeting.

of Four had tried very hard to avoid giving.[731] Norm Stewart, on behalf of the CMA and the Gang of Four, clearly believed that Michael Cochrane had something to do with the article, because he wrote to Cochrane later that week to express his discontent at what he perceived as "posturing" in the media.[732] He was disturbed to see that Cochrane himself, on behalf of the Minister, believed that, "the goal is to write legislation that is less restrictive than that of Quebec".[733] He stated that the article made it very difficult to approach the consultations with an open mind, and that it could cause business interests to "unnecessarily fear that we are about to create a litigation monster."[734] Stewart therefore asked that Committee participants restrict their contact with the media.[735] This was to be the first in a long series of letters from Stewart to Cochrane, in which the former (as the voice of the Gang of Four) persistently attempted to control the outcome of the Committee's deliberations.

These attempts were largely successful, with Cochrane paying more heed to Stewart's input than perhaps any other member of the Committee. This is demonstrated in the fact that, just a few weeks after Stewart's letter, the Attorney General personally addressed the Canadian Manufacturers' Association regarding class actions. This is the only member organization of the Advisory Committee that Scott appears to have personally addressed. Scott attempted to put CMA members' minds at ease, not about class action reform as a whole or even certain elements of it, but about the consultation process itself.[736] Not only did he attempt to persuade the CMA that the consultation process was beneficial to them because it ensured their interests were accommodated, but that, in taking part, they were helping to design a remedy that in reality they had not yet

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[731] A Willis, "Businesses, public welcome Ontario move to class action", *Financial Post* (August 28, 1989) [Financial Post article], in Policy Development Division Counsel Correspondence Files, Class Actions – Media 1990, 1989-1990, CA226, RG 4-40, Box No B248501, Archives of Ontario [B248501 – Media]. The article identified Cochrane as "Scott's policy director". Although Doug Ewart was actually the Director of the Policy Development Division, this epithet may actually have been a more accurate reflection of Cochrane's role with regard to class actions.

[732] Letter from Stewart to Cochrane, September 1, 1989, at 1 [Stewart Sept 1 1989], in B502275 AGAC Minutes, *supra* note 645.

[733] *Ibid.* See also Financial Post article, *supra* note 731.

[734] Stewart Sept 1 1989, *ibid*, at 1-2.

[735] *Ibid* at 2. Stewart's reference to the non-public nature of the LRP discussions with the Ministry of Consumer and Commercial Relations implied that he wished the same for the Committee.

[736] CMA Speech, *supra* note 37.

even agreed to, at least publicly.[737] It was the persuasive genius of Scott to thank the CMA for support it had not yet given. The speech, as an attempt to keep the CMA in the consultation process and reassure other business interests, appears to have been successful as the business groups remained on the Advisory Committee.

Those groups continued to be influential in the Committee's deliberations. For example, at the Committee's second meeting on September 7, Stewart's concerns with the media were the first issue to be raised by Cochrane, with the latter concluding that all future Committee meetings would be confidential.[738] This point was later taken even further, when the Committee decided that Minutes would no longer be attributable to individual members.[739]

However, one of the most controversial issues amongst the Committee members was costs, on which the Committee was more divided than any other issue.[740] It was a consumer advocate who first articulated a possible compromise on this point. At their second meeting the Committee discussed certification, with business interests advocating a stringent test and members such as Andrew Roman (for the CBA) wanting a simpler and less onerous test.[741] In the middle of this discussion, Edward Belobaba, for the Consumers' Association of Canada, stated that he too would prefer less onerous certification requirements.[742] He then articulated the link between certification and costs:

> E.B. added that if Committee wished to constrain class actions it should be accomplished up front with costs and symmetrical appeal rules … E.B. suggested that if we need a structured criteria [for certification] it would do to eliminate … anything to do with merits (and to instead use cost rules)[743]

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[737] *Ibid* at 8-9. Even as late as November 1989, members of the Attorney General's Advisory Committee were asking Cochrane whether they were discussing wholesale reform by way of legislation, or simply through an amendment to the Rules. Cochrane said he would get back to them on that point, but his response is not noted in the remaining minutes: AGAC Minutes of November 8, 1989, at 1-2 [AGAC Minutes Nov 8 1989], in B502275 AGAC Minutes, *supra* note 645.
[738] AGAC Minutes Sept 7 1989, *supra* note 722 at 1-2. In a follow-up letter to the AGAC dated September 14, 1989 (in B502275 AGAC Minutes, *ibid*), Cochrane referred to a recent submission from the Chartered Accountants' Institute, which does not appear to be in the archival record.
[739] AGAC Minutes of September 21, 1989, at 9, in B502275 AGAC Minutes, *ibid*. From the meeting of September 21 onwards, minutes were no longer attributable to individual members.
[740] AGAC Minutes Nov 8 1989, *supra* note 737 at 10. This observation was made by Cochrane himself.
[741] AGAC Minutes Sept 7 1989, *supra* note 722 at 5-6.
[742] *Ibid* at 6.
[743] *Ibid.*

This was one of the first articulations of the connected functions of costs and certification.[744] Both were a way of weeding out unmeritorious actions. Up until this point, the business interests had been pressing for traditional costs rules and a stringent test at certification. The consumer and environmental groups had been advocating for no-way costs and limited or no certification requirements. Belobaba's suggested compromise meant that both groups could get something of what they wanted, while balancing the goals of consumer/environmental groups (access to justice) and those of business (traditional rules of fairness).[745] In addition, it meant that class actions adhered as closely as possible to the traditional model of litigation, another goal of the business groups.[746] It was a brilliant solution at the time, and one that was ultimately to become part of the *Class Proceedings Act*. Unfortunately, it would not work so well in practice, and Edward Belobaba would come to regret his suggestion.[747]

The issue of costs dominated the later meetings of the Committee. On November 8, the members once again discussed the link between certification and costs, with most of the Committee discerning this link to be fairly strong. The business community in particular felt that if the certification standard was lowered, the normal cost rules should not be changed,[748] as current cost rules were essential in deterring frivolous litigation.[749] On the other side, the consumer and environmental representatives felt that contingency fees were a major step towards removing the financial obstacles to class actions. However, more needed to be done to help plaintiffs with costs, or "the integrity of the Attorney General and the government's commitment to class actions would be put in

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[744] This point had not been articulated in the discussion paper on certification provided to the Advisory Committee: Class Action Reform Discussion Paper Re: Certification Procedure, Undated, in B501822 – Background Papers, *supra* note 527.
[745] AGAC Minutes Sept 7 1989, *supra* note 722 at 5.
[746] *Ibid*.
[747] Now a sitting class actions judge, Justice Belobaba wrote the following in his decision in *Rosen v BMO Nesbitt Burns Inc*, 2013 ONSC 6356, at para 2:

> Most members of the class action bar, whether acting for plaintiffs or defendants, agree that a "no costs" rule would be much more sensible. Like them, I also wish that the recommendations on costs as set out in the Ontario Law Reform Commission's *Report on Class Actions* had been accepted. Instead, the provincial legislature decided to adopt the views of the Attorney-General's Advisory Committee and continue the "costs follow the event" convention for the very different world of class actions as well. I was a member of that Advisory Committee. I now realize that I was wrong and that the OLRC was right.

[748] AGAC Minutes Nov 8, 1989, *supra* note 737 at 9, 12.
[749] *Ibid* at 10.

doubt."[750] The discussion became so heated that Cochrane "noted that the Committee was more divisive on this point than any other issue."[751]

With little movement from the business interests on traditional cost rules, and the consumer and environmental groups insisting that more needed to be done for plaintiffs than just a simpler certification test and contingency fees, a middle way was needed to break the deadlock. Various alternatives were suggested, such as no-way costs until certification and traditional cost rules thereafter.[752]

However, public funding, along the lines of the Fonds in Québec, was the most promising middle way. The issue had been raised previously,[753] but the Committee now began discussing it in earnest in order to find a consensus on the costs issue. There was some pushback on the establishment of a Fund for disbursements and to pay legal costs. However, many members stated that such a Fund would remove the barrier to class actions faced by a representative plaintiff, who would otherwise be faced with carrying the costs and disbursements of an entire class (with very little ultimate financial benefit, because she could only pursue damages for her own individual claim).[754] While a no-way costs rule would perform essentially the same function, it was acknowledged that, "defendants would object to this idea".[755] The choice therefore seemed to be between a Fund with traditional costs rules, or no Fund with a no-way costs rule.[756] However, the Committee noted that such a Fund could be politically controversial and could jeopardize the entire Act.[757] The decision was therefore made to ask the Attorney General if the idea of a Fund was acceptable to the government.[758] This was the only question that was formally put to the Attorney General throughout the Committee's deliberations, and the fact that the Committee did so showed the importance of the funding question to breaking the stalemate on costs.

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[750] *Ibid* at 9-10.
[751] *Ibid*; Cochrane Interview 1, *supra* note 7.
[752] AGAC Minutes Nov 8, 1989, *ibid*, at 13-14.
[753] AGAC Minutes of October 26, 1989, at 6, in B502275 AGAC Minutes, *supra* note 645.
[754] AGAC Minutes Nov 8 1989, *supra* note 737 at 3.
[755] *Ibid.*
[756] *Ibid.* This was the same choice that faced the CBA/PIAC in formulating its report, with the original majority report calling for traditional costs and a Fund, and the final CBA/PIAC Report (incorporating the view of the minority), calling for no-way costs and no Fund: *supra* notes 373 and 442.
[757] AGAC Minutes Nov 8 1989, *ibid*, at 4.
[758] *Ibid* at 14.

Subsequent meetings saw discussions on costs that were just as heated. In the November 23 meeting, certain members noted that they felt uncomfortable with bending the costs rules for class actions, which "was removing the original fairness of the British justice system."[759] Others stated that if the Committee members did their job right, "the incremental costs of a class action to the point of certification should be minimal".[760] At this point, the subject of a Fund came up again, because it would prevent the financial disincentive to class actions caused by traditional costs rules.[761]

In the alternative, if the government was not willing to establish such a Fund, the Committee suggested that traditional costs rules could instead apply only at certain stages, such as after certification or after the common issues trial.[762] This option was discussed on November 30, where the Committee agreed that normal costs rules should apply at the individual issues stage, and considered the CBA proposal that there be no costs up to and including certification.[763] The CBA also proposed that trial judges also have discretion to refrain from awarding costs, based on as yet unspecified factors.[764]

The Committee outlined other options, several of them heavily contingent on the existence of a class actions Fund:[765]

- Having traditional costs rules apply;
- Settling on the issue of a Fund, because that would remove or reduce the problems with traditional costs rules;
- Present a "take it or leave it" option to the government: retain a traditional costs regime premised on the existence of a Fund, because otherwise there would be no consensus on the entire issue of class actions; or
- Present two options to the government: the CBA proposal, or traditional costs rules with a Fund.

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[759] AGAC Minutes Nov 23 1989, *supra* note 697 at 4.
[760] *Ibid.* Anyone familiar with the current state of class actions in Ontario, where certification costs easily run to hundreds of thousands of dollars, will know that this hope was in vain.
[761] *Ibid.*
[762] AGAC Minutes Nov 8 1989, *supra* note 737 at 13-14.
[763] AGAC Minutes of November 30, 1989, at 6 [AGAC Minutes Nov 30 1989], in B502275 AGAC Minutes, *supra* note 645. The "CBA proposal" refers to the CBA/PIAC Report, *supra* note 373, although there was also a CBA meeting on costs shortly before the AGAC meeting of November 30, 1989. The minutes of the CBA meeting are not in the archival record.
[764] AGAC Minutes Nov 30 1989, *ibid*, at 7.
[765] *Ibid*.

The Committee was eventually to settle on the third option. It was clear that business groups wanted traditional costs rules to apply, but consumer and environmental groups would not agree to a class actions remedy that would rarely be used because of the financial barriers that plaintiffs would face. The Fund was the key to the consensus between the two camps.[766]

The Attorney General was initially pessimistic on this subject. In answer to the question posed to him on November 8, Scott stated that he could not guarantee a government-financed or even a government-seeded fund.[767] He could not answer the Committee's question, but did say that, "[t]he Treasury will not cough-up a lot of money to make this sort of litigation available."[768] In that same message, however, Scott made it clear that he required a consensus report.[769] The Committee knew that one of the only ways that consensus could be secured was through the provision of a Fund. It therefore decided to ask the government to put its money where its mouth was – in other words, if it wanted a consensus, it would have to pay for it. This is made clear in the final Report, in which, "[t]he Committee concluded that if the Government is committed to reform in this area and committed to increasing access to justice it will provide whatever assistance it can to establish the fund, adequately endowed, to assist class litigants."[770]

The Committee would also have been aware of Scott's personal sympathies towards government funding of public interest litigation. Scott himself had granted $1 million of funding to LEAF in 1988,[771] was a firm supporter of legal clinic funding,[772] and had overseen the introduction of the *Intervenor Funding Project Act*[773] that provided

[766] As the Committee stated in its Advisory Report, "[t]he Committee's retention of the existing costs regime for class actions was based in part on a number of considerations, including … that the Government … should establish a fund to assist parties to class proceedings": AGAC Report, *supra* note 6 at 57. See also Cochrane Interview 1, *supra* note 7.
[767] "Government-financed" meant that the government would supply the money to be distributed by the Fund. "Government-seeded" meant that the government would provide "seed money" to start the Fund, which would eventually become self-financing and thereafter pay back the seed money.
[768] AGAC Minutes Nov 30 1989, *supra* note 763 at 8.
[769] *Ibid*.
[770] AGAC Report, *supra* note 6 at 59-60.
[771] Scott, *supra* note 56 at 134-135.
[772] *Ibid* at 175.
[773] *Supra* note 279.

qualified interveners with advanced funding.[774] These projects were in fact used as examples of government funding in the final report of the Advisory Committee.[775]

At the next meeting on December 15, 1989, the Committee discussed the various models for financing the Fund. It was unanimously decided that a Fund should be part of any class action remedy,[776] and that it should consist of a self-funding assistance program, with seed money from a variety of sources including the government.[777] While the CBA option was discussed as a possible alternative,[778] Michael Cochrane's handwritten notes on the issue of the Fund state, "[n]o alternative."[779]

The Committee was getting close to unanimity on the controversial issue of costs. By the December 15 meeting, a consensus has already been reached on the availability of contingency fees, that such fees should be court supervised,[780] and that traditional costs rules should apply to individual proceedings, to certification and to common issues trials (provided a Fund was put in place).[781] The court would also have discretion not to award costs against unsuccessful plaintiffs, if the proceeding was a test case, raised a novel point of law or was otherwise in the public interest.[782]

Consensus was close, but it had not yet been reached. Business groups continued to be reticent, as evidenced by a *Canadian Business* article in which several of the Committee members were quoted.[783] Nevertheless, on January 2, 1990, Cochrane wrote to Ewart to tell him that the Committee had completed its work and was finalizing the

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[774] Benidickson, *supra* note 248 at 652.
[775] AGAC Report, *supra* note 6 at 63-65; memorandum from Doug Ewart to Scott, February 1, 1990, in B703283 – Bill 28 and 29, *supra* note 564.
[776] Cochrane's handwritten minutes of AGAC meeting of December 15, 1989, at 3 [AGAC Minutes Dec 15 1989], in B502275 AGAC Minutes, *supra* note 645.
[777] *Ibid* at 3; handwritten notes by Daniel Jazvac, law student, of December 15, 1989 meeting, at 4 [Jazvac handwritten notes], in B502275 AGAC Minutes, *ibid*.
[778] AGAC Minutes Dec 15 1989, *ibid*.
[779] *Ibid* at 4. See also AGAC Report, *supra* note 6 at 72, where the Committee declined to make alternative recommendations to its funding proposals.
[780] Jazvac handwritten notes, *supra* note 777 at 1-2.
[781] *Ibid* at 3-4.
[782] *Ibid* at 3. These criteria were based on class actions practice in California and New York (*ibid* at 3), and the point was first raised at the AGAC meeting of November 8, 1989, *supra* note 737 at 12.
[783] C Allard, "Issues: Class War", *Canadian Business* (December, 1989), p 123, in Policy Development Division Counsel correspondence files, Class Actions – Media, 1988-1990, CA226, RG 4-40, Box No B248633, Archives of Ontario [B248633 – Media]. The article referred to the Mississauga train derailment, an event that had occurred a decade previously, showing the influence such mass disasters had on the public debate about class actions.

report, which was "unanimous".[784] Once again, Cochrane was trumpeting consensus when it had not yet come about. The Gang of Four had further comments on the draft Report, and would contact Cochrane with numerous other substantive changes while the legislation was being drafted. For example, just days after Cochrane's letter to Ewart, Norm Stewart suggested changes to section 33 of the draft Act, regarding the use of a multiplier to determine lawyer's fees (Stewart stated that the "risk" the multiplier was intended to reflect was the risk incurred at various stages throughout the proceeding, not simply as assessed at the outset), and to the "Related Matters and Recommendations" section, regarding the percentage contribution to the Fund to be levied against damage awards (Stewart wanted to make it clear that the levy would be taken out of the damage award, not a separate cost the defendant would have to pay).[785] Apart from these changes, however, Stewart approved of the draft Report.[786]

Other Committee members also had concerns about funding. In January 1990, Cochrane asked the Committee to make recommendations on how the Fund should be created and maintained.[787] Several members responded with consternation. Robert Anderson, for the Ontario Chamber of Commerce, said that, although a Fund was crucial to the Report, it would actually weaken the whole proposal unless experts considered its implementation.[788] Terry O'Sullivan, for The Advocates' Society, was concerned that Ian Scott's enthusiasm for the Fund would override the Committee's recommendation that a separate committee look at the best way to set it up.[789] Norm Stewart also stated that the specifics should be left to a task force of actuaries and funding experts.[790] Both O'Sullivan and Stewart disliked the fact that the draft Report did not mention that defendants would also be able to use the Fund.[791] In O'Sullivan's opinion, this left that

[784] Memorandum from Cochrane to Ewart, January 2, 1990, in B502275 AGAC Minutes, *supra* note 645.
[785] Letter from Stewart to Cochrane, January 8, 1990 [Stewart January 8 1990], in B248633 Correspondence, *supra* note 401.
[786] Stewart January 8 1990, *ibid*.
[787] This letter does not appear to be in the archival record, but is mentioned in the subsequent letters of Anderson (January 18) and O'Sullivan (January 25) [O'Sullivan January 25 1990], both of which can be found in B248633 Correspondence, *supra* note 401.
[788] Anderson letter, *supra* note 593.
[789] O'Sullivan January 25 1990, *supra* note 787 at 3; letter from O'Sullivan to Cochrane, January 16, 1990, in B248633 Correspondence, *ibid*.
[790] Letter from Stewart to Cochrane, January 19, 1990, in B703283 – Bill 28 and 29, *supra* note 564.
[791] *Ibid* at 2.

section with a distinctly "pro-plaintiff" flavour.[792] Edward Belobaba, for the Consumers' Association of Canada, was more concerned with the representation on the board that would make funding decisions. He asked that there be representation from a diversity of community groups, which should make decisions according to publicly accountable guidelines.[793]

The Committee met with Michael Cochrane again on January 26, 1990.[794] Norm Stewart seems to have put forward further concerns about the Fund at this point, stating that the Attorney General should provide different options for funding from which the Committee could choose. He was opposed to a specific level of financing for the Fund, and agreed with the other members that actuarial assistance was needed in setting it up.[795] Cochrane was able to accommodate most of Stewart's concerns, but felt that certain of them were beyond the scope of the consensus (specifically, changes to the modified contingency fee which would explicitly forbid lawyers from seeking a percentage of recovery).[796]

Cochrane wrote to the Committee on February 14, 1990, mediating between them and Stewart in an effort to maintain the fragile consensus that was essential for the draft Act to see the light of day. He stated that Scott was working to make the group's recommendations work at a political level, but that he needed a final unanimous report. In order to bring Stewart on side, he offered the Committee's support in "selling the consensus to his members", noting that the consensus was a compromise in which no one group had its way completely.[797] Cochrane's message was clear: Stewart had to pull his weight by supporting the fragile consensus, or the Committee's work would be for

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[792] O'Sullivan January 25 1990, *supra* note 787 at 3.
[793] Letter from Belobaba to Cochrane, January 25, 1990, at 1, in B248633 Correspondence, *supra* note 401.
[794] While the minutes for this meeting do not appear to be in the archival record, Cochrane made handwritten notes of the Committee members' concerns about the Fund [AGAC Minutes Jan 26 1990], in B248633 Correspondence, *ibid*.
[795] AGAC Minutes Jan 26 1990, *ibid*, at 1; letter from Stewart to Cochrane, February 19, 1990 [Stewart Feb 19 1990], at 2, in B248633 Correspondence, *ibid*.
[796] Letter from Cochrane to AGAC, February 14, 1990 [Cochrane Feb 14 1990], in Policy Development Division Counsel Correspondence Files, Class Actions – Class Proceedings Fund, 1988-1990, MGC, RG 4-40, Box No B501822, Archives of Ontario [B501822 – CPF].
[797] Cochrane Feb 14 1990, *ibid*, at 1.

nothing. At the same time, there was public awareness of the Report and mounting pressure to release it, both from business interests and the pro-consumer camp.[798]

Nevertheless, Stewart was willing to gamble on the consensus in order to have further changes made. He wrote to Cochrane again a few weeks later with more detailed concerns regarding the section on the Costs Assistance Fund.[799] He was concerned about the presumptions the draft Report was making regarding the shape of the Fund.[800] Stewart ended his letter by reassuring Cochrane that all of his suggestions were made to ensure that the Report was consistent with the group's consensus.[801] Stewart knew that Scott and Cochrane wanted a consensus, and even at this late stage, he was willing to try and make further tweaks to the draft Report by appealing to that desire. This pattern was to continue even after the Report was finalized, and well into the legislative drafting stage.

Stewart was willing not only to put pressure on Cochrane, but also to try and influence other members of the Committee. Two days after Stewart wrote to Cochrane, Terry O'Sullivan also did so, with comments that were essentially identical to Stewart's (including the changes to the modified contingency fee, that Cochrane had already stated went beyond the scope of the consensus).[802] Stewart's actions were not lost on Cochrane and other MAG officials. Upon receiving O'Sullivan's letter, Shawn Scromeda, an articling student with the Ministry, forwarded the letter to Cochrane with a note saying that O'Sullivan's comments were "very similar to those 'suggested' by Norm Stewart."[803] Stewart was to make many more "suggestions" before the draft legislation was finalized.

While there appears to be no further correspondence between Stewart or O'Sullivan and Cochrane in February 1990, Cochrane must have spoken to the two men to assuage their concerns, because by late February 1990, all the Committee members

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[798] A Hutchinson and K Roach, "Legislation needed to increase access to class-action suits", *Financial Post* (February 24, 1990), p 15; W Macdonald and W Rowley, "Reforming Ontario class action procedures", *Financial Post* (January 20-22, 1990), p 21; A Hutchinson, "Should the Province Expand Class Action Suits? Yes", *Law Times* (March 12, 1990), p 7; W Macdonald and W Rowley, "Should the Province Expand Class Action Suits? No", *Law Times* (March 12, 1990), p 8. All these articles can be found in B248501 – Media, *supra* note 731.
[799] AGAC Report, *supra* note 6 at 56.
[800] Stewart Feb 19 1990, *supra* note 795 at 1-2.
[801] *Ibid* at 3.
[802] Letter from O'Sullivan to Scromeda, February 21, 1990, in B248633 Correspondence, *supra* note 401.
[803] Note from Shawn Scromeda to Cochrane, February 21, 1990, in B248633 Correspondence, *ibid.*

had signed off on the Report and it was presented to Ian Scott.[804] Obtaining something of a consensus amongst such diverse interests was a huge achievement. However, the Committee's recommendations still had to find their way onto the statute books.

F. Drafting the Legislation

Scott and Cochrane had worked hard to get the members of the Committee to agree on the shape of reform.[805] A fragile consensus had been reached that complied with the Attorney General's terms of reference. Specifically, the Fund was the glue that held the positions of the various parties together, and the Committee's Report made it clear that the class actions remedy was contingent on the Fund. In fact, it refused to make alternative recommendations on a class actions remedy should the government refuse to implement a Fund, stating that to do so "would jeopardize the unanimity of the Committee and undercut the value of the recommendations."[806] The certification test, costs regime and Fund were therefore interdependent.

Having worked so hard to secure unanimity, Scott and Cochrane were not about to let the consensus be jeopardized by the tinkering of the Cabinet committees and the drafting process. They were certainly not about to subject the Report and draft Bill to a public consultation process, which would delay the Bill's introduction and possibly change the Advisory Committee's model.[807] The *Class Proceedings Act* that eventually became law therefore looks remarkably like the draft Act put forward by the Committee, except for a few minor changes. There is little doubt that this was the result of Scott's iron hand over the process, as well as Cochrane's ability to negotiate with the various parties to ensure that the consensus held together while the draft Act was given life.

In fact, the draft Bill passed through inter-Ministerial consultation and the various Cabinet committees remarkably smoothly, largely due to the emphasis, in Cochrane's

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[804] Letter from AGAC to Scott, February 1990, in B502275 AGAC Minutes, *supra* note 645.
[805] Cochrane was well aware of his achievement: on February 28, 1990, he wrote to Ralph Nader, champion of the US consumer and a person whom Cochrane clearly admired, to tell him about the Committee's unanimous report. Letter from Cochrane to Nader, February 28, 1990, in B501822 – Communications Plan, *supra* note 581.
[806] AGAC Report, *supra* note 6 at 72. See also memorandum from Cochrane to Scott, May 28, 1990, at 2 [Cochrane May 28 1990], in B248633 – Drafting Instructions, *supra* note 683.
[807] "Briefing Note: Class Action Reform", drafted by Cochrane at the end of October 1989, at 2, in B501822 – Communications Plan, *supra* note 581. This was a departure from Scott's usual style, which was to conduct public consultations before making major policy decisions: Scott, *supra* note 56 at 144.

Cabinet Submission[808] and consultations with the various Ministries,[809] on the unanimous nature of the Committee's recommendations. While certain Ministers had concerns about the Fund (primarily whether it would divert resources away from Legal Aid)[810] and others had concerns that enabling class actions would mean more lawsuits against the government,[811] all had their concerns assuaged[812] and all eventually indicated their assent to the draft Bill.[813] Neither the Cabinet Committee on Justice nor the Cabinet Committee on Economic and Environmental Policy seems to have noticed that the draft Bill departed from the Cabinet Minute of June 21, 1989 (which authorized the establishment of the Advisory Committee) in one significant respect: costs. In fact, both committees recommended to Cabinet that the CPA be adopted along the lines laid out in the draft Bill, and explicitly approved the principle that "normal costs rules apply and continue to be in the court's discretion."[814] Even if the departure was noted (there is no indication that it was), it would have been fairly difficult and politically inexpedient to contest a

[808] Cabinet Submission, March 20, 1990; an earlier draft version, dated March 8, 1990, has much less emphasis on the consensus of the Committee. It is not clear who made the changes to the draft, but it was clearly felt that emphasizing the consensus would assist with the draft Bill's passage through the committee stages. Both documents can be found in B248501 – Cabinet Minutes, *supra* note 715.

[809] Memorandum from Chaloner (Deputy Attorney General) to All Deputy Ministers, March 27, 1990; report of the Deputy Ministers' Committee on Economic and Environmental Policy (E&E 4/90), April 12, 1990, at 2. Both documents can be found in Policy Development Division Counsel Correspondence Files, Class Actions – Inter-Ministry Consultation, 1989, CA226, RG 4-40, Box No B248501, Archives of Ontario [B248501 – Inter-Ministry Consultation].

[810] Report of the Deputy Ministers' Committee on Justice (DCJ 4/90), April 12, 1990. The Ministry of Industry, Trade and Technology raised the same concerns noted by some Committee members, that the Fund needed to be set up and monitored with the help of actuarial experts: letter from Deputy Minister to Chaloner, April 9, 1990. These documents, as well as other correspondence from the various Deputy Ministers raising concerns about funding, can be found in B248501 – Inter-Ministry Consultation, *ibid.*

[811] Internal electronic message from Ewart to Cochrane, April 8, 1990, re: questions from Graham Stoodley of Legal Services, Human Resources Secretariat. Ewart stated that, "the government could occasionally be exposed to an embarrassing lawsuit … but it would probably be more embarrassing to put a provision in the legislation to exempt the Crown from class actions." This document, as well as other correspondence from the various Deputy Ministers raising concerns about increased litigation against the government, can be found in B248501 – Inter-Ministry Consultation, *ibid.*

[812] Letter from Chaloner to various Deputy Ministers, April 12, 1990, addressing their concerns about the Fund, in B501822 – Cabinet Submission, *supra* note 596.

[813] Cabinet approval of CPA and Law Society Amendment Act for introduction, signed by Secretary of the Cabinet Peter Barnes, May 30, 1990, in Cabinet Submissions, CS6990/90 to CS7047/90, 1986-1996, CA61, RG 75-18-1, Box No B861458, Archives of Ontario.

[814] Report of the Cabinet Committee on Economic and Environmental Policy (E&E 4/90), April 19, 1990, at 4; report of the Cabinet Committee on Justice (J 5/90), April 19, 1990, at 8. Cabinet did adopt the CPA along those lines: Cabinet Minute (13-13/90), May 2, 1990. All these documents can be found in B248501 – Cabinet Minutes, *supra* note 715.

costs mechanism that had received the unanimous support of a diversity of stakeholders, and upon which the entire class actions remedy hinged.[815]

In the meantime, Cochrane attempted to control the legislative drafting process itself. Days after the Committee submitted its Report, Cochrane asked Legislative Counsel Cornelia Schuh to draft a Bill for introduction in May 1990. He agreed with Doug Ewart that Schuh had the most talent for drafting the Bill and stated that, "[t]he only delicate issue is the Committee's touchiness about their own drafting."[816] Of course, it was not Cochrane's job to decide which counsel had "the most talent" to draft the legislation.[817]

It was also highly unusual for consultation groups to have detailed input into the drafting process, let alone a veto as Cochrane was implying. Normally, a report or draft Bill would be prepared and given to the Minister, who would then take the report to the Cabinet Committee on Justice and thereafter the Cabinet, which would develop parameters for the legislation by way of a Cabinet Minute. Legislative counsel would then draft the legislation, using the report or draft Bill as only one of many guidance documents, and would also consult with the relevant Ministry officials. The draft would then be examined by the Legislation and Regulations Committee to see if it was in accordance with the Cabinet Minute and, if it was, the legislation would then be approved for introduction.[818] This is very similar to the process that was followed when the regulations under the *Law Society Amendment Act* were drafted, dealing with the Class Proceedings Fund.[819] By contrast, Cochrane's approach, in surrendering the drafting process to the Advisory Committee, was completely unprecedented and profoundly un-democratic.

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[815] In fact, some Deputy Ministers congratulated Cochrane on his success in bringing together so many disparate viewpoints: letter from Deputy Minister of Financial Institutions to J Johnson, Acting Deputy Attorney General, April 17, 1990, in B501822 – CPF, *supra*.

[816] Handwritten note from Cochrane to Cornelia Schuh (Legislative Counsel) and Craig Perkins (Director of the Court Reform Task Force and the Rules Committee at the MAG), February 26, 1990, in B248633 – Drafting Instructions, *supra* note 683.

[817] *Ibid.*

[818] Cochrane Interview 1, *supra* note 7; Revell Memo, *supra* note 683.

[819] Letter from Laura Hopkins, Legislative Counsel, to Carmen Rogers, MAG Counsel, re: Regulations under the *Law Society Act*, December 3, 1992 [Hopkins Letter], in Policy Development Division Counsel Correspondence Files, CPA – Regulations, 1992-1993, CR, RG 4-40, Box No B703283, Archives of Ontario [B703283 – CPA Regulations]. By this time, Cochrane had left the MAG for private practice.

Chief Legislative Counsel Donald Revell quickly attempted to put Cochrane in his place, writing a disgruntled memorandum the next day to Cochrane's superior, Doug Ewart:

> First, I do not think that it is your role or the role of Mike Cochrane to run my office by deciding who has "the most talent" to work on your projects … If Mr. Cochrane understood the policy then I am sure that, given proper instruction, any of my counsel could do an appropriate job.
> …
> Secondly, I am surprised that an advisory committee chaired by a member of your office would get into a drafting exercise on some understanding that the committee and not the Legislative Counsel would draft the bill. This is the first time that I can recall that a member of your staff has been involved in such an action … In the past, when committee's [sic] have been involved in drafting, it was always on the understanding that the committee's draft would be only one more document to be considered by us in drafting the bill. To say that we have a "delicate issue" because of "the Committee's touchiness about their own drafting" is like a threat to this Office to leave the draft as it appears in the report.[820]

While it was a little over-zealous to characterize Cochrane's note as a "threat", in fact it was precisely his intention (and that of Scott) that the final legislation resemble the Committee's draft Act as closely as possible. Revell stated that he did "not intend to compromise the standards of the Office because of the 'touchiness' of a committee",[821] and finished his letter by stating that he would not assign counsel to the project until his concerns were addressed.

There is no other correspondence between Revell and Ewart (or Cochrane) in the archival record. Nevertheless, it appears that Revell's concerns were addressed, because counsel was at some point assigned to the project. Just over two months later, Cochrane received a complete first draft of the CPA from legislative counsel Marilyn Leitman.[822] Even though Leitman was formally appointed by Revell,[823] it appears that she was subsequently co-opted into going along with the Committee's wishes. According to Cochrane, he met with Leitman informally and explained to her that the Committee

[820] Hopkins Letter, *ibid.*
[821] *Ibid* at 2.
[822] Letter from Leitman to Cochrane, enclosing first draft of the *Class Proceedings Act*, May 18, 1990, in B248633 – Drafting Instructions, *supra* note 683.
[823] Cochrane Interview 1, *supra* note 7.

members wanted to be directly involved in the drafting of the legislation. She was reportedly very reluctant to go along with this, but agreed to meet with the Committee anyway, and subsequently drafted the legislation in direct and repeated consultation with them.[824]

Cochrane has confirmed that this process was completely unprecedented, and that, when the Committee asked to be involved in this manner, he told them as much. Leitman reportedly assured the Committee that she would consider their opinions when drafting, but the members insisted on having control over the actual wording of the statute. Each provision of the draft CPA, therefore, was drafted after consultation with the Committee, and then run past them again to make sure each provision reflected their consensus.[825] This is reflected in the letters from Leitman to Cochrane of May 9 and 18, 1990, with which she enclosed the preliminary and complete first drafts of the CPA.[826] Leitman referred repeatedly to sections and subsections of the "AC", meaning the provisions of the Advisory Committee draft Act.[827] She justified why certain sections of the AC draft Act had not been included (because they had been covered elsewhere, either in the draft statute or in other legislation),[828] and asked for clarification on other sections (for example, on contingency fee agreements).[829] Clearly, her aim was to reflect the provisions of the AC draft Act as faithfully as possible, within the confines of coherence, consistency and the current law.

In turn, Cochrane immediately forwarded Leitman's draft Act to the Committee for their review. The Act was annotated with Cochrane's handwritten notes in red pen, showing exactly how the provisions of Leitman's draft Act corresponded with the provisions of the AC draft Act.[830] Where sections of the latter had been changed or

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[824] *Ibid.*
[825] *Ibid*; Woolford Interview, *supra* note 514.
[826] Letter from Leitman to Cochrane, May 9, 1990 (enclosing preliminary first draft of CPA), in B703283 – Bill 28 and 29, *supra* note 564; letter from Leitman to Cochrane, May 18, 1990 (enclosing complete first draft of CPA) [Leitman May 18 1990], in B248633 – Drafting Instructions, *supra* note 683.
[827] Leitman May 18 1990, *ibid.* An annotated copy of the draft Act, forwarded on the same day to the Committee on Cochrane's behalf, clarifies that "AC = Advisory Committee".
[828] *Ibid*, notes section, at 1-2 (regarding section 38 of the Report), 3 (regarding appeal rights) and 4 (regarding costs of notice, offers to settle, and the rules of court).
[829] *Ibid*, notes section, at 3 and 4.
[830] Cochrane handwritten annotations to draft Act, faxed by his assistant to Committee members on May 18, 1990 [Cochrane notes draft CPA], in B248633 – Drafting Instructions, *supra* note 683. Cochrane was in Washington at the time, on secondment to the National Association of Attorneys General.

deleted, Cochrane justified those changes or deletions. For example, on page 4 of the annotated Act, Cochrane wrote that section 6(5) was "[n]ew but needed", and on the top of that page he wrote, "[n]ote AC 4(6) onus eliminated as unnecessary".[831] In doing this, Cochrane was mediating once more – this time between Legislative Counsel, who was improving the legislation while keeping it faithful to the AC draft Act, and the Committee members, who wanted the drafting as far as possible to be in their own words.

On May 25, 1990, the Committee met to discuss the first draft of the Bill.[832] At that meeting, Cochrane produced a second version of the draft Bill[833] incorporating some prior suggestions from the group,[834] all of which were acceptable to the Committee.[835] They also made further changes, including the re-insertion of section 28(1), which suspended the running of applicable limitation periods upon the commencement of a class action.[836] The majority of the changes to the draft Bill appear to have been made by Norm Stewart. He had significant concerns about sections 24 (aggregate damages), 25 (individual issues) and 26 (judgment distribution). His changes meant, in part, that a court had to consider whether individual damage awards were impractical prior to awarding an aggregate damages award; and that unclaimed amounts under both aggregate awards and individual assessments would be returned to the defendants after a certain amount of time.[837] Interestingly, there is no mention in any draft of the Act (including the AC draft Act) of an exception for environmental cases, as was originally suggested (but not required) by the Attorney General's terms of reference. The environmental groups appear to have conceded on this point, in exchange for a provision on *cy-près* distribution of awards, which are dealt with in the same section of the CPA.[838]

Stewart brought up his concerns at the May 25 meeting. He was clearly the dominant force in the Committee's review of the draft Bill. Despite the fact that the other

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[831] Cochrane notes draft CPA, *ibid*, at 4.
[832] The minutes of this meeting do not appear to be in the archival record, but the meeting is referred to in Cochrane May 28 1990, *supra* note 806.
[833] Leitman had sent this to Cochrane the previous day: letter from Leitman to Cochrane, May 24, 1990, in B703283 – Bill 28 and 29, *supra* note 564.
[834] Letter from Stewart to O'Sullivan, May 29, 1990, at 2 [Stewart May 29 1990], in B248633 – Drafting Instructions, *supra* note 683.
[835] *Ibid.*
[836] *Ibid.*
[837] *Ibid* at 1-2.
[838] CPA, *supra* note 10, subsections 26(4)-(6).

members of the Committee, including Michael Cochrane, had not identified any issues with sections 24-26 during their review, they agreed with Stewart.[839] In addition, Stewart objected strongly to a provision inserted into the second draft, that would allow agreements that contingency fees be paid based on percentage of recovery. While he insisted that the provision be replaced by section 33(3) of the AC draft Act that expressly prohibited such agreements, the most he could get was the group's agreement to delete the objectionable provision.[840] Stewart's attempt to impose his will on the Committee was successful only to a certain extent.

However, it is clear that Stewart was able to coerce Cochrane into agreeing to most of his changes, because a few days after the meeting Cochrane reported to the Attorney General that, "several of the changes incorporated into the most recent version of the Bill were necessary to obtain some of the above signatures" (which included Stewart's and the signatures of two other representatives of the Gang of Four).[841] Many of the changes made reflected Stewart's comments.[842] The other Committee members who had not yet signed were unable to attend the May 25 meeting, one of them being Terry O'Sullivan, representing The Advocates' Society.[843] Stewart continued to be successful in influencing O'Sullivan. He filled him in on the discussions that had taken place on May 25, and also offered to advise him on the timing of the Bill's introduction in the Legislature.[844] The two continued to meet after Cochrane sent out the third draft of the Bill on May 31.[845] O'Sullivan thereafter wrote to Cochrane to advise him that he was in agreement with all the changes suggested by Stewart[846] and that he particularly agreed with Stewart's objections on the contingency fee issue.[847]

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[839] Stewart May 29 1990, *supra* note 834 at 1.
[840] *Ibid* at 3.
[841] Leitman had sent the most recent version of the draft Bill to Ewart earlier that day: memorandum from Leitman to Ewart, May 28, 1990, in B703283 – Bill 28 and 29, *supra* note 564; Cochrane May 28 1990, *supra* note 806 at 1.
[842] Memorandum from Cochrane to Legislation Committee, May 28, 1990, in B703283 – Bill 28 and 29, *ibid.*
[843] Cochrane May 28 1990, *supra* note 806.
[844] *Ibid.*
[845] Letter from O'Sullivan to Cochrane, June 1, 1990 [O'Sullivan June 1 1990], in B248633 – Drafting Instructions, *supra* note 683. Leitman had sent the third draft of the Bill to Cochrane on May 31, 1990: memorandum from Leitman to Cochrane, May 31, 1990, in B703283 – Bill 28 and 29, *supra* note 564.
[846] O'Sullivan June 1 1990, *ibid.*
[847] *Ibid* at 2.

Stewart, with O'Sullivan's help, continued to pressure Cochrane regarding the changes he had requested. In the first week of June, he wrote to Cochrane twice to remind him that one of the changes he had mentioned at the May 25 meeting, on aggregate damages, had not been incorporated into the third draft of the Bill.[848] In doing so, he appealed once again to both Cochrane and Scott's desire for consensus and the Committee's desire to remain true to the Committee's draft Act. Stewart informed Cochrane that O'Sullivan shared his concerns and demanded that Cochrane fax, to both him and O'Sullivan, copies of the final Bill incorporating the amendments they had requested by noon the next day.[849]

Cochrane responded quickly, making handwritten annotations to Stewart's letter in order to communicate the changes to others on the Committee. The annotations are addressed to "David"[850] – likely David Poch of the Canadian Environmental Law Association, whose constituents would be especially affected by changes meaning that unclaimed damage awards would be returned to defendants, and whose sign-off would be essential. The first reading of the CPA was just days away, and Cochrane was working to hold the consensus together.

In the final event, however, there was not enough time to make the changes; they would instead have to be addressed after First Reading.[851] By June 5, 1990, all the Committee members had signed off on the draft Bill as consistent with their Report (some of them, like Stewart and O'Sullivan, on the condition that their changes would be made).[852] Cochrane wrote to the Committee to inform them that the *Class Proceedings Act* would receive its first reading on June 7, 1990, along with the *Law Society*

[848] Letter from Stewart to Cochrane, June 1, 1990; letter from Stewart to Cochrane, June 4, 1990 (copying O'Sullivan) [Stewart June 4 1990]. By this time, Stewart had moved from GM Canada to become General Counsel and Secretary of Ford Motor Company of Canada, Ltd. Both documents can be found in B248633 – Drafting Instructions, *supra* note 683.
[849] Stewart June 4 1990, *ibid.* O'Sullivan followed up with a letter to Cochrane on June 5, signing off on the draft Bill on the condition that Stewart's changes would be made: letter from O'Sullivan to Cochrane, June 5, 1990, in B248501 – Correspondence, *supra* note 613.
[850] Stewart June 4 1990, *supra* note 848 at 2.
[851] Letter from Cochrane to AGAC, June 5, 1990 [Cochrane June 5 1990], in B248501 – Correspondence, *supra* note 613.
[852] Memorandum from AGAC to Ian Scott, in B248501 – Correspondence, *ibid.* Although this memo is dated May 22, 1990, it is clear from subsequent correspondence that sign-off was not actually obtained from all parties until late May or early June 1990: Cochrane May 28 1990, *supra* note 806. It is therefore likely that the final memorandum, signed by all parties, indicated sign off on the final draft Bill prior to first reading (which took place on June 7, 1990). The version of the memorandum signed by all parties does not appear to be in the archival record.

Amendment Act creating the Class Proceedings Fund.[853] He further confirmed Scott's commitment to get the legislation through committee without substantive changes, stating that, "[t]he Attorney General is committed to our Bill and we can continue to polish it without jeopardizing the consensus."[854]

On June 12, 1990, the *Class Proceedings Act* and the *Law Society Amendment Act* received their First Reading in the Ontario legislature.[855] In speaking to the House, Scott referred to the unanimous recommendations of the Committee members, many of whom were sitting in the gallery.[856] While Scott stated that traditional costs rules would apply to class actions, he also pointed to contingency fee arrangements and the Fund as a counterbalance to this.[857] The goal was to get the legislation passed as soon as possible.[858]

To this end, Cochrane proposed to the Advisory Committee that the Bill go to a Committee of the Whole House and be passed without amendment by June 28; the Attorney General would then give a written undertaking that the changes requested by Stewart and O'Sullivan would be contained in an amending bill in the fall of 1990, prior to Royal Proclamation of the CPA.[859] However, Stewart and O'Sullivan both felt that they could not accept this approach, as too many intervening events could take place that would be beyond Scott's control.[860] They insisted instead that their amendments be made prior to Second Reading.[861] In addition, Stewart reminded Cochrane of the Attorney General's promise that the CPA would be the only class actions mechanism available in

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[853] Cochrane June 5 1990, *supra* note 851.
[854] *Ibid.*
[855] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 34th Parl, 2nd Sess (June 12, 1990) (Ian Scott), online: <http://hansardindex.ontla.on.ca/hansardespeaker/34-2/l045_90-22.html> [Hansard June 12]. The CPA and the LSAA were companion Bills, and from this point onwards, reference to the CPA includes the LSAA.
[856] *Ibid.*
[857] *Ibid.*
[858] *Ibid.* See also memorandum from Ewart to Communications Branch, May 31, 1990, making changes to Scott's draft Statement to the Legislature because "[i]t's important that we signal a desire for early passage" (emphasis in original), in B501822 – Communications Plan, *supra* note 581.
[859] Letter from Stewart to Cochrane (copied to O'Sullivan), June 25, 1990, in B248633 – Drafting Instructions, *supra* note 683.
[860] *Ibid* at 2.
[861] *Ibid.*

Ontario; the *Environmental Bill of Rights* was still before the legislature, and it still contained a class actions remedy.[862]

Scott would never get the chance to implement the changes requested by his Committee. The Attorney General wrote to the Committee on July 16, 1990,[863] saying there was a high degree of consensus in the House regarding the CPA, and he did not anticipate any problems with its passage. However, it had not been possible to pass the legislation before the House rose at the end of June, and it would therefore have to be reintroduced in the Fall. Before that could happen, the "intervening events" anticipated by Stewart came to pass, in a way that very few could have predicted. On October 1, 1990, the Ontario provincial election saw David Peterson's Liberal government voted out of power. Ian Scott did not lose his seat, but he lost his job as Attorney General and was replaced by Howard Hampton. The NDP assumed the mantle of government, and the CPA was left in legislative limbo.

G. Re-Introduction of the CPA

The members of the Attorney General's Advisory Committee had seen what happened when a draft Act got stuck in no man's land.[864] The OLRC draft Act was never even introduced as a Bill, and had gathered dust for about six years before consultations on the subject of reform began again. Cochrane and the Committee had worked hard to bring about a consensus and see legislation drafted, and they were not about to let the momentum slow down. They had to act quickly to get the CPA re-introduced.

The Consumers' Association of Canada was the first to write to Hampton, just days after his appointment as Attorney General, to express support for re-introduction of the Bill.[865] Early in November, the Committee met in order to discuss a strategy for re-introduction of the CPA (now Bill 213), and also to discuss the amendments on aggregate

[862] Letter from Stewart to Cochrane, June 29, 1990, in B248633 – Drafting Instructions, *supra* note 683. Stewart had also reminded Cochrane of this provision in the *Environmental Bill of Rights* in the fall of 1989: letter from Stewart to Cochrane, October 26, 1989, in B502275 AGAC Minutes, *supra* note 645.
[863] Letter from Scott to the AGAC, July 16, 1990, in B248501 – Correspondence, *supra* note 613.
[864] Cochrane Interview 1, *supra* note 7.
[865] Letter from Joan Huzar, President, Consumers' Association of Canada, to Hampton, October 12, 1990, in B248501 – Correspondence, *supra* note 613.

damages requested by Stewart and O'Sullivan on June 4 and 25, 1990.[866] Fortunately for the Committee, Cochrane indicated that the new Attorney General was in favour of re-introduction, as well as any agreed technical amendments."[867] Indeed, it would have been strange if Hampton wasn't supportive: the previous year, he had criticized the Liberal government for not including class actions in the *Courts of Justice Amendment Act*, arguing passionately that aggrieved consumers needed access to justice.[868]

The Committee agreed to make almost all of Stewart and O'Sullivan's changes, and also agreed that they should send a joint letter to the Attorney General in support of an early re-introduction of Bill 213.[869] The Committee knew that unanimity was crucial to the Bill's passage, and that any doubt regarding the consensus would cause delay. Their best strategy would be to present a united front. As a result, Cochrane was careful to note the unanimous nature of the Committee's recommendations in his communications with his superiors.[870] In November 1990, Cochrane sent Ewart a copy of the finished Bills,[871] stating that they were ready for consideration by the Policy & Planning and Legislation Committees, [872] and enclosing a note in support of reintroduction, which stated that the Advisory Committee continued to unanimously urge reintroduction of the Bills.[873]

True to his word, Hampton put the Bills on the Fall Legislative Program, to be considered for early re-introduction.[874] As the MAG tried to get the Bills through Committee, Cochrane's note in support of re-introduction made the rounds. At the end of November, Hampton submitted Cochrane's note to the Cabinet Committee on Justice in

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[866] Fax from Norm Stewart to the AGAC, November 12, 1990, detailing the Committee's discussions when it met on November 8, 1990 [Stewart Nov 12 1990], in B248501 – Correspondence, *ibid.*
[867] Stewart Nov 12 1990, *ibid*, at 1.
[868] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 34th Parl, 2nd Sess (June 14, 1989) (Howard Hampton), online: <http://hansardindex.ontla.on.ca/hansardeissue/34-2/l025.htm>.
[869] Stewart Nov 12 1990, *supra* note 866 at 1-2.
[870] Memorandum from Cochrane to Ewart, November 14, 1990, in B703283 – Bill 28 and 29, *supra* note 564.
[871] That is, the CPA and the LSAA, at this time known as Bills 213 and 214, respectively.
[872] Memorandum from Cochrane to Ewart, November 22, 1990 [Cochrane Nov 22 1990], in B248633 – Drafting Instructions, *supra* note 683. As previously, the Committee members reviewed and signed off on these updated Bills. See, for example, letter from Stewart to Cochrane, December 3, 1990, in B248633 – Miscellaneous Material, *supra* note 305.
[873] Cochrane Nov 22 1990, *ibid.*
[874] Memo from Ewart to Hampton, November 23, 1990, in Policy Development Division Counsel Correspondence Files, Legislation 1990-91, CA226, RG 4-40, Box No B807794, Archives of Ontario [B807794 – Legislation 1990-91].

his efforts to have the Bills reintroduced.[875] Around the same time, the Deputy Attorney General wrote to the Deputy Ministers also enclosing Cochrane's note and emphasizing the unanimous and non-controversial nature of the Committee's recommendations.[876] The MAG's ability to claim that the CPA was "non-controversial", when just two years previously it had provoked bitter debate amongst the various interest groups, shows how valuable the Committee's consensus really was. As one of the Committee members has stated, "Scott was nobody's fool. He knew that to get this through the house, he would have to come in waving a report and say, "we've talked to everybody, they've signed off, why are you complaining?" Otherwise there would be no legislation for another 10 years."[877] This was essentially the position put forward by Cochrane when he briefed all the Ministries about the re-introduction on December 4, 1990.[878]

This is almost certainly why the Bills passed through the Committee stage so easily. It would have been difficult to take issue with legislation that was not only based on a unanimous report by many of the major players, but that had also been drafted and signed off on by those same players. As one Committee member put it, "it was pre-ordained to be acceptable."[879] This point can clearly be seen in the correspondence from the Ministries regarding the re-introduced Bills. Some of them had concerns regarding the potential for increased litigation against the government that could affect their Ministries. However, they nevertheless indicated their assent for the consultation record, because of the Advisory Committee's unanimous support for the legislation. This struck them as "unusual"[880] and was powerful enough to overcome their hesitation.

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[875] Memo from Hampton to Cabinet Committee on Justice, November 30, 1990, in Cabinet Submissions, CS417/90 to CS7076/90, 1990, CA61, RG 75-18-1, Box No B861459, Archives of Ontario [B861459 – Cabinet Submissions].
[876] Letter from Chaloner to Deputy Ministers, November 29, 1990, in Ministry of the A-G acts & regs files, Proposed Legislation 1990, 1100, RG 4-143, Box No B827937, Archives of Ontario [B827937 – Acts & Regs].
[877] AC Member Interview, *supra* note 12.
[878] Memo from Suzanne Harrington, Counsel, to Rita Burak, Deputy Minister of Agriculture and Food, December 5, 1990 [Harrington Memo], in B827937 – Acts & Regs, *supra* note 876.
[879] AC Member Interview, *supra* note 12.
[880] Harrington Memo, *supra* note 878; similar responses from Deputy Ministers in other Ministries can be found in B248633 – Miscellaneous Material, *supra* note 305.

The MAG's goal was to have the legislation re-introduced as quickly as possible, with first reading before December 19 and second reading in January 1991,[881] and initially this plan was on track.[882] On December 17, Bills 213 and 214 were re-introduced in the legislature.[883] The MAG press release put out the same day once again emphasized the consensus reached by the Advisory Committee.[884] It also downplayed the innovative nature of the Bills by stating that they would support the government's work on environmental rights and the law of standing.[885] A few days previously, Minister of the Environment Ruth Grier had announced in the legislature that the government intended to introduce an *Environmental Bill of Rights*, that an advisory committee had been established for this purpose, and that the MAG was working on the questions of legal standing and class actions that would complement the Bill.[886] While previous drafts of the *Bill of Rights* had included a class actions remedy, this had been removed at the request of the business members of the Attorney General's Advisory Committee.[887] The passage of the *Bill of Rights* was therefore dependent on the passage of the CPA, because only the latter provided a remedy for breach of the rights enshrined in the former.

The *Bill of Rights* and the CPA were also connected in other ways. The advisory committee mentioned by Grier was eventually modeled on the Attorney General's Advisory Committee on Class Action Reform. Michael Cochrane recalls that, following his success with the CPA, Grier asked him for his assistance when the consultation

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[881] Memo to Hampton from Ewart, December 3, 1990, re: Fall Legislative Program, in B807794 – Legislation 1990-91, *supra* note 874.

[882] The Bills were approved by the Cabinet Committee on Justice on December 6, by the Priorities & Planning Committee on December 12, and by the Legislation & Regulations Committee on December 13: Memo to Hampton from Ewart, December 14, 1990, re: Fall Legislative Program, in B807794 – Legislation 1990-91, *ibid.* Cabinet approved re-introduction of the Bills shortly thereafter: Cabinet Minute of December 19, 1990, 17-11A/90, in B861459 – Cabinet Submissions, *supra* note 875.

[883] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 1st Sess (December 17, 1990) (Howard Hampton), online: <http://hansardindex.ontla.on.ca/hansardeissue/35-1/l071_90.htm>.

[884] Press Release by the Ministry of the Attorney General, "Class Proceedings Act Introduced by Attorney General", December 17, 1990, in Policy Development Division Counsel Correspondence Files, Class Proceedings – Communications, 1992-1993, CA226, RG 4-40, Box No B703283, Archives of Ontario.

[885] *Ibid* at 1. The press release was not widely picked up in the media, and the newspapers that did cover the story did so fairly uncritically: R Mackie, "Class action legislation revived in Ontario", *Globe and Mail* (December 18, 1990), PA5; unknown author, "NDP OK's group suits", *Toronto Sun* (December 18, 1990), p 19; P Todd, "Ontario plans fund to help cover cost of class-action suits", *Toronto Star* (December 18, 1990), PA13. All these articles can be found in B248633 – Media, *supra* note 783.

[886] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 1st Sess (December 13, 1990) (Ruth Grier), online: <http://hansardindex.ontla.on.ca/hansardeissue/35-1/l070_90.htm>.

[887] Letter from Stewart to Cochrane, June 29, 1990, in B248633 – Drafting Instructions, *supra* note 683; letter from Stewart to Cochrane, October 26, 1989, in B502275 AGAC Minutes, *supra* note 645.

process for her bill went off the rails. "She had an unholy war on her hands about the *Environmental Bill of Rights* – I was told that the [consultation] process was out of control. People were standing on tables yelling at each other".[888] A similar process was therefore set up for the *Bill of Rights*, with many of the same players. Cochrane was appointed co-chair of the Task Force on the Ontario *Environmental Bill of Rights*.[889] This Task Force operated according to terms of reference that were agreed in advance, and the understanding was the same as for the Advisory Committee on Class Action Reform: if the Task Force produced a unanimous report, the government would have to run with it and enact legislation accordingly. When the legislation was ready to be drafted, Leitman was once more brought in to do the drafting according to the Task Force's instructions.[890]

This legislation could not be passed, however, until the CPA was passed. While the original plan was to pass the CPA as quickly as possible, there was a delay of almost a year between first reading (on December 17, 1990) and second reading (November 18, 1991). There is little to explain this delay,[891] although the Rae government may well have been distracted by the severe difficulties it faced in its first year and thereafter, as well as the deepening recession in Ontario. At the end of October 1991, Cochrane grew tired of waiting and wrote to the Leader of the House to ask him that the CPA receive second reading before the end of the session, highlighting again the unanimous nature of the Advisory Committee's recommendations.[892] In doing so, he referred to the Task Force on the Ontario *Environmental Bill of Rights*, stating that its terms of reference were formed on the assumption that redress for breaches of that Bill would be available through the CPA. If the CPA was not passed, the work of the Task Force would be jeopardized.[893]

It is unclear why Cochrane was alone in urging swift passage of the CPA. There appear to be no follow-up letters from the Advisory Committee, either to Cochrane or to

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[888] Cochrane Interview 1, *supra* note 7.
[889] Letter from Cochrane to Dave Cooke, Government House Leader, October 29, 1991 [Cochrane Oct 29 1991], in B248633 – Miscellaneous Material, *supra* note 305.
[890] Cochrane Interview 1, *supra* note 7.
[891] This same question was asked when the CPA received its second reading: Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 1st Sess (November 18, 1991) (Robert Chiarelli), online: <http://hansardindex.ontla.on.ca/hansardeissue/35-1/l083.htm>: "I ask, what could possibly have taken this Attorney General almost a full year to bring these bills forward?" [Hansard November 18].
[892] Cochrane Oct 29 1991, *supra* note 889.
[893] *Ibid.*

any other government representative. It is curious that a group that was so keen on having the legislation passed just one year before subsequently lost interest. Given the reaction of business groups to the Rae government, the Gang of Four may have been happy to let the possibility of class action reform lie dormant. As Cochrane recalls, "[t]he business community was horrified that there was an NDP government. The Gang of Four was on high alert for all policy development."[894]

Nevertheless, Cochrane's letter appears to have worked. Just a few weeks later, the CPA received second reading in the legislature. MPPs noted the consensus that the Advisory Committee had reached,[895] as well as the unusual nature of the consultation process, which they felt should be used more widely:

> Of interest about this bill is [that it] was based not just on consultation but collaboration, something this government should learn … their definition of consulting is to make a decision and tell people about it afterwards but not ask for their input or opinion. This bill should teach this government a lesson … that if it wants to get a good piece of legislation before this Legislature, it should not just consult after the fact but make people the real players … part of a collaboration process.[896]

The CPA received widespread support in the House, with the only criticisms being that the government took almost a year to get the legislation to second reading,[897] and that some of its provisions were not more widely available (for example, intervener funding).[898] It passed second reading and went to the Standing Committee stage.[899]

It was at this point that the fears of the Gang of Four were almost realized. The submissions of two groups to the Standing Committee threatened to upset the consensus that had been reached. The Advisory Committee members had made it clear that if

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[894] Cochrane Interview 1, *supra* note 7.
[895] Hansard November 18, *supra* note 891 (David Winninger on behalf of Howard Hampton).
[896] *Ibid* (Charles Harnick).
[897] *Ibid* (Robert Chiarelli).
[898] *Ibid* (Robert Chiarelli and Charles Harnick).
[899] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 1st Sess (December 2, 1991), Standing Committee on Administration of Justice, *Class Proceedings Act, 1990*, *Law Society Amendment Act (Class Proceedings Funding), 1990* [Standing Committee on Administration of Justice], in B703283 – Bill 28 and 29, *supra* note 564. Michael Cochrane was in attendance.

substantive changes were made to the legislation as it passed through the readings, then they might no longer be able to support it.[900]

Parkdale Community Legal Services was the first to make submissions to the Standing Committee.[901] Their main request was that the CPA be amended so that tenants could bring class actions (the CPA did not apply to them pursuant to section 37, because they could bring representative actions under the *Landlord and Tenant Act*). The Tenant Advocacy Group (TAG) had made similar submissions to the MAG earlier that year and had even met with the Attorney General to discuss their concerns.[902] Cochrane had drafted a briefing note for the Attorney General regarding possible responses.[903] He recommended that Hampton tell the groups that a delicate consensus existed on class proceedings that the Ministry was reluctant to jeopardize. To allow the "traditional power struggle between landlords and tenants to spill over into class actions" would be to endanger access to justice for all other litigants in the province.[904] Hampton's responses to the tenants' rights groups had clearly not been as effective as had been hoped, as demonstrated by the opposition that the legislation faced at Standing Committee.

Another group that voiced its opposition consisted of labour lawyers who represented trade unions. Speaking on their behalf to the Standing Committee was Toronto lawyer Mark Zigler.[905] Their main concern was that the CPA should be amended to allow for injunctions, and also to allow unions and other unincorporated associations to sue.[906] This terrified the Gang of Four and triggered their "high alert". Cochrane had told the Advisory Committee that he would take responsibility for making sure the CPA was

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[900] Cochrane Interview 1, *supra* note 7.
[901] Standing Committee on Administration of Justice, *supra* note 899 at J-1603 to J-1606.
[902] Letter from AR Keating, Staff Lawyer, TAG, to B Holman, Policy Development Division, MAG, February 18, 1991 (re: meeting with Howard Hampton, February 21, 1991), with enclosed brief (at 7-9), in Policy Development Division Counsel Correspondence Files, Class Actions – Landlord Tenant Representative Proceedings, 1991, CA226, RG 4-40, Box No B248633, Archives of Ontario [B248633 – Landlord-Tenant].
[903] MG Cochrane, "Briefing Note: Class Proceedings and Group Tenant Applications" (February 19, 1991) [Tenant Briefing Note], in B248633 – Landlord-Tenant, *ibid.*
[904] Tenant Briefing Note, *ibid*, at 3.
[905] Standing Committee on Administration of Justice, *supra* note 899 at J-1606 to J-1607. Zigler was (and still is) a lawyer at the firm of Koskie and Minsky. He also submitted his points in the form of a memo: Mark Zigler to "Ontario Legislature Justice Committee", re: An Act Respecting Class Proceedings, December 2, 1991 [Zigler], in B248633 – Miscellaneous Material, *supra* note 305.
[906] Zigler, *ibid.*

passed without any substantive changes,[907] and now it looked like the fragile consensus was in jeopardy. He recalls that precarious time:

> [A] rumour went around that the government was going to move for an amendment to allow the CPA to be used by unions. That was a pretty tough moment – I told the Attorney General at the time that, "you're going to lose the whole thing." He said, "okay, I'll get back to you." Next thing we knew they didn't propose the amendment and the CPA was passed intact.[908]

Presumably the Attorney General took the same action with regard to the tenants' rights groups, because their requested amendments were not made either. The Standing Committee reported the CPA and the LSAA (now known as Bills 28 and 29, respectively) without amendment, and they were ordered for third reading.[909]

Another five months passed before the Bills received third reading in the legislature, despite the request of the opposition that third reading and royal assent take place in December 1991.[910] During that time, the legal profession was busy preparing for the CPA[911] and further objections to the Bills rolled in. These objections were dealt with fairly summarily: with the Bills based on unanimous recommendations from the major stakeholders, and having passed the Standing Committee stage without amendment, there was very little stopping them now. The first objection was from Courts Administration, stating that little thought or discussion had been directed towards the Bills' impact on the court system.[912] That objection appears to have been dealt with by a simple phone call.[913]

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[907] Cochrane Interview 1, *supra* note 7.
[908] *Ibid.*
[909] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 1st Sess (December 3, 1991) (Gord Mills), online: <http://hansardindex.ontla.on.ca/hansardeissue/35-1/l092.htm>.
[910] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 2nd Sess (April 27, 1992) (Robert Chiarelli), online: <http://www.olip.ontla.on.ca/hansardeissue/35-2/l012.htm> [Hansard April 27].
[911] Law Society of Upper Canada Continuing Professional Development Program, "Ontario's New Class Proceedings Act: Are You Prepared?" (Michael Cochrane, Chair), February 18, 1992, in Policy Development Division Counsel Correspondence Files, Class Proceedings – LSUC program February, 1992, CA226, RG 4-40, Box No B248501, Archives of Ontario [B248501 – LSUC]; Canadian Institute Program, "Righting Mass Wrongs: Ontario's New Class Proceedings Act" (Andrew Roman, Chair), March 3, 1992, in Policy Development Division Counsel Correspondence Files, Class Proceedings – Canadian Institute Conference March 1992, CA226, RG 4-40, Box No B248501, Archives of Ontario [B248501 – CI].
[912] Letter from Jill Bell, Acting Manager, Operations Support, Courts Administration, to Ann Merritt, Deputy Director, Policy Development Division at the MAG, March 24, 1992 [Bell Letter], in Policy Development Division Counsel Correspondence Files, Class Proceedings – Courts Administration, 1992, CA226, RG 4-40, Box No B703283, Archives of Ontario.

The second was directed to the Premier himself. Bernard Wilson, a chartered accountant at Price Waterhouse, told Bob Rae that class actions legislation would have an adverse impact on Ontario's economic competitiveness and would open the Pandora's Box of frivolous litigation.[914] Given that the Gang of Four had signed off on the legislation long ago, however, this was too little, too late. It is also strange that Wilson objected on behalf of an OCC committee, given the fact that the OCC was part of the Gang of Four. Rae did not even respond to Wilson's letter until after the Bills had received Royal Assent, and even then he got his Attorney General to write back.[915]

The Bills received third reading on April 27, 1992.[916] Again, they received widespread support and there was very little debate about the substantive details of the Bills or the concept of reform. The major controversy regarded the significant delay in the passage of the Bills, with Hampton announcing for the first time that his government needed six months from Royal Assent to take the several steps necessary for the Bills to come into force. Several MPPs asked, justifiably, why none of these steps had been taken when the government was fairly confident that the legislation would be passed.[917] In the end result, the Bills passed third reading and received Royal Assent on June 25, 1992.[918]

As Hampton had noted, numerous tasks needed to be completed before the CPA and the LSAA were proclaimed into force.[919] First, the Class Proceedings Fund had to be designed and funds put in place so the CPF would be ready to receive applications.

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[913] Bell Letter, *ibid*, handwritten note (unknown author), that states, "Called Jill March 31/92 to discuss." There appears to be no further correspondence to or from Courts Administration in the archival record.
[914] Letter from Bernard Wilson to Bob Rae, April 15, 1992, copied to all members of the Ontario Business Advisory Council (a committee of the Ontario Chamber of Commerce), in B703283 – Bill 28 and 29, *supra* note 564.
[915] Letter from Hampton to Wilson, July 7, 1992, in B703283 – Bill 28 and 29, *ibid.* Hampton once again emphasized the unanimous nature of the Advisory Committee's recommendations (at 2), and reassured Wilson about the gatekeeping function of traditional costs rules (at 4). He also made clear that economic competitiveness had to be balanced with the government's commitment to access to justice (at 5).
[916] Hansard April 27, *supra* note 910 (Howard Hampton). The debate was adjourned until May 4, 1992 (David Winninger, on behalf of Howard Hampton), online: <http://hansardindex.ontla.on.ca/hansardeissue/35-2/l016.htm> [Hansard May 4].
[917] Hansard April 27, *ibid* (Robert Chiarelli; Steven Offer; Chris Stockwell; Charles Harnick); Hansard May 4, *ibid* (Robert Chiarelli; Elinor Caplan).
[918] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 2nd Sess (June 25, 1992) (Deborah Deller), online: <http://hansardindex.ontla.on.ca/hansardeissue/35-2/l043b.htm>.
[919] Hansard April 27, *supra* note 910 (Howard Hampton); Larry Fox, PDD Counsel, Briefing Note Re: Implementation of Bills 28 and 29 (April 9, 1992), in Policy Development Division Counsel Correspondence Files, Class Proceedings – Briefing Notes, 1992, CR, RG 4-40, Box No B703283, Archives of Ontario [B703283 – Briefing Notes].

Second, the rules of civil procedure needed to be adapted to accommodate class actions. Third, the Law Society of Upper Canada needed to be consulted on whether changes to the Rules of Professional Conduct were necessary to take into account various ethical concerns. Fourth, the judiciary, lawyers and the public needed to be educated on the impact of the new legislation. In addition, Courts Administration had to be prepared for the tracking and registry of class proceedings.[920]

All these tasks had to be completed following considerable turnover at the Policy Development Division. Michael Cochrane left the MAG in mid-March 1992. With his work on class action reform (and other projects such as the *Environmental Bill of Rights*) largely completed, Cochrane decided to leave government for private practice.[921] Carmen Rogers and Larry Fox would continue his work in the Policy Development Division. Fox had been a Legal Research Officer at the Ontario Law Reform Commission and had done considerable work on its Report on Class Actions, particularly with regard to costs. Another former OLRC Legal Research Officer, Ann Merritt, became Deputy Director of the PDD. While there was a changing of the guard at the PDD, therefore, the new faces were in fact very experienced in class actions policy and reform.

The major task facing the MAG was the issue of funding. A deal had been struck whereby the Law Foundation of Ontario would contribute $500,000 as seed money for the Class Proceedings Fund and would also administer it.[922] However, an advisory committee still had to be set up to develop the structure, administration and procedures for the Fund; regulations had to be written and enacted; and a Class Proceedings Committee had to be established that would process applications for funding.[923]

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[920] This was taken care of fairly easily, with the preparation of a supplement to the Court Procedures Manual which was finalized in December 1992. The manual also addressed the collection of statistical data on class proceedings: Briefing Note prepared by Carmen Rogers and Larry Fox, November 17, 1992, at 1, in B703283 – Briefing Notes, *ibid.*

[921] Bell Letter, *supra* note 912. Although he went to Scott & Aylen, Ian Scott's family firm, Cochrane's decision to do so was nothing to do with Scott (the firm was at that time run by David Scott, Ian's brother): email correspondence with Michael Cochrane, July 6, 2016. Ian Scott returned to his previous firm of Gowling, Strathy & Henderson upon his retirement from the legislature, and also began teaching at Osgoode Hall Law School: Scott, *supra* note 56 at 207.

[922] Hansard June 12, *supra* note 855 (Ian Scott).

[923] Hansard April 27, *supra* note 910 (Howard Hampton).

This process was complex and extensive.[924] What is particularly notable, however, is that the advisory committee process was deliberately different from that used with the CPA. The Policy Development Division acknowledged that it would be useful to have some of the representatives of the Attorney General's Advisory Committee on the Fund Advisory Committee;[925] however, they did not want to simply "use the old group,"[926] because that would increase the risk that the AGAC would expect the same consultation process to be used for the Fund.[927] This time, there would be no promise of a public report; the Fund Advisory Committee "was structured as an advisory committee only",[928] simply providing advice to the Attorney General.[929] Members were not asked to reach consensus on issues, and no "sign off" was requested.[930]

As the PDD explicitly stated in its final report to the Attorney General on the Class Proceedings Fund, the report was not a "Committee" report as the AGAC Report had been, but was prepared by the PDD and simply drew on the advice of the committee members.[931] In this second process, the PDD therefore gave much less power to the parties with whom it consulted. The CPA had by this time received its third reading,[932] and the PDD was only too familiar with the control that had been exerted over that legislation, particularly by the business interests. Consultations on the Fund – a mechanism constructed specifically for plaintiffs – were different.

In addition to the Fund, changes also had to be made to the rules of civil procedure in order to reflect the new legislation. Fortunately, relatively little work was

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[924] Full details on the administration of the Fund and applications for financial assistance are provided in the Report to the Attorney General re: Implementation of Bill 29 (the LSAA), November 29, 1992 [Fund Report], in B703283 – CPA Regulations, *supra* note 819. The Fund covered plaintiffs' disbursements and indemnified them against an adverse costs award, but did not cover the fees of plaintiffs' counsel.
[925] Larry Fox, Briefing Note on Class Proceedings Fund, April 27, 1992 [Fund Briefing Note], in B703283 – Briefing Notes, *supra* note 919. Two of the AGAC members (Terry O'Sullivan for the Advocates' Society and Edward Belobaba for the Consumers' Association of Canada) sat on the Fund Advisory Committee: Fund Report, *ibid*.
[926] Annotation by Doug Ewart on letter to him from Chris Happel, Legislative Assistant to the Attorney General, re: Advisory Committee for Fund, March 31, 1992, in Policy Development Division Counsel Correspondence Files, Class Proceedings Committee, 1992-1993, CR, RG 4-40, Box No B703283, Archives of Ontario.
[927] Fund Briefing Note, *supra* note 925.
[928] Fund Report, *supra* note 924.
[929] Fund Briefing Note, *supra* note 925.
[930] Fund Report, *supra* note 924; Fund Briefing Note, *ibid*.
[931] Fund Report, *ibid*; Fund Briefing Note, *ibid*.
[932] Hansard April 27, *supra* note 910.

needed on this front.[933] Rule 12 needed to be revoked, and replaced with a rule that took into account class proceedings: to allow for court staff to identify and register class proceedings; with regard to discovery of class members other than the representative plaintiffs; to allow the Law Foundation to make submissions to the court on the issue of costs in funded cases; to remove the costs consequences of offers to settle where the case was funded; and to require that any judgment or settlement approval order of a funded case deal with how the Law Foundation's levy would be paid.[934] The Rules Committee reviewed these recommended changes on November 24, 1992,[935] and six weeks later the new Rule 12 came into force.[936]

The ethical issues arising from class actions also had to be considered. On August 18, 1992, Larry Fox wrote to the Senior Counsel for Professional Conduct at the Law Society of Upper Canada, on the subject of whether the Professional Conduct Handbook should be amended to accommodate the ethical issues arising from class proceedings.[937] These included the duty of class counsel to represent the interests of both the representative plaintiff and class members, and where conflicts of interests could arise; sharing information among class members and whether that would breach the duty of confidentiality; whether special written retainers were required in order to clarify the duties of class counsel; the use of contingency fees; advertising to class members and making public statements. The LSUC decided not to amend the Rules of Professional Conduct, but instead issued a set of guidelines entitled, "The Challenges of Class Proceedings for Civil Litigators".[938]

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[933] Letter from Larry Fox to the Honourable Mr. Justice RS Montgomery, Ontario Court (General Division), Civil Rules Committee, October 22, 1992, in Policy Development Division Counsel Correspondence Files, Class Proceedings – Rules of Court, 1992-1993, CA226, RG 4-40, Box No B703283, Archives of Ontario [B703283 – Rules].

[934] Memorandum of the Civil Rules Secretariat, re: Rules to fit with the *Class Proceedings Act, 1992*, October 22, 1992 (enclosure to letter from Fox to Montgomery, *ibid*), in B703283 – Rules, *ibid.*

[935] Letter from Fox to Montgomery, *ibid.*

[936] Ontario Gazette, Vol 126-1, Reg 770/92, January 2, 1993 at 20-21 [CPA into force], in B703283 – Rules, *supra* note 933.

[937] Fox to Stephen Traviss, Senior Counsel, Professional Conduct, LSUC, August 18, 1992, in Policy Development Division Counsel Correspondence Files, Class Proceedings – Ethics, 1992, CA226, RG 4-40, Box No B703283, Archives of Ontario [B703283 – Ethics].

[938] Law Society of Upper Canada, *The Challenges of Class Proceedings for Civil Litigators* (Toronto: LSUC, 1992). These guidelines were mentioned in an LSUC circular (Vol 2, No 2; November 1992), which in turn were attached to a letter from Traviss to Rogers, November 18, 1992, in B703283 – Ethics, *ibid.* Traviss stated in this letter that Michael Cochrane was drafting the guidelines, which indicates that Cochrane continued to be involved in the work of finalizing the CPA even after leaving government. A

That left the issue of education. Numerous conferences had been held in order to educate lawyers and the judiciary,[939] and the MAG had also corresponded with other Ministries and provinces on the subject.[940] However, the public also needed to be informed about the effects of the new legislation. The MAG had already released a backgrounder with the details of the CPA and the LSAA,[941] and in November 1992 it also developed a communications plan.[942] This plan noted that, despite the unanimous nature of the Advisory Committee's recommendations, the CPA was still controversial amongst some groups (particularly business interests).[943] However, other sections of the population, particularly consumer groups, had greeted the legislation with enthusiasm,[944] and some even praised the collaborative nature of the Attorney General's Advisory Committee and its unanimous consensus.[945] The MAG through its communications plan also took pains to emphasize this consensus, as well as the access to justice dimensions of the new statutes.[946] Overall, the news articles published around the time of third reading and proclamation reveal a high level of awareness about the legislation. The release of the Attorney General's Advisory Committee Report, as well as high-profile cases such as *Naken*, appear to have made an impression on the public consciousness.[947]

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change to the Rules of Professional Conduct would have been preferable to guidelines, given the numerous ethical challenges that have since arisen in the context of class actions in Ontario.

[939] B248501 – LSUC and B248501 – CI, *supra* note 911.

[940] See, for example, memorandum to Larry Fox from Christopher Ferguson, Policy Analyst, Ministry of Consumer and Commercial Relations, re: Class Proceedings in Ontario, October 26, 1992, in Policy Development Division Counsel correspondence files, Class Proceedings – Miscellaneous, 1989-1992, CR, RG 4-40, Box No B703283, Archives of Ontario. Ferguson wanted information for use by his Deputy Minister at a federal-provincial Deputy Ministers' conference on class actions, which took place in Victoria, BC, on November 12-13, 1992. Ferguson particularly wanted to know why the legislation had not yet been proclaimed into force.

[941] MG Cochrane, *Class Proceedings in Ontario: Backgrounder* (Toronto: Ministry of the Attorney General, 1990), in B248633 – Miscellaneous Material, *supra* note 305.

[942] Class Proceedings Communication Plan, MAG Communications Division [MAG Communications Plan], in B248633 – Miscellaneous Material, *ibid*. This document is undated but appears to have been prepared in November 1992.

[943] MAG Communications Plan, *ibid*, at 3. See also D Best, "Coming soon: legal excess, US-style", *Financial Times of Canada* (March 9, 1992) [Best], referred to in MAG Communications Plan, *ibid*, at 3. Best's article states that class actions and contingency fees will lead to a major change in the way Canadian courts do business, towards the more litigious US model.

[944] *Ibid* at 2-3. See also T Williams, "Class action suits: laws are welcome news for consumers", *Toronto Sun* (November 7, 1992), p 77, in PDD Media, *supra* note 154.

[945] C Bernstein, "Proposed new class action law shows how rules should be made", *Toronto Star* (May 5, 1991), F6, in PDD Media, *ibid.*

[946] MAG Communications Plan, *supra* note 942 at 4.

[947] See, for example, Lemon Car Legacy, *supra* note 154. This article outlines the events leading up to the *Naken* decision, and the effect that decision had on the movement for class action reform.

On January 1, 1993, the CPA and LSAA came into force.[948] A MAG news release put out shortly thereafter explained the basics of the CPA and the Fund, and provided information to the public on how to start a class action lawsuit.[949] It did not take long for the public to do so, with the first lawsuit under the CPA being issued less than two weeks later.[950] Canadian Tire credit card holders alleged that their agreements with Canadian Tire were in violation of section 4 of the federal *Interest Act*, and sought $800 million in interest plus damages.[951] The lawsuit garnered fairly extensive news coverage,[952] which provided further awareness of the new legislation and the manner in which it could be used by consumers and others.

However, the first class action under the CPA also served as a warning to the others that would follow. It was dismissed on a Rule 20 motion, with Justice Winkler for the Ontario Divisional Court finding that the credit card agreements were not in violation of the *Interest Act* on a plain reading of that statute.[953] A subsequent judgment on the issue of costs found that there had been serious improprieties akin to champerty or maintenance, with a non-party conducting and basically profiting from the proceedings, and promising a reward that was not available under the CPA.[954] The non-party, Larry Whaley, had set up a corporation called the Borrowers Action Society to solicit contributions from credit card holders towards the costs of this and other class proceedings against credit card companies.[955] The "investors" were promised between 10 and 30 per cent of any settlement or judgment in favour of the Society. While a different

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[948] CPA into force, *supra* note 936.
[949] MAG News Release, "Class Proceedings Legislation Expands Access to Justice", January 7, 1993, with backgrounder, in Policy Development Division Counsel Correspondence Files, Legislation 1992-1993, CA226, RG 4-40, Box No B807794, Archives of Ontario.
[950] Press Release, "Credit Card Class Action Seeks $800 Million Plus Interest", January 18, 1993 (Toronto, ON) [Canadian Tire Class Action], PDD Media, *supra* note 154.
[951] Canadian Tire Class Action, *ibid.*
[952] See, for example, J Heinzl, "Canadian Tire faces lawsuit: borrowers dispute interest charges", *Globe & Mail* (January 9, 1993), B3; and L Ainsworth, "Ontario's class action laws face first test", *Toronto Star* (January 16, 1993), PA14. Both articles can be found in PDD Media, *supra* note 154.
[953] *Smith v Canadian Tire Acceptance Ltd,* 1994 CanLII 7298 (ON SC), dismissed on appeal: 1995 CanLII 3152 (ON CA).
[954] *Smith v Canadian Tire Acceptance Ltd*, 1995 CanLII 7163 (ON SC) [Smith 1995].
[955] D Carlson, "Ontario's Class-Action Law to Get its First Test", *Law Times* (January-February 1993); L Ainsworth, "Class action suit filed against Canadian Tire", *Toronto Star* (March 16, 1993), PC1. Both of these articles can be found in PDD Media, *supra* note 154. Both reported that Whaley was soliciting contributions from class members, and the Star article reports that class members had to pay a fee to register their credit cards with the Borrowers Action Society.

representative plaintiff was put forward in order to shield Whaley from an adverse costs award, he personally gained from the lawsuit by paying himself a salary from the Society.[956] Justice Winkler awarded costs on a solicitor-client basis[957] against Mr. Whaley and the Society, holding that they were the "real" plaintiffs who had instigated the action. The financial consequences would have been devastating, given that the plaintiffs subsequently appealed the costs judgment and sought leave to appeal to the Supreme Court of Canada (which was denied with costs).[958]

This case had a chilling effect on entrepreneurial lawyers who might have been tempted to use the costs provisions of the CPA to generate a profit.[959] Class actions were not as easy to bring as many in the business community had previously thought, and, while the CPA aimed to level the playing field for plaintiffs in terms of costs, it was not a boon to avaricious lawyers nor a tool for promoting litigation.[960] It was to be many years, and indeed the turn of the millennium, before the CPA began to be used on anything like a widespread basis. The fears that it would open the floodgates of litigation have never been realized, and in fact the certification requirement has become burdensome for plaintiffs far beyond that envisaged by the members of the Attorney General's Advisory Committee.[961] Nearly 25 years later, the CPA is now under review by the Law Commission of Ontario due to various issues that have arisen – including those related to costs – that were never foreseen by its authors.

H. Conclusion

Many of the issues that have arisen since the inception of the CPA are a result of the influence of various private interest groups that held sway over the debate and passage of the legislation. The public interest theory of regulation has been the dominant paradigm

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[956] Smith 1995, *supra* note 954. See also "Caught In a Trap - Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings", speech by The Honourable Chief Justice Warren K Winkler, online: <http://www.ontariocourts.on.ca/coa/en/ps/speeches/caught.htm> [Winkler Speech].
[957] Known today as substantial indemnity costs.
[958] *Smith v Canadian Tire Acceptance Ltd,* 1995 CanLII 2281 (ON CA); application for leave to appeal to the Supreme Court of Canada dismissed with costs October 3, 1996 (La Forest, Cory and Major JJ), SCC File no 25080, SCC Bulletin, 1996, p 1559. It is unlikely that the Fund would have paid these costs, given that its role was to indemnify plaintiffs for adverse cost awards, not lawyers personally.
[959] Winkler Speech, *supra* note 956.
[960] Smith 1995, *supra* note 954.
[961] AC Member Interview, *supra* note 12.

in the literature on the history of class proceedings. As stated in Chapter 1, scholars such as Bill Bogart and Shaun Finn have focused on consumers and the environment, seeing class actions legislation as a counterbalance to the exploitation of both.[962]

Public interest theory posits that legislation is enacted to correct market failures.[963] These market failures arise in a number of circumstances. For example, natural monopolies arise due to the infrastructure cost of providing a service, such as electricity, thereby driving up the price for consumers. Externalities such as air pollution affect consumers, but because those externalities are not fully incorporated into the price of a product, there is little incentive for manufacturers to change their behaviour.[964]

The non-economic perspective on public interest theory sees the issue in terms of the protection of vulnerable groups or the fair distribution of resources.[965] In the context of class actions, for example, regulation seeks to protect the interests of consumers. If such consumers were overcharged $10 for a product, for example, they would not sue the corporation individually as it would not be economically worthwhile. A class action would aggregate the individual claims, preventing the unjust enrichment of the corporation at the cost of the consumer, ensuring the fair distribution of resources and protecting the vulnerable consumer's interests.

However, the genesis of class actions in Ontario reveals that private interests were just as important, if not more, in the creation of the legislation.[966] The historical record demonstrates that, while Scott and Cochrane intended class actions legislation to serve a public interest purpose, in fact the legislative process was co-opted or "captured" by private interests, notably the Gang of Four and other business groups.[967]

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[962] Finn 2005, *supra* note 20; Finn 2011, *supra* note 20; Bogart 2007, *supra* note 20.
[963] Ogus, *supra* note 19 at 55.
[964] *Ibid* at 29-46. Backhaus, *supra* note 21 at 71-72.
[965] Ogus, *ibid*, at 46-54.
[966] This reflects a general trend whereby neoliberalism erodes the regulatory capacity and public accountability of states (which empower citizen stakeholders) in favour of unaccountable private interest networks (which empower entrenched corporate interests): A Sisson Runyan and V Spike Peterson, *Global Gender Issues in the New Millennium*, 4th ed (Boulder, CO: Westview Press, 2014) at 199.
[967] Interestingly, this "capture" theory also includes legislators' private interests, which can include a desire to make an imprint on history (Ogus, *supra* note 19 at 67). This could well have been one of Scott's primary motives. Scott stated in his memoirs that, "the legislation allowing class actions may be the most important legacy of my time as attorney general" (Scott, *supra* note 56 at 182). Ogus also applies this analysis to bureaucrats (Ogus, *supra* note 19 at 68), and Cochrane very likely had similar motives. As Peter Woolford of the Retail Council of Canada put it, "[t]hey were trying to get legislation for the ages" (Woolford Interview, *supra* note 514).

Anthony Ogus and other scholars of law and economics[968] have articulated this "capture" theory. Essentially, regulatory agencies are stymied in meeting their public interest goals because they have been subverted by pressure and influence to protect the interests of those who were the subjects of the regulation.[969] This is particularly so in circumstances when such agencies conduct their work away from the public gaze; when certain information required by the agency is only obtainable from the regulated industries; when the agency must rely on the expertise of officials from those industries; and when those industries have the power to exercise some kind of veto or ability to obstruct the agency's work.[970] The historical record shows that these circumstances were in play when class proceedings legislation was being considered in Ontario:

i) The Attorney General's Advisory Committee conducted its work away from the public gaze. Its terms of reference and its Report were public, but the deliberations of its members were confidential, leaving room for influence by corporate representatives such as Norm Stewart;

ii) Scott and Cochrane needed the Gang of Four, not only for the information they could provide as to how class actions would affect corporate interests (a perspective that had been sorely lacking from the OLRC Report), but also for their ability to represent the views of their constituents. The membership network of the CMA alone, for example, accounted for approximately 75 per cent of all Canadian manufacturing production;[971] and

iii) The Gang of Four had the power to stop the work of the Attorney General's Advisory Committee. Without their sign-off, there would have been no consensus and therefore no CPA. Cochrane explicitly stated that the business groups had a veto over class action reform,[972] and this enabled them to disproportionately influence the work of the Advisory Committee.

[968] See, for example, G Stigler, "Theory of Economic Regulation" (1971) 2:1 Bell Journal of Economics and Management Science 3 [Stigler].
[969] Ogus, *supra* note 19 at 57.
[970] *Ibid* at 57-58.
[971] CMA Letter 1983, *supra* note 401.
[972] Cochrane Interview 1, *supra* note 7.

The circumstances articulated above, however, applied equally to both the corporate and the consumer/environmental groups. What would enable the former to exercise more sway than the latter? And why did the latter not advance their position on class actions in Ontario as forcefully as they might have done? According to public choice theory that has expanded on the above analysis, there are two types of interest groups: those representing particular sectional interests (such as manufacturers or retailers), and those representing causes or ideologies (such as environmentalists or consumers).[973]

Each group is subject to the "free rider" problem, in that their members will benefit from the activities of the group even if they have not participated in those activities. The group will be less subject to this problem, however, if it is well-organized and able to exercise control over its members, which in turn will be made easier if the members' interests are homogenous. Effectiveness will be maximized where the group has a strong leadership that can require financial contributions and has the power to speak for the members. Sectional interests (such as the CMA and the Retail Council of Canada) fit this description; consumer and environmental groups (such as the Consumers' Association of Canada and Energy Probe), whose memberships tend to be much more diffuse, numerous and disparate in interest, and who rarely require financial contributions, do not. The pressure for a particular measure will be greater from a homogenous group whose members are heavily invested in and will derive direct benefits from the measure, than from a diffuse group whose members may or may not experience benefits and have little invested in the result.

As Ogus points out, therefore, this theory predicts that groups representing producers are likely to exert a greater influence on legislation than those representing consumers and other 'public' interests, such as the environment.[974] This also explains the central thesis of the work of Richard Posner and George Stigler, that "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."[975]

The irony of this scenario will not be lost on anyone familiar with the economics of class actions. Class actions are needed, ostensibly, because the interests of consumers

[973] Ogus, *supra* note 19 at 70.
[974] *Ibid* at 71; S Harnay and A Marciano, "Collective litigation versus legislation: a rent-seeking approach to class actions", in Backhaus, *supra* note 21 at 221.
[975] Stigler, *supra*, note 968 at 3; Posner, *supra* note 19.

and other citizens are diffuse, and the impact of corporate misbehaviour on each individual is relatively light. As a result, it is not financially viable to bring an individual action, and neither is it possible to join together those diffuse interests in one lawsuit without incurring huge transaction costs.[976] The same factors that necessitate class actions legislation, however, also ensure that consumers and other citizens have less influence on the shape of that legislation.

Ontario was no exception to this theory. Business interests with well-organized and well-resourced constituencies were successful, first in delaying class action reform and, when reform appeared inevitable, shaping that reform to be as conservative as possible, particularly with regard to costs. The disproportionate nature of this influence was made possible by the informal and non-public nature of the Advisory Committee's deliberations. The results changed the shape of the CPA and continue to be felt by class actions lawyers to this day.

[976] TS Ulen, "The economics of class action litigation", in Backhaus, *supra* note 21 at 79-81.

Chapter 5
Conclusion

The history of the *Class Proceedings Act* provides significant insights into the ways in which law reform can be brought about effectively. In this regard, the contrast between the OLRC Report and the AGAC Report are striking. A number of factors, both internal to the legislative process and external as part of the wider culture, ensured that the AGAC Report was successful in bringing about reform where its predecessor failed.

A. Wider Social and Cultural Context

A number of changes had taken place in the wider culture by the time the OLRC Report was tabled in the legislature in June 1982. For example, consumer and environmental rights had come to the forefront of the public consciousness, with reports being released throughout the 1970s promoting consumer rights in general and class actions in particular, as well as a number of environmental disasters raising awareness of the fragile state of the planet. The closely-related issue of standing was the subject of several court decisions in the 1970s and 1980s, which gave public interest litigants standing in certain circumstances. In the same vein, the *Charter* became part of Canadian law in 1982, giving citizens certain rights against the power of the State. The *Charter* would also see an increasing amount of power taken out of the hands of the legislature and given to judges, who would play more of an activist role in public interest litigation. These developments, which challenged the traditional two-party model of litigation and allowed judges a more active role in the cases before them, were to prove positive for the advent of class actions.[977]

In addition, by the time the OLRC Report was released, Ontario had the examples of the US and Québec on which to rely. The two jurisdictions were referred to extensively in both the OLRC and the AGAC Reports,[978] with reformers using various statistics to combat the argument that class actions would open the floodgates of litigation

[977] Interview with WA Bogart, April 1, 2016 [Bogart Interview].
[978] OLRC Report, *supra* note 2 at 50-69, 70-75, 214-278; AGAC Report, *supra* note 6 at 56-73 and Part II.

in the province. The findings of the Williston Report, which concluded that, "the present procedure concerning class actions is in a very serious state of disarray", were also a boost to proponents of class actions. The Supreme Court's judgment in *Naken*, that legislation was needed in order to enable class actions in Ontario, also seemed to be a victory for those pushing for reform.

However, the opponents of class actions remained intransigent in the face of the *Naken* decision, as evidenced by the submissions of business groups and the bar to the Ministry of the Attorney General. The OLRC Report and *Naken* brought the divisions on the subject of class action reform to the fore, but did nothing to heal them. This was likely the primary reason why McMurtry did not subsequently introduce class actions legislation, because the issue was simply too contentious – it is not surprising that a government on the eve of an election would not want to touch it.

By contrast, by the time Ian Scott was setting up consultations on class action reform in the late 1980s, the Liberal government was in a very strong position. It had been in power for two years with the help of the NDP (a party that was also sympathetic to the case for reform), and ostensibly had years ahead of it. In addition, the factors that had been favourable to the movement for reform in the early 1980s were now more mature and arguably more favourable: the example of Québec (and, to a lesser extent, of the US), and the influence of the *Charter*, which had undergone several years of litigation and which had made lawyers and the public more comfortable with the concept of judicial activism, collective rights and public interest standing. The absence of contingency fees was another major obstacle in the way of class actions (because few representative plaintiffs would choose to bear the financial burden of the class while having no greater an entitlement to any eventual damage award), and these were a particularly contentious part of the OLRC Report. By the time the Attorney General's Advisory Committee was discussing reform, however, contingency fees had been approved by the Law Society of Upper Canada and were receiving cautious acceptance amongst members of the bar. It was therefore easier for the Committee to recommend a court-supervised contingency fee.

Nevertheless, conditions were not entirely favourable for the Advisory Committee. There were still fears of US-style excesses,[979] and business groups continued in their opposition to various aspects of reform, a fact noted by Michael Cochrane.[980] These obstacles were faced by the authors of both the ORLC and the AGAC Reports. However, there were other key differences between the Reports that explained the success of the latter where the former had failed. Ian Scott and Michael Cochrane ensured that interest groups were prepared for the prospect of reform by organizing the Access to Justice Conference and attending the ULCC Conference, both in the summer of 1988. The OLRC, by contrast, conducted virtually no consultations before releasing its report in 1982, long after the Attorney General had referred the question of class actions to them. Scott and Cochrane, for their part, oversaw a unique consultation process that mediated between the various interest groups and drew together their positions, so that compromise on the subject of reform was possible.

B. The Consultation Process

More than anything else, it was Scott and Cochrane's unique consultation process that led to class actions reform in Ontario. While the initial consultations in December 1988 and the following months may seem cursory, in comparison to the usual lengthy and formal consultation processes engaged in by governments, they were still more substantial than the OLRC's almost non-existent process. It was not until after the OLRC Report was released, to heavy criticism from many quarters, that the Attorney General formally invited submissions from interested groups.

By contrast, Scott and Cochrane began their consultation process almost a year and a half before the AGAC Report was released. Better yet, the parties with whom the government was consulting were also the authors of the Report. Scott was well aware of the fate of the OLRC Report and the hackles it had raised in the business community; that was why he didn't simply introduce the OLRC's draft Act in the legislature upon becoming Attorney General. Instead, he was willing to drop the controversial OLRC draft

[979] MAG Communications Plan, *supra* note 942; Best, *supra* note 943.
[980] Cochrane handwritten notes, *supra* note 525 at 18.

Act, start from scratch and have a new Act drafted by the interest groups themselves.[981] In negotiating with these groups, Scott and Cochrane often overreached and concluded that consensus had been reached or aspects of reform had been agreed to when in fact they hadn't, and Scott even stepped outside the bounds of his Cabinet mandate. Nevertheless, this "pushing" was never quite enough to drive away the interest groups (although at times it came fairly close), and it arguably speeded up the consultation process and made the groups realize that reform was going to happen, whether they liked it or not.

The "pushiness" of Scott and Cochrane was combined with a willingness to mediate and compromise, in order to reach agreement on the terms of reference of the Attorney General's Advisory Committee. These terms of reference were key to the success of the Report.[982] The Ministry of the Attorney General's initial consultations were aimed at securing the interest groups' commitment to reform around the terms of reference, so that a public announcement could be made stating that: (a) reform would be taking place, (b) certain widely representative groups would be discussing the shape of that reform, and (c) the discussions would revolve around fixed terms of reference which were not up for negotiation. To a certain extent, the shape of reform had been decided even before the Attorney General's Advisory Committee had its first meeting. The terms of reference meant the interest groups were publicly committed to reform[983] and could not leave the negotiating table without appearing to go back on their word. In exchange for agreeing to these terms of reference, Scott promised the members of the Committee that he would carry forward their recommendations to Cabinet. This was important to the Committee, who knew that their efforts would not be wasted.[984]

The process by which the Attorney General's Advisory Committee deliberated was also unique. It reflected a method that Michael Cochrane has dubbed the "Principled

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[981] Michael Cochrane encouraged Environment Minister Ruth Grier to do the same with the *Environmental Bill of Rights* – in other words, to drop the draft Act as detailed in her Private Member's Bill, and bring the various interest groups to the negotiating table with entirely new terms of reference: Cochrane Interview 1, *supra* note 7.
[982] Cochrane Principled Negotiation, *supra* note 5 at 6.
[983] *Ibid.*
[984] *Ibid*, at 2 and 6.

Negotiation of Public Policy."[985] The discussions of the Committee were interest-based, rather than positional: for example, business groups did not approach the negotiating table simply stating that, "class actions are bad for business", but they instead negotiated the various aspects of reform in ways that would benefit business.[986] Because consumer and environmental groups did the same, the final product was a compromise that would benefit all the groups to some degree. In addition, abandoning a positional approach meant that each of the groups at the table were more likely to listen to each other on the various aspects of reform, so that, for example, consumer groups could see why business groups would want to retain the traditional costs rules.[987] The unique nature of this process was noted, and appreciated, by several members of the Committee. This included Norm Stewart who, when making submissions to a Standing Committee nearly a decade later with regard to changes to competition legislation, stated that the process was ideal for framework legislation such as the CPA:

> They also work well when you have a contentious issue, where there is or has been some opposing views by various groups in society, and there's a need to legislate. Where you can bring those groups together in a strong framework, strong terms of reference, and with a careful chairperson to guide the process, you can reach a consensus you wouldn't ordinarily reach … It's worked well in Ontario with their *Class Proceedings Act* and their *Environmental Bill of Rights* Act…[988]

David Poch, for the Canadian Environmental Law Association and Energy Probe, also stated that, because of the opportunity to educate and be educated and to share goodwill with one's opponents, the process "was quite different from the usual multi-stakeholder consultation in which opposing viewpoints are presented to government with no

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[985] Cochrane's process is unique in that it has rarely been attempted outside of a certain number of contexts: namely, the *Class Proceedings Act*, the Hamilton-Wentworth Mediation Pilot Project (in family law), and the *Environmental Bill of Rights*. Cochrane spoke to Bob Rae about using the process for labour legislation, but this never materialized: Cochrane Interview 1, *supra* note 7. There is evidence that a similar process was used for amendments to the *Competition Act*, which came into force in March 1999: Bill C-20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Industry, May 6, 1998 (Norman Stewart and Peter Woolford), online: Parliament of Canada <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1038689&Language=E&Mode=1&Parl=36&Ses=1> [*Competition Act Amendment* oral hearing].

[986] Cochrane Principled Negotiation, *supra* note 5 at 3-4, 6-7.

[987] *Ibid*, at 6-7; Cochrane Interview 1, *supra* note 7.

[988] *Competition Act Amendment* oral hearing, *supra* note 985.

resolution to the debate except by fiat."[989] Several other members of the Committee have praised the Principled Negotiation concept in similar terms.[990]

Through this mediation-style process, the groups were able to reach a consensus and come up with unanimous recommendations for reform. According to the Principled Negotiation model, such unanimity eliminates the political risk for the Minister concerned because it demonstrates a broad base of support. In exchange, the Minister agrees to use her authority to promote the recommended reforms.[991] This is exactly what happened with the *Class Proceedings Act*: the Advisory Committee reached consensus on their recommendations, and Scott and Cochrane ensured they were enacted, unchanged, into legislation.

The Principled Negotiation approach is a combination of a strong point of American politics (the very active involvement of interest groups and stakeholders in policy development) and a strength of Canadian politics (powerful Cabinet Ministers who can single-handedly make reform happen in certain circumstances).[992] In the case of class action reform, the members of the Advisory Committee were motivated to reach a consensus because they knew that it would result in legislation that would be pushed through by Ian Scott. Scott was not just any Cabinet Minister; he had the force of personality and the political adroitness to push through class reform, and the unanimity of the AGAC Report enabled him to do just that.

The consensus of the Advisory Committee stands in stark contrast to the divided nature of the OLRC Report. However reasonable it was, the dissent of OLRC Chairman Derek Mendes da Costa substantially undermined the strength of the Report. He dissented not only on the crucial issue of costs, but also on five other major issues.[993] Even supporters of class action reform observed that, "[t]he proposals appear to be the

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[989] Letter from Poch to Cochrane, January 10, 1990, Policy Development Division Counsel correspondence files, RG 4-40, Box No B248633, Archives of Ontario, at 1-2 [Poch Jan 10]. Poch added a few cautions, noting first that not every constituency was represented at the table, and that less well-financed groups would benefit from government funding to remedy this; second, that the government should avoid viewpoints that were too polarized, but at the same time should not paper over differences in opinion; and finally, that the success of any such consultation depended upon knowledgeable support from within the Ministry (as happened here) and the political will to follow through with any recommendations.

[990] Woolford Interview, *supra* note 514; Woolford Interview 2, *supra* note 590; AC Member Interview, *supra* note 12.

[991] Cochrane Principled Negotiation, *supra* note 5 at 5.

[992] *Ibid* at 4.

[993] Chairman's Reservations, *supra* note 438.

product of different minds and sets of values."[994] The divisions and philosophical inconsistencies apparent in the OLRC Report are undoubtedly one of the reasons why McMurtry never introduced the draft Act as legislation. If the OLRC itself could not come to agreement, what hope was there for the massively divided stakeholders?

By contrast, Scott's insistence that the Advisory Committee reach a consensus meant that he was able to present the legislature and any opponents with a united front – it would be very difficult to oppose a Report on which most of the key stakeholders had signed off.[995] In this way, Scott was able to pull together the many divergent interests and break the logjam on class action reform. Scott's strength of personality and his skills as a Minister, combined with the Principled Negotiation approach, are the main reasons why the AGAC Report succeeded where the OLRC Report did not.

C. The Recommendations

It was not only the unanimous nature of the Advisory Committee's recommendations that made its Report so influential; it was also the nature and timing of its recommendations. The AGAC Report departed as little as possible from the established rules of civil procedure, because each step away from the established rules would lead to more opposition.[996] That is one of the reasons why the Report did not depart from the traditional costs rules; not only did the business interests strongly oppose such a change, but Cochrane as well as the consumer and environmental representatives knew that this departure would undermine the unanimity of the draft Act and make it much more difficult to "sell". The AGAC Report had to chart a course between the desire of consumer and environmental groups to use class actions to enforce and advance their rights, and the desire of the business groups to adhere to the traditional rules of court and not change the substantive law.[997]

The OLRC Report, on the other hand, departed quite drastically from the established rules. Not only did it recommend that traditional costs rules not apply to class

[994] Roman article 1988, *supra* note 406 at 1.
[995] AC Member Interview, *supra* note 12.
[996] Bogart Interview, *supra* note 977.
[997] Faced with the same situation in the US, Marcus writes that "decision-makers [have] muddle[d] through without picking sides", enabling the two desires to coexist by maintaining an ambiguity in the interpretation of class action doctrine: *supra* note 44 at 10.

actions; it recommended that the Attorney General have a right to intervene in private civil litigation; it would allow courts to enquire as to the competence of plaintiffs' counsel; and it would make class members take part in litigation unless the court gave them leave to opt out. Such recommendations indeed gave the OLRC Report an unrealistic air; a sense that these proposals would put an unacceptable burden on the civil litigation system.

This may have been a product of the authors of the Report, very few of whom were actively involved in litigation at the time of writing. The OLRC did have an Advisory Committee on which several practicing lawyers sat; however, this Committee never met, and it does not appear as if any of its members were ever consulted with regards to the OLRC Report.[998] This factor left the Report open to accusations of "academic perfectionism" and a failure to "correct real world problems".[999] It might also explain the length of the Report, which, at nearly 900 pages, was read by very few people with more pressing things to do. The OLRC Report was repetitive, meandering, and read like a series of largely unedited essays by a number of different people; indeed, that is exactly what it was. This, in turn, would explain the length of time the Report took to write. The timing of the OLRC Report was very poor. The fact that it took six years to write meant that any momentum the movement for reform might have had in 1976, when McMurtry wrote his reference, had long since dissipated by 1982. If it had not been for the *Naken* decision and the fact that Scott picked up the cause of class action reform later in the decade, the OLRC Report might have disappeared into obscurity entirely.

The Attorney General's Advisory Committee was very different in composition to the group that authored the OLRC Report. More than half of the Committee were practicing lawyers; where they were not lawyers, they were representatives with significant experience in their area of industry.[1000] They were not only knowledgeable, they also represented a fairly wide cross-section of the groups that would be affected by the CPA.[1001] They knew from everyday experience how class actions would interact with the courts, the legal profession and business. Furthermore, their recommendations

[998] Letters from Derek Mendes da Costa to members of the OLRC Advisory Committee on Class Actions, March 1982, in B380543, *supra* note 160.
[999] CMA Submission 1983, *supra* note 425.
[1000] Cochrane Interview 1, *supra* note 7.
[1001] Cochrane Principled Negotiation, *supra* note 5 at 6.

depended for their strength not on their length (the AGAC Report can be comfortably read in an hour), but on their simplicity and their unanimity. As one of the members of the Committee has put it, "[t]he unanimity of the product was essential. You don't even have to read the Report. It was unanimous."[1002]

The timing of the AGAC Report was also the result of political mastery. The Advisory Committee met over the course of at least six months, which enabled them to become educated about the other interests at the table and bring them closer to a compromise. It also enabled them to consult with their various constituencies to ensure that the consensus that was eventually reached was truly representative of those constituencies.[1003] However, the process did not last much longer than that. The Attorney General made his statement to the legislature regarding the consultation process at the end of June 1989, and the CPA received its first reading less than a year later. This meant that the Attorney General could capitalize on the momentum that he had successfully built up with the various conferences on class actions as well as the consultation process.[1004] He introduced legislation based on a unanimous report to a house that was well-informed and very supportive of reform. In light of this, it is no surprise that the only real controversy in the legislature, when the Bill was debated, was why it had taken so long to progress through its various readings.

D. Political Will

Another secret to the success of the AGAC Report was the political will behind it. The Principled Negotiation method advocated by Michael Cochrane dictates that the unanimity of a committee's recommendations must be matched with the political will to implement them.[1005] This was certainly true for the AGAC Report, which Ian Scott had the will and the ability to carry through into legislation. Both Ian Scott and Michael Cochrane made commitments to the Attorney General's Advisory Committee to get their

[1002] AC Member Interview, *supra* note 12.
[1003] Cochrane Principled Negotiation, *supra* note 5 at 7.
[1004] *Ibid.*
[1005] *Ibid* at 5.

draft legislation enacted without substantive changes,[1006] and this is indeed what happened, despite the submissions of unions and tenants' groups that the CPA be amended to include them.

Of course, Scott was part of a reformist government that had been largely sympathetic to his other changes, such as court reform and no-fault auto insurance. The NDP government that succeeded the Liberals in September 1990 was also sympathetic to the cause of class action reform. Politically, therefore, circumstances were in Scott's favour. It was his use of those circumstances, however, that led to the passage of the CPA. He knew that he needed to get the right people to the table and get them to agree on the shape of reform. Michael Cochrane's negotiating skills and training as a mediator were also crucial in bringing the Advisory Committee to agreement. Once agreement was reached, Scott (and Cochrane) also had the determination and the ability to manoeuvre the unanimous report through the legislature without substantive change.

The members of the Advisory Committee, as well as Cochrane himself and his superior, Doug Ewart, agree that Scott's personality was crucial to the successful enactment of class action reform.[1007] Peter Woolford, who attended the Committee meetings on behalf of the Retail Council of Canada (which was part of the Gang of Four), put it this way:[1008]

> I don't think the CPA would have happened without Mr. Scott. He was the driver, he was determined and had a brilliant legal mind. Everyone was deeply respectful of him and his skill and knowledge. Another Minister would not have had the credibility to get [the CPA] through. He was a very powerful Minister who clearly had the confidence of the Premier, and there was also the force of his personality. No Ian, no Act.

Members of the Advisory Committee praise Ian Scott as a masterful tactician[1009] who provided the leadership that class action reform needed, and that few other Attorneys General could have provided.[1010] He was not an average Attorney General; he not only

[1006] Cochrane June 5 1990, *supra* note 851; Cochrane Interview 1, *supra* note 7; AC Member Interview, *supra* note 12.
[1007] AC Member Interview, *supra* note 12.
[1008] Woolford Interview, *supra* note 514; Bogart Interview, *supra* note 977.
[1009] AC Member Interview, *supra* note 12.
[1010] Cochrane Interview 1, *supra* note 7.

ran his own Ministry without interference, but was very influential and had a significant role in the work of other Ministries.[1011] Doug Ewart recalls that Scott was, "rhetorically adept. He never really lost that cross-examination style. He had the power of persuasion to get things through Cabinet. He was a lovely man but you didn't want to get into an argument with him." The political determination of Ian Scott, combined with the unanimous support of the major stakeholders and the work of Michael Cochrane, meant that the CPA saw the light of day after decades of debate on class action reform,[1012] thereby leading the way for class actions legislation throughout the rest of Canada.[1013]

The political will behind the OLRC Report, by contrast, was clearly lukewarm at best. This was not due to any antipathy on McMurtry's part towards law reform in general: in fact, McMurtry was a very active Attorney General for whom reform was a major priority. During his tenure, he introduced 59 statutes that were passed by the Ontario Legislature.[1014] However, this enthusiasm did not extend to class actions. Following the release of the OLRC Report, the Attorney General did not introduce class actions legislation, despite the fact that the *Naken* court implicitly asked him to do so. It is not surprising that a certain amount of "criticism and cynicism set in as government used [the consultation process] to delay, rather than develop, reform",[1015] because the OLRC had not reported for six years and, even after that, there was no government commitment to implement its recommendations.[1016] If Ian Scott had not broken the logjam,[1017] class actions in Ontario could have stagnated for another decade,[1018] as happened in New Brunswick and British Columbia.

[1011] Ewart Interview, *supra* note 512.
[1012] AC Member Interview, *supra* note 12.
[1013] The only province that remains without class actions legislation is Prince Edward Island. Even here, a class action can be brought pursuant to the common law following the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, which distinguished and effectively overturned *Naken*.
[1014] McMurtry, *supra* note 56 at 198.
[1015] Cochrane Principled Negotiation, *supra* note 5 at 1.
[1016] *Ibid.*
[1017] Bogart 2007, *supra* note 20 at 3.
[1018] AC Member Interview, *supra* note 12.

E. Flaws in the Advisory Committee process

The Principled Negotiation method by which Scott and Cochrane successfully brought about class action reform was well received by almost all who observed it. It was praised in the legislature as "a collaboration process [that] make[s] people the real players."[1019] Members of the Advisory Committee also said that the method "was quite different from the usual multi-stakeholder consultation ... Here it seemed possible to obtain a result that satisfied everyone. One reason is the opportunity to educate one's enemy and be educated in turn. Another is due to the good will shared by all the participants."[1020] The process engendered a great deal of good will and was ultimately successful in bringing about class action reform. However, it was not without its flaws.

The main charge against the Principled Negotiation process is that it is anti-democratic. The process worked in the case of the CPA because the members of the Advisory Committee reached a consensus, in exchange for Scott's promise to get the legislation through the House unamended. In Cochrane's words, "[i]t is essentially an almost contractual relationship between the political forces in Cabinet and the public as represented by these key stakeholders."[1021] But who is party to that contract? This question raises two problems from the perspective of democracy.

The first is that there is no guarantee that the "key stakeholders" are truly representative of the public. The Attorney General's Advisory Committee was selected by Ian Scott, based on organizations with whom he had worked on other consultations.[1022] The assumption was that these organizations had the power to "veto" class action reform if they were not consulted.[1023] Once the Committee had been selected, the powerful business interests ensured that no further groups were invited to the table on the basis that the process would otherwise be unworkable.[1024] The fact that one man, or a small group of men, could decide who would sit at the negotiating table, does not seem

[1019] Hansard November 18, *supra* note 891 (Charles Harnick).
[1020] Poch Jan 10, *supra* note 989.
[1021] Cochrane Principled Negotiation, *supra* note 5 at 5.
[1022] Woolford Interview, *supra* note 514.
[1023] Cochrane Principled Negotiation, *supra* note 5 at 6.
[1024] Scott May 11 1989, *supra* note 678 at 9. See also Cochrane Principled Negotiation, *ibid*, at 6: "[t]he negotiating table can only accommodate so many voices."

especially democratic.[1025] Women's groups, especially, felt that they were not sufficiently represented in the debate on class actions reform.[1026] If the basis of the Principled Negotiation process is that the key stakeholders represent the public, the Attorney General's Advisory Committee arguably failed in this respect.[1027]

The representative nature of the Committee may also have been compromised by the fact that lobbying the government is expensive. Briefs need to be researched and written, meetings attended, vast amounts of material read. This all takes time and money. Groups with more resources are therefore more likely to lobby the government on certain issues and, when it comes to selecting an Advisory Committee, are more likely to be chosen because the Minister involved knows who they are. They can also afford to send a representative for monthly or weekly meetings. Once on the Committee, groups with more resources will have the time and money to be better prepared and better informed. As a result, financially less advantaged groups will be drowned out. This was arguably the case with the Attorney General's Advisory Committee. For example, Rollie Thompson, representative of the Consumers' Association of Canada, was unable to sit on the Committee due to cuts to CAC funding.[1028] The Retail Council of Canada, on the other hand, had numerous lawyers and marketing experts at its disposal.[1029] As David Poch, representative of the Canadian Environmental Law Association, pointed out:

> [T]he wealthier interests will always be able to pay for good representation in the consultation process. The situation is analogous to that of class actions – improved access is only valuable if you can also afford to get involved. Environmental groups, minority groups and other special interests that do not have a direct pecuniary interest or who are relatively poorer need both access and funding.[1030]

[1025] This is ironic, given Scott's self-avowed commitment to broad-based consultations on major policy decisions: Scott, *supra* note 56 at 144.
[1026] AGAC Minutes Nov 23 1989, *supra* note 697 at 16.
[1027] Poch Jan 10, *supra* note 989: "not every constituency was represented at the table." Poch did not refer to any constituencies specifically.
[1028] Thompson May 1 1989, *supra* note 684. The CAC was eventually able to retain Edward Belobaba to represent it.
[1029] Woolford Interview 2, *supra* note 590.
[1030] Poch Jan 10, *supra* note 989 at 1. See also Cochrane Interview 2, *supra* note 4.

Cochrane also admitted that funding would be required in order to make the Principled Negotiation process truly representative.[1031] The ability of better-resourced groups to make stronger and more frequent submissions was not unique to the Advisory Committee; this was also the case with the submissions on the Legislative Review Project, the OLRC Report and, before that, the debate on the *Competition Act*.

The second problem with the Principled Negotiation process is the implied promise by the Ministers involved that they will carry through the draft Act into legislation. In the case of class action reform, this effectively meant that the unanimous recommendations of the Committee were enacted into legislation without any meaningful democratic oversight by the legislature. As noted in Chapter 4, the Committee agreed upon a draft Act, and then undertook a clause-by-clause review of the Legislative Counsel's work to ensure that it complied with their draft and their consensus. Once this Bill was drafted, Scott and Cochrane ensured that it passed through the legislature without substantive amendment, over and above the submissions of unions and tenant groups, as well as some expressions of concern by various Ministers.

The lack of democratic oversight also meant that there was nothing stopping the more powerful representatives (*ie* the business groups) exerting an undue amount of influence on the creation of the CPA. These private interests used their influence to make the CPA as conservative as possible, especially with regard to costs. This began even before the Advisory Committee's first meeting. Due to the Gang of Four's influence, Ian Scott exceeded the terms of the Cabinet Minute authorizing consultations by dropping the no-way costs requirement from the terms of reference.

This was a politicization of the process that Ian Scott was virtually powerless to stop if he wanted a consensus. The Gang of Four held a veto power over class actions reform[1032] – Scott needed their support in order to obtain his unanimous Report, but if they did not support reform, it was very likely that it simply would not happen (which would be just fine from the business groups' standpoint). He had much more to lose from a failure to bring about reform (having announced publicly that it would happen) than the

[1031] Cochrane Principled Negotiation, *supra* note 5 at 7. On the funding of public participation in consultations, Ian Scott was of the same view: Scott and Anand, *supra* note 276.
[1032] In fact, both Scott and Premier David Peterson were of the view that the business groups had a veto over class actions reform – if they did not agree to it, it simply wouldn't happen: Cochrane Interview 1, *supra* note 7.

business groups. They were therefore able to blackmail Scott, playing to his desire for consensus. The group as a whole also did this with regard to the Fund, telling Scott that if he wanted class actions reform, his government would have to pay for it. Scott's need for unanimity meant that he was willing to make compromises, even against the terms of his government mandate.

F. Compromises made in the Advisory Committee process

The fact that there was little accountability to the consultation process also meant that compromises were made against the wishes of the legislature. As noted in Chapter 4, Ian Scott stepped outside the bounds of his Cabinet mandate by agreeing to terms of reference that were not reflected in the Cabinet Minute of June 21, 1989. This included dropping the term of reference that specifically mandated no-way costs. While the Secretary of the Cabinet picked up on the fact that Scott's public commitment to a new statute was beyond the bounds of his mandate, the other transgressions seem to have slipped by unnoticed. The government's public commitment to no-way costs, therefore, was simply dropped. Having been dropped as a public commitment, it was much easier to drop as part of the discussions of the Attorney General's Advisory Committee.

The consumer and environmental advocates were willing to back down on no-way costs in exchange for a no-merits certification test. In addition, plaintiffs would also be able to make use of contingency fee agreements, and could also apply to a Fund for financial assistance. The intent of the Advisory Committee was that plaintiffs would not have to pay up-front fees (their lawyers would assume these under a contingency fee agreement), and would be protected from any adverse cost awards by the Fund.[1033] In certain circumstances (for example, public interest cases), the court could also exercise its discretion not to award costs against the plaintiffs. The end result would be essentially the same as no-way costs, without departing too far from traditional costs rules.[1034] The expectation was also that a no-merits certification process would be fairly straightforward and consume relatively little time and resources.[1035]

[1033] AGAC Report, *supra* note 6 at 49-51, 58-61.
[1034] *Ibid*, at 56-61.
[1035] AGAC Minutes Nov 23 1989, *supra* note 697 at 4; AGAC Report, *ibid*, at 31.

Unfortunately, however, the practice of class actions has not reflected the hopes of the Advisory Committee. The Class Proceedings Committee (which administers the Fund) has proven quite conservative in its willingness to fund cases, and has only approved about two-thirds of applications to date.[1036] There is a general perception that it will only fund cases that are "sure bets". The application process for funding is quite labour intensive, and this, combined with the Committee's risk-averse approach which assesses the merits of the case and its chances of being certified,[1037] means that the vast majority of plaintiff lawyers simply choose not to apply for funding.[1038] Many instead have chosen to apply for third party litigation funding, which generally offers a better deal than the Fund's 10 per cent levy on any amount recovered. While the courts have held that such funding is not inherently champertous, it can become so in certain circumstances,[1039] and can certainly lead to self-dealing as the interests of plaintiffs' counsel are more closely aligned with the funder than with the class or even their client.[1040]

With regard to the courts' discretion not to award costs against unsuccessful plaintiffs, pursuant to section 31 of the CPA, this discretion has been exercised quite sparingly. Decisions such as *Kerr v Danier Leather Inc*[1041] have demonstrated that the courts interpret this section permissively, and are not necessarily obligated to discount costs simply because the litigation involves the public interest.[1042] These decisions have placed something of a chill on such cases, with a fair amount of unpredictability that plaintiffs' counsel will be absolved from paying costs.[1043]

[1036] Law Foundation of Ontario, *Class Proceedings Fund: 20 Years in Review*, online: <http://www.lawfoundation.on.ca/wp-content/uploads/CPF-Brochure-2013.pdf> at 7, 14 [CPF Review].
[1037] Fund Report, *supra* note 924.
[1038] CPF Review, *supra* note 1036 at 1 (only 10% of all class actions in Ontario to date have received funding). This was predicted by Kent Roach in his review of Michael Cochrane's book (Cochrane 1993, *supra* note 27), in "Book Reviews" (1994) 23 Canadian Business Law Journal 156 at 159.
[1039] *Metzler Investment GMBH v Gildan Activewear Inc* (2009), 81 CPC (6th) 384 (ON SC).
[1040] LCO 2013, *supra* note 9 at 8.
[1041] 2007 SCC 44. See also *McCracken v Canadian National Railway*, 2012 ONSC 6838.
[1042] LCO 2013, *supra* note 9 at 9.
[1043] *Ibid.*

Certification, too, has proven much more onerous than the Advisory Committee anticipated. Motions can easily take more than a year to bring,[1044] and both sides file voluminous certification motion material, often going to the merits of the case. Certification hearings can last several days. The time and resources spent on the certification motion means that adverse costs awards against plaintiffs can be in the hundreds of thousands of dollars, especially if appeals are involved. Such awards can motivate plaintiffs to abandon any rights of appeal in exchange for a discount on costs, thereby compromising the rights of the class for reasons having nothing to do with the merits of the case.[1045]

The Advisory Committee made it clear that its recommendations on certification were closely intertwined with its recommendations on the Fund, contingency fees and traditional costs rules.[1046] However, there is serious doubt as to whether those recommendations are functioning as intended.[1047] Given that other provinces such as British Columbia, Manitoba, Saskatchewan and Newfoundland have the "no-way" costs rule,[1048] the Law Commission of Ontario has stated that, "[a] comparative analysis of the way in which adverse costs alter the landscape of class actions in Canada would assist to paint a clearer picture of its impact."[1049] Such a study has not been conducted to date,[1050] and would prove a fruitful avenue for future research. For now, however, it is clear that the costs provisions of the CPA are not functioning quite as the Advisory Committee intended, and may even be obstructing the goal of access to justice underlying the Act.[1051]

G. Conclusion

The Attorney General's Advisory Committee succeeded where the OLRC had failed. The Committee's success owed a great deal to the personality of Ian Scott, and the innovative consultation process that he set up with the help of Michael Cochrane. The collaborative

[1044] This is despite the requirement of section 2(3) of the CPA that certification motions be brought within 90 days of the date on which the last statement of defence, notice of intent to defend or notice of appearance is or should have been delivered.
[1045] LCO 2013, *supra* note 9 at 10.
[1046] AGAC Report, *supra* note 6 at 72; see also Cochrane May 28 1990, *supra* note 806 at 2.
[1047] LCO 2013, *supra* note 9 at 9.
[1048] *Ibid*.
[1049] *Ibid* at 10.
[1050] Correspondence from the Law Commission of Ontario, July 14, 2016.
[1051] LCO 2013, *supra* note 9 at 9.

nature of the AGAC Report and the political will with which it was carried forward into legislation explains its success. However, this success was not entirely democratic. The consensus of the Advisory Committee was admirable, but many groups remained shut out of this process, and the political "contract" that Ian Scott made with the Committee meant that the CPA was not subject to meaningful democratic oversight. In addition, the compromises that had to be made in order to reach unanimity were not without cost. Class actions came about in Ontario when they did because Ian Scott knew that consensus was the key, and that consensus involved negotiation and compromise. The compromises made for the sake of reform, however, are still being felt amongst class actions lawyers nearly a quarter of a century later.

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