Class Actions Statute 1995

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Civil Section Documents - A Uniform Class Actions Statute

By: Ruth Rogers, Ministry of the Attorney General of British Columbia

[See 1995 Proceedings at page 41.]

Introduction

This Discussion Paper has been prepared for the Uniform Law Conference to be held in August of 1995. Although it contains excerpts from the *British Columbia Class Proceedings Act* those excerpts are not intended as recommendations for a uniform bill. Instead, they are to be used to focus discussion on the issues that must be resolved before uniform legislation is drafted. Options for dealing with each issue are discussed and, in some cases, specific provisions are set out as examples. The discussion and examples are intended to assist in focussing the discussion, but comments related to details or issues not covered in the paper are welcome.

The drafters of the paper have relied heavily on the important work done by the Ontario Law Reform Commission (the "L.R.C.") in its 1982 three volume report on class actions. We have also used legislative provisions from various jurisdictions as examples of how specific issues may be dealt with. In particular, we refer frequently to the Ontario L.R.C.'s draft bill, the Ontario Class Proceedings Act (which was passed in 1992), the provisions of the Quebec Code governing class actions and Rule 23 of the United States Federal Rules of Civil Procedure.

In Part A, the work of the Uniform Law Conference on class action reform is reviewed and the need for uniformity is examined.

Class action legislation typically includes a mechanism for determining whether or not an action is properly characterized as a class action. Usually this issue is dealt with through a certification procedure. The advisability of such a procedure is reviewed in Part B.

There are a number of possible criteria that may be considered by the court in deciding an application to authorize or certify a class action. These are discussed in Part C, Criteria for Certification.

The rules related to the hearing itself are covered in Part D, Conduct of a Hearing.

Part A - Need for Uniformity or Harmonization

The first issue to be determined is whether class actions legislation is an appropriate topic for the Uniform Law Conference to address. It is the view of the drafters of this paper that this is an appropriate topic, for the reasons that follow.

We would be the first to note that not all aspects of class action legislation need to be uniform from province to province. There are a number of areas where the best approach is to recommend that local procedures be followed. This is particularly appropriate with respect to issues that will be dealt with in Rules of Court. In the interests of making a uniform act "user friendly", however, the drafters suggest that it would be appropriate to insert in square brackets possible options for dealing with these issues. The recommendations that follow the discussion of each of the issues in the paper indicate the circumstances in which "local option" is suggested as the preferred option.

1. Interprovincial Actions

Many class actions deal with situations where the relief sought is the result of mass injuries: mass products liability (urea formaldehyde foam insulation, silicone gel breast implants), mass environmental injury (chemical spills) or mass injury through negligence (airplane crashes, Kansas City skywalk collapse). While some of these claims may arise totally within one province or territory or affect the citizens of only one province or territory, many of them will involve cases that have interprovincial effect. The committee suggests that, in such cases, it is appropriate and desirable for both defendants and class members in the various provinces or territories to have consistent rules across the country.

The proposed British Columbia Act contains provisions dealing with the treatment of non-British Columbia resident plaintiffs, as follows:

Opting out

16. (2)... a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

The Ontario and Quebec laws contain no provisions that specifically address treatment of non-residents. This difference may give rise to uncertainty respecting the position of persons who may qualify as members of more than one class; defendants could be left in the untenable position of having claimants who are class members in more than one class action. It is essential that there be certainty in the description of a class so that defendants can readily ascertain any latent liability they are facing outside the class action.

The report prepared for the Ontario Attorney General by the Advisory Committee on Class Action Reform commented on this issue, as follows:

Mass injury does not always honour provincial or national borders. Where potential class members or defendants reside out of province methods will need to be devised to accommodate the resulting logistical problems. Sub-classing of class members, for example,

may address the problem in part. Uniform class procedures in all Canadian provinces would minimize concern over such occurrences. If all injured persons had access to such a procedure then uniformity of access to justice would occur regardless of how or where the mass loss occurred.

The consequences for consumers of this lack of uniformity is illustrated in the silicone gel breast implant cases. The class action that was certified in Alabama excluded from the subclass of "foreign claimants" persons who reside in or had an implant in Ontario, Quebec and Australia because of the ability of those persons to pursue class actions in their own jurisdictions. Canadian residents who reside and received their implant outside Ontario and Quebec are left with the options only of participating in an American class action (and receiving what some have characterized as token damages) or commencing an individual action (which would be extremely expensive).

2. Consistency with the National Conference of Commissioners on Uniform State Laws

In 1976 the National Conference of Commissioners on Uniform State Laws adopted Uniform Class Action legislation. It was revised in 1987 and its name amended to Uniform Law Commissioners' Model Class Action Act. In its Prefatory Note, the Commissioners made the following comment:

A strong need exists for states to adopt a uniform class action act. Many activities have impact on large numbers of persons often from several states. Adoption of a uniform act will assist states in handling multistate class actions, thereby reducing multiplicity of litigation and the chance of inconsistent judgments.

When the Act was amended in 1987 it was noted that the deletion of the jurisdictional and reciprocal provisions of the Act diminished the need for uniformity and therefore the Act was re-titled as "Model". We share their view that uniformity is not essential in all respects; many of our recommendations provide for local practice to be accommodated.

3. Previous Resolutions of the Uniform Law Conference

This topic was first considered by the Conference in 1977. At that time, the Report of the British Columbia Commissioners had this to say:

The fact that class actions may be desirable in cases where a product is consistently defective and where the product is sold from coast to coast and where the purchasers may move from province to province appears to make questions of uniformity of legislation and reciprocity of procedure of paramount importance. [1]

The impetus for the 1977 report was the introduction of amendments to the *Combines Investigation Act* to permit a class action in Federal Court for the recovery of loss or damage suffered as a result of conduct contrary to the *Combines Investigation Act*.

The Conference adopted the following resolution:

RESOLVED that a committee be established composed of one or more representatives of British Columbia, Ontario and Quebec to be named by the Executive to monitor current studies and legislation and generally to watch developments in the field and to report to the 1978 annual meeting.

A further report was presented to the Conference each ensuing year, reporting on developments in the field.

In 1988 the Ontario Commissioners presented another comprehensive report to the Conference on Class Actions. Following consideration of the report the Conference passed the following resolution:

RESOLVED that the Ontario Commissioners' Report on Class Actions be received and printed in the Proceedings and that the matter be referred back to the Ontario Commissioners for a further report, draft Act and commentaries for discussion in 1989.

No further written materials were provided to the Conference in the succeeding years. The topic was added to the Conference agenda for 1995 at the request of a number of jurisdictions who are interested in having the matter discussed.

Recommendation:

*That a Uniform Act be prepared for consideration at the 1996 Conference to deal with the issues mentioned below where uniformity is seen as appropriate. A number of the issues provide more than one option from which jurisdictions can choose the procedural approach that is most consistent with their current legislation and Rules of Court.

Part B - Requirement for Certification or Authorization

The first issue in any proposal for class action legislation is whether there is a need for a preliminary step in the process called "certification" or "authorization". In Quebec, a class action cannot be instituted without the prior authorization of the court. Under the Ontario Act, the proposed British Columbia Act and Federal Rule 23, a member of the class may commence the action, but then must apply to the court for an order certifying the proceeding as a class proceeding and appointing a representative plaintiff. Outside Quebec and Ontario (and soon British Columbia), the existing law on class actions is set out in Rules of Court in terms similar to the following Saskatchewan provision:

70.Where there are numerous persons having the same interest in one cause or matter, including actions for the prevention of waste or otherwise for the protection of property, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such cause or matter, on behalf of or for the benefit of all persons so interested.

This Rule does not require judicial approval before a class action can be undertaken by a plaintiff.

Amendments to the *Federal Court of Australia Act* in 1991 established a procedures for what it calls "Representative Proceedings". It does *not* include a certification process. It relies instead on a number of other protections for absent class members and defendants:

*requiring the court to fix a date before which class members may opt out;

*allowing the court to order, where it is in the interests of justice to do so, on its own motion or on application by the respondent, that a proceeding not continue as a representative proceeding;

*allowing a group member to apply to the court to have another group member substituted as the representative party where the representative party is not adequately representing the interests of the group members;

*allowing the court, on its own motion or on the application of a party or group member, to make any order appropriate or necessary to ensure that justice is done in the proceeding;

*requiring the approval of the court before the proceeding may be settled or discontinued; and

*requiring that group members be given notice, in a form approved by the court, of the commencement of the proceeding and their right to opt out.

In Sweden, as well, the proposal of their law reform commission is that class action legislation be implemented that does not include a certification procedure.

In 1994 the Scottish Law Commission published a discussion paper entitled *Multi-Party Action: Court Proceedings and Funding*. After reviewing the class action procedures in the United States, Canada and Australia, they suggested that a class procedure be established in

Scotland that includes a certification procedure. They suggested four criteria for certification:

*there are so many potential pursuers that it would be impracticable for all of them to sue together in a single conventional action;

*they are an identifiable class whose claims give rise to similar or common issues of fact or law;

*a class action is the preferable or superior procedure for the fair and efficient determination of the issues;

*the representative pursuer will fairly and adequately protect the interests of the class on the common issues.

They also suggest that the procedure be based on opting in rather than opting out.

The main reason usually cited for including a certification requirement is to ensure that the interests of absent class members are protected. The certification process also protects

defendants from unsubstantiated claims. The Ontario L.R.C. made this comment on this issue:

the fact that class proceedings are capable of having an adverse binding effect upon absent class members who have no control over the proceedings would seem to justify the imposition of procedural safeguards to protect against inadequate self-appointed representatives. Such safeguards are unnecessary in individual suits, where the litigant has some opportunity to supervise the proceedings. The greater complexity of class actions also justifies special safeguards for the courts, the public and defendants.[2]

The report on class actions provided to the Uniform Law Conference in 1988 also cited the following advantages of a certification process:

*it acts as a screen to potential abuse of the process;

*up to that point, certification requirements existed in every other jurisdiction that had enacted modern class action procedures;

*it is a counter-balance to other reforms that might be seen as favourable to class members, (for example, special costs rules);

*certification protects class members by ensuring adequate representation of their various interests.

In recent years, the need for certification is starting to be questioned. Prior judicial approval is a departure from the practice governing individual suits. Prior approval places an additional burden on class representatives and the courts. It may impede the access to justice goal of class action reform. Some argue that, with adequate provision to permit opting out, certification is redundant. In an article appended to the 1988 report on class actions provided to the Uniform Law Conference, Andrew Roman put the argument as follows:

The process of certification denies a fundamental interest: the interest of a prospective plaintiff in bringing his or her dispute before the court in the most efficient and effective manner, in the judgment of the plaintiff's counsel. Anything but the traditional A versus B litigation is treated as if it were a legal freak, a Frankenstein monster so dangerous that it must be kept in a cage until the plaintiff (or plaintiff's lawyer) has devoted a massive investment of time and money to a largely irrelevant ordeal. This procedure imposes an anomalous type of reverse onus. Rather than the plaintiff bringing the action in the normal course on the theory that it is, after all, the plaintiff's case, he or she must first discharge a very onerous burden of evidence and argument. The purpose of certification appears to be to force the plaintiff to commence the action on bended knee; before the case even begins, he or she is put on the defensive. No other type of plaintiff is required to go through this kind of torture test in order to obtain a day in court. The root of the problem is not this or that part of the certification test but the process of certification itself. [3]

Roman's opinion appears to rest on the statement that "it is, after all, the plaintiff's case". That statement ignores the fact, however, that it is not just the plaintiff's case. If the plaintiff wanted to bring the case for his or her benefit alone, the certification procedure would not be required. Rather, the procedure is required because the plaintiff wants to take on the case for the benefit of other persons. The court, in effect, is playing a parens patriae role with respect to those other class members by reviewing the plaintiff's proposal early on in the process to ensure that absent class members' interests are being properly protected. In addition, where there is a departure from the normal rules of cost, as in the British Columbia and Ontario legislation, is makes sense to allow the court to decide whether or not a class proceeding is the appropriate procedure for resolution of the dispute.

In a paper prepared for a legal education seminar in Toronto in May 1994 Yves Lauzon, a noted class action expert who specializes in class actions representing petitioners only, expressed the opinion that, as a result of recent, more liberal interpretations of the authorization requirements of the Quebec Code, those provisions were no longer causing difficulties, and the need for this preliminary step could no longer be questioned. [4]

Recommendation:

*That a certification procedure be included as a preliminary step in a class action.

Part C - Criteria for Certification

1.Certification

Section 4 (1) of the proposed British Columbia Class Proceedings Act contains the Act's certification criteria. That section states:

Certification

4.(1) The court must certify a proceeding as a class proceeding if:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members,

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and

(e) there is a representative party who:

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class members and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest in conflict with the interests of other class members.

Contained within this section are various elements that make up the certification criteria. They are numerosity, commonality, the adequacy of representation, a preliminary merits test, superiority and typicality. These elements will be discussed individually.

(a) Numerosity [5]

Prior to the passage of the Act, Rule 5 (11) of the British Columbia Supreme Court Rules allowed a representative proceeding to be brought where "numerous" persons have the same interest. This rule provided that, where numerous persons have the same interest in a proceeding, one or more of them may commence the proceeding as representing all or some of them. Other jurisdictions tie the requirement for numerosity to the difficulty or impracticality of joining parties in one action (Federal Rule 23 and the Quebec Code) or require a minimum number of named plaintiffs. The Ontario L.R.C. rejected these two options as too inflexible and recommended the maintenance of the "numerous persons" test. It is not clear from the case law what number of plaintiffs is required to meet this test, but courts interpreting former Ontario Rule 75 have held that classes of two, four and five members are not "numerous".

The Ontario Act clarifies the issue by providing for a slightly different test. That act requires an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant. The British Columbia Act adopted the model of the Ontario Act. The intent of the "two or more persons" test is to avoid litigation on what constitutes "numerous persons" while facilitating certification through a minimal numerosity threshold. The Australian legislation requires that there be seven or more persons.

(b) Commonality

Generally, class action legislation provides some form of common questions test. Such a test usually provides that the action must raise questions of fact or law common to the members of the class in order to qualify as a class action. The debate centres around whether or not common questions should predominate. That is, should common questions out number or be more significant than the individual issues raised in the action. The Ontario L.R.C. recommended that the predominance of the common questions should not be required as part of this test. However, it did recommend that the predominance of common questions be considered as a component of the superiority test, which is discussed below. The Quebec Code has a slightly different test: "the recourse of the members raises identical, similar or related questions of law or fact." In Quebec, common questions need not predominate. [6]

Under the Ontario Act the predominance of the common questions is not a factor to be considered by the court. The Act provides merely that the claims or defences of the class

members must raise common issues. Despite this, in *Abdool et al v. Anaheim Management Ltd. et al* (1993) 15 O.R. (3d) 39 (Ont. Gen. Div.), Mr. Justice Montgomery appeared to import a "common questions predominate" requirement into section 5 (1) (c) of the Ontario Act. The phrase "whether or not those common issues predominate over issues affecting only individual members" was included in the British Columbia Act to steer a clear course around such an interpretation of the decision in *Anaheim*. [7]

(c) Adequacy of Representation

Class actions are unique in that they allow the determination of the rights and interests of individuals who are not parties to the litigation. This means that special provisions are needed to protect absent class members. One such measure is a requirement that the representative party adequately represent the class.

Article 1003 (d) of the Quebec Code requires that the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

Section 5 (e) of the Ontario Act provides that there must be a representative party who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying the class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

The British Columbia Act adopts this model.

A more controversial component of the adequacy test, recommended by the Ontario L.R.C., would allow the court to consider whether provision has been made for competent legal representation. This recommendation was based on a recognition of the critical role played by the lawyer in a class action. This test is not part of the Ontario Act, the Quebec Code nor Federal Rule 23, although some commentators have claimed that the single most important factor considered by the American courts in determining the adequacy of representation has been the calibre of the class lawyer.

The requirement in the Ontario Act that the representative plaintiff produce a plan for the action - a criterion not discussed by the L.R.C. - may have been adopted in lieu of direct scrutiny of the adequacy of the class lawyer. British Columbia did not incorporate an adequacy of legal counsel component. The drafters of the legislation felt that the *Legal Profession Act* and the *Law Society Rules* contained sufficient protection to ensure competent legal representation and, further, that governance of the legal profession was within the jurisdiction of the Law Society of British Columbia.

(d) The Representative Plaintiff and Membership in the Class

The Ontario Act provides that only class members may commence proceedings on behalf of a class. In Quebec, however, nonprofit corporations and employee associations are given

limited rights to act as class representatives. In accordance with article 1048 of the Code of Civil Procedure, three legal persons may request representative status. [8] The experience in Quebec has shown that no abuse has resulted from this provision.

While recognizing that an "ideological advocate" may be an adequate class representative, the Ontario L.R.C. did not endorse the Quebec model. Their failure to do so appears to have been based both on American case law, under which class representatives generally must have individual standing, and their reluctance to make changes to the law of standing pending the release of their report on standing.

Section 2 (4) of the British Columbia Act allows a court to certify a person who is not a member of the class as the representative plaintiff if it is necessary to do so in order to avoid a substantial injustice to the class. That provision was included in the act on the belief that a particular non-member individual or group may possess special ability, experience or resources that would allow them to be not only an adequate class representative, but also, the most appropriate class representative.

(e) Preliminary merits test

The Ontario L.R.C. recommended more rigorous scrutiny of the merits of class actions at the certification stage than is available for ordinary actions. They recommended an action be certified only if it has been brought in good faith and there is a reasonable possibility that the material issues of fact and law common to the class will be resolved at trial in favour of the class. Under article 1003 (b) of the Code of Civil Procedure, the judge must conclude that the facts alleged "seem to justify" the conclusions sought. [9] Neither the Ontario Act nor the British

Columbia Act includes a preliminary merits test. Instead, these acts merely require that the pleadings disclose a cause of action. It should be noted that the use of a preliminary merits test for interlocutory applications has been rejected by the courts because of the difficulty of conducting a mini-trial on the merits at this stage of the proceedings.

In a certification proceeding, the plaintiff carries the onus of meeting all the criteria for certification, including any preliminary merits test. An alternative to a preliminary merits test would be to shift the onus to the defendant to show that there is not a reasonable probability that issues will be resolved in favour of the class or that the action is not brought in good faith.

(f) Superiority and Cost Benefit

Many class action acts include a requirement that the action be superior to other procedural alternatives in order to be certified. In some jurisdictions, the court may also consider whether the adverse effects of the action on the class members, the court or the public outweigh its benefits. The Ontario L.R.C. endorsed both provisions and lists five factors for the court to consider in making its determination as to superiority (the predominance of common questions, an individual's interest in controlling the litigation, the existence of other proceedings, whether other proceedings are less practicable or efficient, and whether

the administrative difficulties of the class action would be greater than those in other types of proceedings). The Ontario Act requires that the class action be the "preferable procedure for the resolution of the common issues" and does not list any factors the court must consider in making its determination. It does not include a specific power to consider the broader cost benefit issue. The Quebec Code does not include a superiority test, but merely requires that other specified procedures be difficult or impracticable in order for the class action to be certified. The experience in Quebec has shown that it is often more effective to proceed by means of a class action than by a multitude of individual actions.

Section 4 (2) of the British Columbia Act follows the Ontario L.R.C. model. Unlike the Ontario Act, the British Columbia legislation provides the court with a list of factors to consider in determining whether a class proceeding is the "preferable procedure". That section reads as follows:

In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including

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

(b) whether a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions,

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings,

(d) whether other means of resolving the claims are less practicable or less efficient, and

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Subsection (c) includes a common questions predominate test but only as one of various factors that the court must weigh when assessing superiority. This follows the recommendation of the Ontario L.R.C.

(g) Typicality

Under Federal Rule 23, the claims of the representative parties must be typical of the claims of the class. The Ontario L.R.C. pointed out that this requirement tends to overlap with the common questions and the adequacy of representation tests. Since the L.R.C. recommended inclusion of both of those tests in legislation, they took the view that a typicality requirement was unnecessary. No Canadian legislation contains such a test.

Recommendation:

*An application for certification should be granted by the court where:

(a there are two or more persons in the class whose class raises common issues;

(b) the representative plaintiff will fairly and adequately represent the interests of the class;

(c) the pleadings disclose a cause of action; and

(d) a class action is the superior or preferable procedure in the particular case.

*Predominance of common questions should not be a separate test that must be met before a class action will be certified. Instead, it should be one of the components of the superiority test.

*As a general rule the class representative should be a member of the class. The court should have the discretion to appoint a non-member as the class representative to avoid a substantial injustice to the class.

*The plaintiff should not be subject to a preliminary merits test.

*There should be no separate "typicality" test in the certification process.

2. Certification Hearing

(a)Timing

In Quebec, a class action cannot be brought without the prior authorization of the court and the class action must be brought within three months of authorization. In most other jurisdictions, however, a certification application must be filed within a specified period after the defendant files its appearance. The period ranges from 30 to 90 days. The 90 day period is recommended by the Ontario L.R.C. and adopted in the Ontario Act and the British Columbia Act.

(b) Evidence

The Ontario L.R.C. bill and the Ontario Act differ significantly with respect to the evidence required at the certification hearing. The inclusion of a preliminary merits test in the L.R.C. draft bill necessitated a requirement that the plaintiff and defendant file affidavits containing the material facts on which they intend to rely. The Ontario Act, which does not contain a preliminary merits test, merely requires the parties to file affidavits regarding the size of the class. Aside from this requirement, the general rules dealing with evidence in interlocutory proceedings apply.

On a motion for authorization the Quebec Code requires that an affidavit be filed that supports the allegations of fact in the motion. The Rules of Practice of the Superior Court sets out a detailed list of documents that must be filed in support of the motion.

In British Columbia, the certification application proceeds by way of affidavit. Section 5 (5) of the British Columbia Act requires that a person filing a certification application must:

(a) set out the material facts on which the deponent intends to rely at the hearing of the application;

(b depose that the deponent knows of no fact material to the application that has not been disclosed in the deponent's affidavit or in the affidavits previously filed in the proceedings, and

(c) provide the person's best information on the numbers of members in the proposed class

The inclusion of subsections (a) and (b), over and above the Ontario requirements, is designed to help clarify and focus the arguments in the certification hearing.

(c) The Certification Order

There is wide variation in class action legislation in the degree of detail required in the certification order. Federal Rule 23 does not deal with the contents of the order while the Ontario Act requires that the order describe the class, state the names of the representative parties, the nature of the claims and relief sought, the common questions and the method for opting out. The Act also gives the Court the discretion to amend the certification order or to decertify the class if the criteria for certification are not met, on the motion of a party or class member. Under the Quebec Code, the order describes the class, identifies the common questions and states the method for opting out; it must also require the publication of notice to the members of the class. The Ontario Act allows the court to make a separate order dealing with notice.

Section 8 of the British Columbia Act sets out the requirements of the certification order. Like Ontario, the British Columbia Act allows the court to make a separate order for notice. Section 8 requires that the certification order describe the class, appoint a representative plaintiff, state the nature of the claims and the relief sought, set out the common issues for the class and state the method for opting out. The Ontario Act, the Quebec Code and the British Columbia Act also permit the court to amend an order certifying or authorizing a class proceeding.

Recommendation:

*Class action legislation should address the issues of timing, evidence and contents of the certification order. This legislation should be based on the following premises:

(a) authorization from the court to proceed as a class action should be required prior to or within a short time after the action is commenced;

(b) evidence to be filed on the motion should be set out in Rules of Court; and

(c) the certification order should include a description of the class, the names of the representative plaintiffs, the nature of the claims and relief sought, common questions and method for opting out.

3. Substantive Barriers to Class Actions

The "same interest" test in British Columbia Supreme Court Rule 5 (11) that governs representative actions has been narrowly interpreted to preclude claims for which a single measure of damages does not apply, claims arising out of separate contracts, or claims for

which different remedies are sought. If the goal of expanding class actions is to be met, these substantive barriers to bringing class actions need to be reduced.

The Ontario L.R.C. draft bill, the Ontario legislation and the British Columbia Act each provides that the court shall not refuse to certify a class action solely on the grounds that the relief claimed includes damages that may require individual assessment or arise out of separate contracts. The Ontario Act deals with the matters that are not to bar certification in the following way.

Certain matters not bar to certification

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defenses that raise common issues not shared by all class members.

The British Columbia Act follows the Ontario model with the following exception.

Section 6 of the Ontario Act includes the word "solely" between "proceeding" and "on" in the first line. The decision was made not to include "solely" in the British Columbia legislation in order to ensure that the presence of more than one of the elements listed in (a) to (e) would not bar certification. The Quebec Code does not have an equivalent provision.

Recommendation:

*Class actions legislation should enumerate factors that the court is not to consider when determining whether an action should be certified as a class action. The legislation should state that the following factors are not a bar to certification:

a) the class action will require individual assessment of damages;

b) the class members have claims arising out of separate contracts;

c) there are different remedies sought for different class members;

d) the number or identity of all class members is not known; and

e) the class includes one or more subclasses.

Part D - Conduct of a Class Action

1.Management

Courts take a much more active role in managing the conduct of class actions than they do in ordinary actions. This is due both to the complexity of most class actions and the fact that the rights and obligations of those not before the court are being determined. The Quebec Code provides:

1045. The Court may, at any stage of the proceedings in a class action, prescribe measures designed to hasten their progress and to simplify the proof, if they do not prejudice a party of the members.

The Ontario L.R.C. draft bill and the Ontario Act both include a broad general management provision that allows the court to make orders it considers appropriate to ensure a fair and expeditious hearing. While the Ontario L.R.C. would have allowed the court to exercise these powers on its own motion, under the Ontario Act the court may exercise its broad general management powers only on the motion of a party or class member. The British Columbia legislation follows the Ontario L.R.C. recommendations. Sections 12 and 13 of the Ontario Act are reproduced below.

Court may determine conduct of a proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensureits fair and expeditious determination and, for that purpose, may impose such terms on the parties as it considers appropriate.

Court may stay any other proceeding

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

In addition to the general management power, class action legislation often gives the court broad discretion to make orders with respect to aspects of the class action. These will be covered in parts of the paper that deal with specific issues such as notice and calculation and distribution of damages. The following sections outline some techniques for managing class actions.

Recommendation:

*The courts should be given broad general management powers exercisable either on the application of a party or class member or on the application of a party or class member or on the court's own motion.

2. Common Questions and Individual Questions

The Ontario Act and the British Columbia Act adopt the recommendation of the L.R.C. in

providing that common issues shall be determined together and that issues requiring the participation of individual class members shall be determined individually.

Both Acts give the court broad discretion to require the participation of individual class members and to determine the procedure by which individual questions may be resolved. Section 11 of the Ontario Act reads as follows.

Stages of class proceeding

11. (1) Subject to section 12, in a class proceeding,

(a) common issues for a class shall be determined together;

(b) common issues for a subclass shall be determined together; and

(c) individual issues that require the participation of individual class members shall be determined individually ...

Under section 25 of the Ontario Act, the same judge who presided over the trial on the common questions may determine the individual questions or a different judge may preside. The British Columbia Act requires that the same judge hear all motions in a class proceeding, unless otherwise ordered by the chief justice. The same judge may, but need not, preside at the trial of the common issues. In Quebec, unless the chief justice decides otherwise, the same judge hears the entire proceedings related to the same class action.

In Ontario, the court may also appoint another person to conduct a reference under the rules of court and report back to the court or use any other process agreed to by the parties. In determining the procedure, the court must use the least expensive and most expeditious procedure and may set time limits for the assertion of individual claims. The British Columbia legislation does not contain this provision.

The Ontario L.R.C. draft bill and the Ontario Act both provide that one judge shall hear all the preliminary matters (including those usually heard by a master) and another judge shall preside over the trial of the common questions and all subsequent proceedings. It should be noted that this is consistent with Ontario rules that do not permit the same judge to sit on pre-trial motions and the trial proper. This practice is allowed under B.C. rules.

Recommendation:

*Common questions should be determined together and issues requiring the participation of individual class members should be determined individually. One judge should hear

all of the preliminary matters. Local practice will determine whether that judge or a different one presides over the trial.

3. Participation of Class Members

The Ontario L.R.C. recommends that class members be permitted to apply to participate in the class action. This measure allows absent class members to assert some control over the litigation and to draw the court's attention to issues that affect them. The L.R.C.

recommendation was adopted in the Ontario Act and the British Columbia Act. Section 14 of the Ontario Act contains these provisions.

Participation of class members

14. (1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

The wording in the British Columbia legislation is virtually identical.

Under articles 1017 and 1018 of the Quebec Code the court can allow a class member to intervene if it would be "useful to the group".[10]

Recommendation:

*The court should have the discretion to permit class members to participate in the proceedings.

4. Subclassing

Another method used by courts to manage complex class actions is subclassing. Subclassing allows the court to certify a class action where some members of the class have common issues that are not shared by all members of the class. Subclassing is seen as an effective tool to ensure the interests of absent class members are protected.

The Ontario L.R.C. recommended against a subclassing provision on the basis that provisions for participation by any member of the class and for the broad general management powers of the court would be sufficient to protect the interests of absent class members. The Ontario Act not only allows subclassing, but prohibits certification if a subclass exists unless there is a representative party for that subclass. Federal Rule 23 and many other American class action mechanisms also allow subclassing. The Quebec Code also allows the court to create subclasses "if the circumstances so require".

The British Columbia Act follows the Ontario model. Its subclassing provisions state:

Subclass certification

6. (1)..., if a class includes a subclass whose members have claims or defenses that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who,

(a) would fairly and adequately represent the interests of the subclass,

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

(2) For the purposes of section 16, a class that comprises persons resident in British Columbia and persons not resident in British Columbia must be divided into subclasses along those lines.

Section 16 (2) was included in the British Columbia legislation to deal with non-resident class members who may wish to become members of a British Columbia class proceeding.

Recommendation:

*Where a subclass is identified, the court should appoint a representative plaintiff for the subclass.

5. Settlement and Discontinuance

Under the current British Columbia Rules of Court that deal with representative actions, the settlement or discontinuance of an action requires neither the approval of the court nor notice to other class members. The interests of absent class members are not protected under this rule and representative parties are in a position to use representative proceedings to enhance their own bargaining position to settle their individual claims.

Both the Ontario Act, the Quebec Code and the Ontario L.R.C. draft bill attempt to remedy this by providing that proceedings may only be settled, abandoned or discontinued with the approval of the court. This provision applies to the pre and post certification stages of the proceeding. The Ontario Act and the British Columbia Act directs the court to consider the issue of notice. The Quebec Code makes notice mandatory for settlements, but not for discontinuance.

Section 35 of the British Columbia legislation is presented below.

Discontinuance, abandonment and settlement

35.(1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court, and

(b) on the terms the court considers appropriate.

(2) A settlement may be concluded in relation to the common issues affecting a subclass only

(a) with the approval of the court,

(b) on the terms the court considers appropriate.

(3) A settlement under this section is not binding unless approved by the court.

(4) A settlement of a class proceeding or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class proceeding, but only to the extent provided by the court.

(5) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court must consider whether notice should be given under section 20 and whether notice should include

(a) an account of the conduct of the proceeding,

(b) a statement of the result of the proceeding, and

(c) a description of any plan for distributing any settlement funds.

The Quebec Code provides that a class action cannot be amended or discontinued without the permission of the court and except on the conditions it deems necessary. Settlements are valid only if approved by the court after notice has been given to the class members.

Recommendation:

*Settlement, discontinuance or abandonment of a class proceeding should require the prior approval of the court.

6. Opting out and Opting in

A central policy issue in class action legislation is whether class members should be required to "opt in" to the class proceeding in order to be subject to any judgment or settlement or whether they should be bound unless they explicitly "opt out".

Support for an opting in procedure is based largely on the belief that individuals who have no knowledge of a lawsuit should not be bound by its outcome. Opting in requires people to make the choice to join an action in order to have their legal rights determined. Advocates of this procedure argue that opting out presupposes a significant level of sophistication by class members to know that their rights are being determined and to assess whether their interests are being adequately addressed in the proceedings. Supporters of the opt in procedure also suggest that class members ought to be required to show some minimal interest in the litigation in order to benefit from it.

Those who favour opting out argue that an opt in procedure is based on the assumption that failure to opt in reflects a deliberate, informed decision by an individual class member not to participate in the litigation. They suggest that, because many of the psychological and social barriers to bringing individual actions could underlie a failure to opt in, such a requirement could undermine the access to justice goals of class actions. This could be particularly true with respect to class actions involving small individual claims. Supporters of the opt out procedure also claim that it is fairer to defendants, who know exactly how many class members they may face in subsequent individual proceedings.

The British Columbia Act adopts an opt out procedure based on the belief that it is the more effective means to ensure that the barriers to justice, which class actions are intended to overcome, are reduced. Opting out is the procedure employed in the large majority of

jurisdictions with expanded class actions. It was recommended by the Ontario L.R.C. and is adopted in both the Ontario and Quebec legislation.

If an opt out procedure is adopted, various methods can be used to protect the interests of absent class members. These include provisions dealing with notice, intervention and subclassing, all of which are discussed elsewhere in the paper.

Assuming the adoption of an opt out procedure, a question remains as to whether class members should have the unconditional right to opt out or whether this right should be subject to the discretion of the court. In some cases, allowing class members to opt out may be problematic. For example, where injunctive or declaratory relief is sought, opting out achieves little.

The U.S. Supreme Court has held that due process under the Fourteenth Amendment requires that members of a plaintiff class under Federal Rule 23 (b) (3), which covers claims seeking predominantly money damages, be entitled to opt out. Such a constitutional requirement has not been imposed on other categories of class actions. Commentators have criticized this decision, arguing that unconditionally allowing class members to opt out undermines the effectiveness of class actions and may infringe the due process rights of plaintiffs whose access to a remedy may be impeded.

Under the Ontario Act and the Quebec Code, class members are entitled to opt out. The L.R.C. draft bill gives the court discretion to determine whether class members should be able to opt out. The bill includes a list of factors which the court may consider in determining whether or not to allow members to opt out. The conditional opting out provisions of the L.R.C. draft bill are presented below.

Exclusion

20.(1) The court shall determine whether some or all of the members of the class should be permitted to exclude themselves from a class action.

(2) In determining whether members of the class should be permitted to exclude themselves from the class action, the court shall consider all relevant matters including,

(a) whether as a practical matter members of the class who exclude themselves would be affected by the judgment,

(b) whether the claims of the members of the class are so substantial as to justify independent litigation,

(c) whether there is a likelihood that a significant number of members of the class would desire to exclude themselves,

(d) the cost of notice necessary to inform members of the class of the class action and of their right to exclude themselves, and

(e) the desirability of achieving judicial economy, consistent decisions, and a broad binding effect of the judgment on the questions common to the class.

(3) Where the court has determined that some or all of the members of the class may exclude themselves, they may do so by informing the court in writing by a date specified by the court of their desire to be so excluded.

Unlike the L.R.C. draft bill, the Ontario Act and the British Columbia Act are predicated on a class member's unconditional right to opt out of a class proceeding. Section 9 of the Ontario Act states that:

Opting out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

The British Columbia section that deals with opting out is modeled on the Ontario Act but provides for the ability of class members who are not British Columbia residents to opt in to the class proceeding.

Recommendation:

*Class action legislation should provide class members with an unconditional right to opt out.

7. Notice

Notice provisions are critical to the protection of absent class members. Court ordered notice may be the only way that absent class members may learn about the existence of the action, how and when to opt out, the progress of the litigation and how to recover their portion of any damages awarded. However, notice requirements can place a significant burden on the parties to a class action who must bear the cost of notifying class members. Notice requirements have been the subject of considerable controversy in the United States, where due process under the Fourteenth Amendment has been interpreted to mandate individual notice of the right to opt out in certain circumstances. While these same constitutional standards do not apply in Canada, which does not have due process requirements in relation to property, the type of notice required in class actions raises questions of fairness.

When and what type of notice is fair? Who should be responsible for giving notice and who should pay for it? The answers to these questions may differ for notice requirements at various stages of the proceedings.

(a) Notice of Certification

Existing class action legislation offers a number of different examples of notice of certification provisions. For class actions seeking predominantly money damages under

Federal Rule 23, the court must direct the best notice practicable in the circumstances, including individual notice to all members who can be identified by reasonable efforts.

Other forms of class actions under Rule 23 have no specific notice requirements and are subject to the general notice provisions of the Rule. Those provisions give the court discretion to make orders regarding notice.

The Ontario L.R.C. draft bill and the Ontario Act have more flexible notice provisions than those under Federal Rule 23(b)(3), but they take slightly different approaches. Under the draft bill, the court *may* order that notice be given. The Ontario Act provides that the representative party *shall* give notice. However, the court may dispense with notice having regard to a number of factors. Both the bill and the Act provide for criteria to guide the court in its determinations regarding notice.

The British Columbia section that deals with notice of certification contains a number of sections that also allow for flexible notice provisions. However, like the Ontario Act, the representative party *must* give notice to class members. The notice sections for the British Columbia legislation are modelled on the Ontario Act. Section 17 of the Ontario Act reads as follows:

Notice of certification

17.(1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

(a) the cost of giving notice;

(b) the nature of the relief sought;

(c) the size of the individual claims of the class members;

(d) the number of class members;

(e) the places of residence of class members; and

(f) any other relevant matter.

(4) The court may order that notice be given,

(a) personally or by mail;

(b) by posting, advertising, publishing or leafleting;

(c) by individual notice to a sample group within the class; or

(d) by any means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

(6) Notice under this section shall, unless the court orders otherwise,

(a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;

(b) state the manner by which and time within which class members may opt out of the proceeding;

(c) describe the possible financial consequences of the proceeding to class members;

(d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

(e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;

(f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;

(g) describe the right of any class member to participate in the proceeding;

(h) give an address to which class members may direct inquiries about the proceeding; and

(i) give any other information the court considers appropriate.

The British Columbia legislation includes, under subsection (1), the requirement that the court consider whether or not there are subclasses and whether some or all of the class members may opt out of the class proceeding.

In Quebec, notice to class members that the court has authorized a class action is imperative. The Quebec Code includes the following provision with respect to that notice:

1006. The notice to the members indicates:

(a) the description of the group;

(b) the principal questions to be dealt with collectively and the related conclusions sought;

(c) the right of a member to intervene in the class action;

(d) the district in which the class action is to be brought;

(e) the right of a member to request his exclusion from the group, the formalities to be followed and the delay for requesting his exclusion;

(f) the fact that a member who is not a representative or an intervener cannot be called upon to pay the costs of the class action; and

(g) any other information the court deems it useful to include in the notice.

The mandatory nature of article 1006, in combination with the list of key questions to be addressed collectively, make the notice provisions quite onerous. This resulted in exorbitant notice costs. More recently, however, prosecutors have adopted the habit of submitting draft notices to the court, which are more simply and succinctly phrased. This, in all likelihood, will lower the costs of notice.

(b) Costs of Notice of Certification

The L.R.C. draft bill, the Quebec Code and the Ontario and British Columbia Acts also differ in their treatment of the costs of notice. The Ontario and British Columbia Acts give the court the discretion to make any order regarding the costs of notice, including orders apportioning the costs among the parties. The draft bill has no such provision regarding notice of certification, although it does allow the court to make any order regarding costs under the general notice provisions. In Quebec, the cost of the notice is always borne in the first instance by the representative plaintiff. However, under Article 1035 of the Code of Civil Procedure, the costs of notice are transferred to the defendant if the class action is successful.

The Ontario Act and the British Columbia Act also include a provision that allows, with leave of the court, the notice to include a solicitation for funds to support the class proceeding.

(c) Notice of Judgment

While much of the American class action legislation is silent on the issue of the notice of judgment, the Ontario L.R.C. draft bill and the Ontario Act include specific provisions requiring this notice where the common questions have been disposed of, but further proceedings may be necessary to resolve individual questions. The provisions for notification of individual participants are similar to the notice of certification provisions.

The British Columbia legislation and Quebec Code are different as they require that notice be given to class members when the court determines common issues for a class, regardless of whether or not further proceedings may be necessary to resolve individual questions. The British Columbia notice of judgment sections otherwise are similar to the Ontario Act and the L.R.C. draft bill and to the notice of certification requirements listed earlier. Both Acts, the Quebec Code and the L.R.C. draft bill include a description both of the judgment on the common issues and of the steps required for class members to take to establish an individual claim.

(d) General Notice

General notice provisions in the L.R.C. draft bill and the Ontario and British Columbia Acts allow the court to require notice to be given when it is necessary for the fairness of the trial. Each gives the court the power to make any order respecting the costs of notice under this

section. The Quebec Code allows the court to order the publication of a notice to the members when it considers it necessary for the preservation of their rights.

The British Columbia Act also allows the court to order a party to give the notice required to be given by another party. This section was included for situations, for example, where the defendants routinely deliver bills or other information to class members by way of a routine delivery system. The intent is that the notice could be included with the regular deliveries and that this would minimize the costs of the notice.

Recommendation:

*Class action legislation should address the issues of when and by whom class members should be given notice and the content of the notice. These provisions should require that notice of certification be given unless the court orders otherwise and that the court should approve the form of notice. Notice should also be given where the common questions have been resolved and individual issues need to be decided. The court should also have a general power to require that notice be given when it is necessary for the fairness of the trial.

8. Monetary Relief

A barrier to the use of class actions under current British Columbia Rules of Court has been judicial interpretation that has required that a single measure of damages be applicable to all class members. As discussed above, the Ontario L.R.C. draft bill and the Ontario and British Columbia Acts specifically provide that certification of a class action shall not be refused merely on the basis that the relief claimed may require individual assessment. This raises two important questions: should common proof be permitted to determine the level of damages and will individual damages be determined in the context of a class action?

(a) Monetary Relief as a Common Question:

Aggregate Assessment

Even prior to the introduction of expanded class action procedures in some provinces, Canadian courts have treated damages as a common question in a number of cases. The alternative would have been to require separate mini-trials with individual proof from each class member. In some cases, this process would render the class action so unmanageable that it would not meet the test for certification. Many other barriers could prevent individuals from pressing their claims for damages after liability has been determined and this could result in the unjust enrichment of the defendant.

Although the L.R.C. recognized that in some cases the injuries to the class members will be so varied that individual proceedings will be required to establish the total amount of damages, they concluded that legislation should specifically authorize the treatment of monetary relief as a common question. They recommended the most widely accepted mechanism for doing this, aggregate assessment: the determination of the total amount to which a class is entitled in a single proceeding. The L.R.C. recommendation was consistent with the Quebec Code. It allows the court to order collective recovery where it can establish,

with "sufficient accuracy" the total amount of the class members' claims. It is authorized to determine the amount owed by the defendant "even if the identity of each of the members or the exact amount of their claims is not established."

The Ontario L.R.C.'s recommendations on this point are adopted in the Ontario Act and the British Columbia Act. Both the Acts and the draft bill allow the court to determine the aggregate or part of a defendant's liability to class members where all or part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. The British Columbia legislation deals with aggregate awards in the following manner.

Aggregate awards of monetary relief

29.(1) The court may make an aggregate monetary award in respect of all or any part of the defendant's liability to class members and may give judgment accordingly if

(a) monetary relief is claimed on behalf of some or all class members,

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

The L.R.C. draft bill includes a condition that the monetary relief awarded as part of an aggregate assessment must be capable of assessment "with the same degree of accuracy as in an ordinary action". This phrasing is not included in the Ontario Act or the British Columbia Act. Instead, these Acts adopt the more flexible requirement that monetary relief "can reasonably be determined without proof by individual class members."

In British Columbia, concern for defendants' interests resulted in the inclusion of subsection 29 (2). That subsection requires that:

(2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,

(a) submissions that contest the merits or amount of an award under that subsection, and

(b)submissions that individual proof of monetary relief is required due to the individualized nature of the relief.

Although the defendant's ability to make these sorts of arguments may be implicit in the L.R.C. draft bill and the Ontario Act, the British Columbia drafters preferred to explicitly grant this ability.

(b) Individual Assessment of Monetary Relief

Where aggregate assessment is not feasible, the Ontario Act and the British Columbia Act give the court broad discretion to establish a procedure to determine individual damages, including inquiries and reports back to the court by non judges. The court is required to choose the least expensive and most expeditious method of determining the issues that is consistent with justice. If class members fail to make their claim within the time period set by the court, they may do so at a later date only with leave.

The Quebec Code takes a similar approach. Class members may file their claims within one year. The court may either decide the individual claims or order the prothonotary to decide them. The court may provide for the use of special modes of proof and procedure, if necessary, in the interests of justice and of the parties.

Section 27 of the British Columbia Act, included below, is modelled on the Ontario Act.

Individual issues
27.(1)When the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under section 32^{11} that are applicable only to certain individual members of the class or subclass, the court may

(a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court,

(b) appoint one or more persons including, without limitation, one or more independent experts, to conduct an inquiry under the Rules of Court and report back to the court, or,

(c) with the consent of the parties, direct that those individual issues be determined in any other manner.

(2) The court must give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1).

(3) In giving directions under subsection (2), the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties, and, in so doing, the court may

(a) dispense with any procedural step it considers necessary, and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

(4) The court must set a reasonable time within which individual members of the class or subclass may make claims under this section in respect of the individual issues.

(5) A member of the class or subclass who fails to make a claim within the time set under subsection (4) must not later make a claim under this section in respect of the issues applicable only to that member except with leave of the court.

(6) The court may give leave under subsection (5) if it is satisfied that

(a) there are apparent grounds for relief,

(b) the delay was not caused by any fault of the person seeking the relief, and

(c) the defendant would not suffer substantial prejudice if leave were given.

(7) A determination of issues made in accordance with subsection (1)(c) is deemed to be an order of the court.

Individual assessment of liability

28. If, after determining common issues in favour of a class or subclass, the court determines that the defendant's liability to individual class members cannot reasonably be determined without proof of those individual class members, section 27 applies to the determination of the defendant's liability to those class members.

Note that section 28 refers back to the individual assessment procedures in section 27 if the court determines that the defendant's liability to individual class members requires individual assessment.

(c)Distribution

When an aggregate award has been made, it must be distributed to the class members. While Federal Rule 23 is silent on the issue of aggregate assessment, the Ontario Act and the British Columbia Act include a number of provisions dealing specifically with distribution of an aggregate award. Section 33 of the British Columbia legislation is reproduced below.

Distribution

33. (1) The court may direct any means of distribution of amounts awarded under this Division that it considers appropriate.

(2) In giving directions under subsection (1), the court may order that,

(a) the defendant distribute directly to the class or subclass members the amount of monetary relief to which each class or subclass member is entitled by any means authorized by the court, including abatement and credit,

(b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class or subclass until further order of the court; and

(c) any person other than the defendant distribute directly to each of the class or subclass members the amount of monetary relief to which that class or subclass member is entitled by any means authorized by the court.

(3) In deciding whether to make an order under subsection (2)(a), the court

(a) must consider whether distribution by the defendant is the most practical way of distributing the award, and

(b) may take into account whether the amount of monetary relief to which each class or subclass member is entitled can be determined from the records of the defendant.

(4) The court may supervise the execution of judgments and the distribution of awards under this Division and may stay the whole or any part of an execution or distribution for a reasonable period on the terms it considers appropriate.

(5) The court may order that an award under this Division be paid

(a) in a lump sum, promptly or within a time set by the court, or

(b) in instalments, on the terms the court considers appropriate.

(6) The court may order that the costs of distributing an award under this Division, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make any other order it considers appropriate.

As can be seen from the above, the court may direct any means of distribution it considers appropriate, including ordering the defendant to directly distribute the money. While the L.R.C. draft bill provides that such an order will be made only when the amount of damages to which each class member is entitled can be determined from the defendant's records, the Ontario Act and the British Columbia Act merely require the court to take that factor into account in deciding whether to make the order.

The Quebec Code allows the court two options. It may order that the defendant pay the amount due into court and fix terms and conditions of payment. Alternatively, if may order that all or part of the amount due be used by the debtor to carry out a reparatory measure.

Recommendation:

*In determining the amount of damages to be ordered the court may make an aggregate assessment or individual assessments. When an aggregate assessment is made the court shall give directions respecting distribution to class members and may, where appropriate, require the defendant to distribute the damages directly to the class members.

9. Disposition of Undistributed Funds

(a) Disposition of Undistributed Funds Awarded Aggregately

Under both the Ontario L.R.C. draft bill and the Ontario and British Columbia Acts, the court also has the power to order that funds that are awarded under an aggregate assessment, and remain undistributed after a time set by the court, may be applied in any manner that may benefit class members if a reasonable number of class members, who would not otherwise receive any monetary compensation, would benefit from the distribution. Such an order may be made even if non class members and class members who have already received monetary relief would also benefit. This is referred to as a *cy-prés* distribution.

Another option for the disposition of undistributed funds would be to allow the court to order that all or part of the money be applied to a class action fund.

(b) Disposition of Undistributed Funds Awarded Individually

There are a number of different options for the disposition of undistributed funds that are awarded to individual class members. The Ontario L.R.C. recommended that the court have the power to order that such funds be forfeited to the Crown or returned unconditionally to the defendant. The Ontario Act provides that any undistributed funds that form part of an award to individual class members must be returned to the defendant. In British Columbia, such undistributed funds may be applied against the cost of the class proceeding, forfeited to the government or returned to the defendant. In Quebec, an application is made to the court for an order disposing of the funds.

Recommendation:

*Class action legislation should provide the court with discretion to determine the appropriate disposition of undistributed funds.

10. Discovery

Federal Rule 23 does not refer to discovery. This has left American federal courts to determine whether the Federal Rules of Civil Procedure governing discovery in ordinary actions apply to class actions. These rules differ from British Columbia Rules of Court as they allow the discovery of non parties. However, the type of discovery of non parties that is permitted under the American rules is restricted. This has led to conflicting case law about whether class members can be treated as parties for the purposes of discovery rules.

To avoid this kind of controversy, the Ontario L.R.C. followed the approach of the Quebec Code and recommended that class action legislation contain explicit provisions dealing with discovery of representative parties and class members. In the L.R.C. draft bill, the Quebec Code, the Ontario Act and the British Columbia Act, parties to a class action have the same rights of discovery as are available in ordinary actions. After the representative party has been discovered, a party may make a motion to examine absent class members. The Quebec Code provides that such an application may be granted where the court is of the view that it would be useful to the adjudication of the questions of law or fact to be dealt with collectively. The sections of the Ontario Act that relate to discovery are presented below.

Discovery of parties

15. (1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding.

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members.

(3) In deciding whether to grant leave to discover other class members, the court shall consider,

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the claims or defenses of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and

(f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery.

Recommendation:

*Class action legislation should allow the court to authorize discovery of class members in addition to the representative plaintiff.

11. Costs

Existing cost rules pose barriers to bringing a class action. Although the whole class may benefit from the action, the representative party shoulders the burden of paying lawyer's fees and disbursements and will receive only a portion of the total costs back if he or she is successful. The representative party is also liable for any party and party costs ordered by the court if the action is unsuccessful. Under the previous Ontario law, the financial barriers to bringing a class action were even greater than those which currently exist in British Columbia because of Ontario's prohibition against contingency fee arrangements. Under the Ontario Act, class actions are now exempted from this prohibition. The Ontario L.R.C. draft bill, the Quebec Code the Ontario Act and the British Columbia Act deal with a number of important costs issues differently. These are discussed in the following sections.

(a) Party and Party Costs

Party and party costs are costs payable by one party in a lawsuit to the other party. The court has the discretion to make any order as to costs, although the usual order is that the unsuccessful party pays the costs of the successful party. However, these costs are assessed according to a tariff and do not cover the total out of pocket expenses of the successful party.

Based on a concern that individuals not be deterred from bringing a class action because of the risk of having party and party costs imposed on them, the Ontario L.R.C. recommended a "no costs" rule. Their draft bill provides that costs shall not be awarded to any party unless this would be unjust or there has been frivolous, vexatious or abusive conduct by one of the parties. This is similar to the American federal rule, under which an award of

attorney's fees cannot be ordered against an unsuccessful party. The Ontario Act, on the other hand, incorporates the provisions of the *Judicature Act* under which the court has discretion to award costs. The Act provides that, in exercising its discretion, the court may consider whether or not the action was a test case. In Quebec, the general rule concerning expenses applies. This means the losing party bears the costs of those expenses. The costs of those expenses are limited by article 1050.1 of the Code of Civil Procedure.

The British Columbia section that deals with costs is more closely modelled on the L.R.C. draft bill.

Costs

37. (1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

(2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding

(a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,

(b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purposes of delay or increasing costs or for no proper purpose,

(c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.

(3) The court may order that costs awarded under subsection (2) be assessed in any manner that the court considers appropriate.

(4) Class members, other than the representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

The British Columbia legislation on costs follows the L.R.C. draft bill. However, subsections (2) (c) and (d) are unique to British Columbia and do not appear in the draft bill.

(b) Fees and Disbursements

This section deals with the costs which a client must pay his or her own lawyer. These include the lawyer's fees, as well as out of pocket expenses incurred for such things as giving notice and hiring expert witnesses. The L.R.C. draft bill provides that the fees and disbursements payable by a representative party, as well as disbursements that have already been paid to a lawyer, may be deducted from the damage award and that each class member pays a portion of the costs in proportion to his or her share of the award. The Ontario Act is not so specific, providing only that amounts owing under an enforceable

agreement are a first charge on any award; the Quebec Code also makes lawyers fees and costs a first charge on an award.

In Ontario, all fee arrangements between a representative plaintiff and his or her lawyer are covered by this provision. These agreements must be in writing and approved by the court. The agreement must estimate the amount of payment and can allow the lawyer to later apply to the court for increases in the fee. In the absence of an approved agreement, the court may determine the fees to be paid. The Ontario L.R.C. recommends that fee agreements be prohibited from stipulating the amount of payment or the method of calculation. Instead, the L.R.C. recommended that the court determine the fees and disbursements in every case. In Quebec, lawyer's fees must also be approved by the court.

The difficulty faced by representative plaintiffs who may have to pay considerable disbursement costs up front was dealt with in Ontario by the establishment of the Class Proceedings Fund. The fund, endowed with $500,000 by the Ontario Law Foundation, covers plaintiffs' disbursements and costs ordered against defendants. A Class Proceedings Committee has been established to consider applications for financial support from plaintiffs and defendants in class actions. A similar fund was established under the Quebec legislation, but it also covers legal fees. The Ontario L.R.C. recommended against the establishment of such a fund. This recommendation is closely tied to the no costs rule adopted in their draft bill.

The British Columbia section that deals with fees and disbursements is presented below.

Agreement respecting fees and disbursements

38. (1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid,

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not, and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

(3) Interest payable on fees and disbursements under an agreement approved under subsection (2) must be calculated in the manner set out in the agreement or, if not so set out, at the interest rate, as that term is defined in section 7 of the *Court Order Interest Act*, or at any other rate the court considers appropriate, on the balance of disbursements incurred as totalled at the end of each 6 month period following the date of the agreement.

(4) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

(5) If an agreement is not approved by the court, the court may,

(a) determine the amount owing to a solicitor in respect of fees and disbursements,

(b) direct a reference under the rules of the court to determine the amount owing, or

(c) direct that the amount owing be determined in any other manner.

The British Columbia legislation follows the L.R.C. recommendations and does not create a public fund for class proceedings. In every other respect, it is similar to the Ontario Act.

Recommendation:

*****Class actions legislation should require court approval of fees to be paid to the lawyers for the representative party. In determining whether to award party and party costs, the court should consider whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest.

12. Effect of Judgment on Class Members

The fact that class actions affect the rights and interests of individuals who are not parties to the litigation raises questions about the effect of judgments in class actions. Should class members who have not opted out be bound by a class action judgment? If they are not, the purposes of the class action, particularly in terms of judicial economy, would be defeated.

While the doctrine of *res judicata* prevents *parties* from relitigating matters arising from the same cause of action, it is not clear that the doctrine allows non party class members to rely on a judgment to prevent an unsuccessful party from relitigating issues determined in the first case. To clarify any uncertainty in the law, the Ontario L.R.C. recommended, and the Quebec Code and the Ontario and British Columbia Acts incorporate, explicit provisions dealing with the binding effect of judgments in class actions.

The Ontario L.R.C. recommended that judgment on the common questions should bind every member of the class who has not opted out. The judgment will be binding to the extent that it determines the common questions and relief specified in the certification order. This means that issues that could have been determined by the class action, but were not, can be litigated individually by class members. This recommendation is incorporated into the Ontario Act and the British Columbia Act and is consistent with the approach in Quebec that provides:

Every final judgment describes the group and binds the member who has not requested his exclusion from the group.

The British Columbia Act also states that a judgment on common issues does not bind a party to the class proceeding, in any subsequent proceeding, between the party and a person who opted out of the class proceedings. This provision prevents a class member from opting out of a class proceeding and then, at some later date, benefitting from a judgment on common issues.

Recommendation:

*Judgment on the common questions should bind every member of the class who has not opted out.

13. Appeals

(a) Certification Orders

The Ontario L.R.C. draft bill and the Ontario Act take slightly different approaches to the question of whether certification orders should be subject to appeal. Under the draft bill, appeals from certification orders lie, as of right, to the Divisional Court. Under the Ontario Act, a right of appeal exists from a refusal to certify a class action, while an appeal of an order certifying an action can be brought only with leave. The British Columbia legislation follows the Ontario L.R.C. recommendations and grants a right of appeal to either party.

Under both the L.R.C. draft bill and the Ontario and British Columbia Acts, if a representative party does not appeal, any class member may seek leave from the court to act as the representative party for the purposes of bringing an appeal.

Under the Quebec Code, an order refusing to authorize a class action may be appealed by the representative party or, with leave of a judge of the Court of Appeal, by any class member. An order authorizing the commencement of a class action cannot be appealed. The limitation of this right of appeal was introduced in 1982 for a very simple reason: until then, every ruling that authorized a class action was systematically appealed by the defendants. A commentator on the Quebec legislation is of the view that this paralyzed the development of class actions for several years.

(b) Judgment on Common Questions

Under the L.R.C. draft bill, the Quebec Code and the two provincial acts either party has a right to appeal judgment on the common questions, including an aggregate assessment, to the Court of Appeal. Where the representative party does not appeal, another class member may seek leave of the court to act as the representative party for the purposes of bringing the appeal.

(c) Judgment on Individual Issues

The L.R.C. draft bill gives a right of appeal to a class member who wishes to appeal a judgment of $1,000.00 or more. If a class member wishes to appeal a judgment of less than $1,000.00, however, the class member must be granted leave to appeal.

The Ontario Act includes a complicated set of rules respecting the appeal of orders distributing aggregate awards and determining individual issues. Class members, representative plaintiffs or defendants may, with leave, appeal any order dismissing a claim for monetary relief. Representative plaintiffs may appeal any order related to the distribution of an aggregate award if it is for $3,000 or more. The representative plaintiff

may, with leave, appeal an order involving a claim by any class member for more than $3,000. Any class member may appeal an order distributing an aggregate award or determining an individual issue where the amount involved is more than $3,000. If the amount involved is less than $3,000, leave is required.

In British Columbia, an appeal of individual issues requires leave of the court regardless of the amount of the award. The Quebec Code does not provide for an appeal of individual issues.

Recommendation:

*Class action legislation should provide for an appeal from an order refusing certification. From an order granting certification, either an appeal should not lie or should require leave. Class members other than the representative party should have the right to apply for leave to launch an appeal. An appeal should lie from a judgment on common questions and aggregate assessments. Judgments on individual issues and individual assessments should be subject to appeal either with leave or where the amount at issue exceeds a fixed amount.

14. Statutory Limitation Periods

Generally, statutory limitation periods stop running when an action is commenced. In most jurisdictions, the filing of a certification application suspends the running of time for all class members. If limitation periods continue to run against class members until after certification, they may be forced to file individual actions to preserve their causes of action.

The Ontario Act suspends the running of time for all class members when a proceeding is commenced under the Act. Time begins to run against a class member when he or she opts out or is excluded from the class, a decertification order is made, or the class action is dismissed, abandoned, discontinued or settled with the approval of the court. The Ontario Act section that deals with class proceeding limitations is presented below. It is closely modeled on the Quebec Code and L.R.C. draft bill and adopted in the British Columbia Act.

Limitations

28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

(2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

Recommendation:

*The commencement of a class action should suspend limitation periods for all class members until the member opts out, the member is excluded from the class, the action is decertified, or the action is dismissed, abandoned, discontinued or settled.

15.Statistical Evidence

Statistical evidence has been used in class action litigation in the United States to reduce administrative and evidentiary problems encountered by the use of traditional means of proof for claims arising in a mass production economy where lawsuits involve the effect of a product or practice on a large number of people. In the U.S., statistical and sampling evidence has been used to assist in the determination of aggregate awards, in the distribution of the award and to establish liability.

The Ontario L.R.C. concludes that this kind of evidence can be valuable in enhancing the manageability of class actions and recommends special provisions to overcome current barriers to its admissibility. The Ontario Act and the British Columbia Act depart from the recommendation of the Ontario L.R.C. to the extent that they allow the admission of statistical evidence only for the purpose of determining issues related to the amount or distribution of a monetary award and not for establishing liability. In British Columbia, for example, it was felt that the use of statistical evidence in questions of liability should be examined in the broader context of evidence in civil litigation and not limited to class proceedings. In addition, a mandate in drafting the British Columbia class proceedings legislation was to limit, as far as possible, the act to procedural requirements only and to refrain from changes to the substantive law. The Quebec Code does not specifically address this issue, though it does give the court the broad power to prescribe measures to simplify proof.

Recommendation:

*Class action legislation should authorize the use of statistical evidence in determining issues related to the amount or distribution of a monetary award.

16. Interjurisdictional Issues

A class defined in a class action brought under the Ontario Act may purport to include

individuals whose cause of action arose in British Columbia. If such an individual did not opt out of the Ontario class action and attempted to sue the defendants in British Columbia, he or she would likely be met by the argument that he or she was bound by the Ontario judgment and was barred from bringing an individual action. The response of the British Columbia litigant would be that legislation in Ontario did not bind him or her.

In the United States, national class actions, referred to as "multi district litigation", are conducted under special rules and have been legitimized in court decisions. These actions are not based on an opting in system, but rather follow the same opting out procedure as for any other class member. In the class case on this issue, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the United States Supreme Court decided that there was no need for non-resident class members to have any form of contact with the state where the class action had been commenced.

All that was required was that the non-resident class members be adequately represented, receive appropriate notice and be given the right to opt out. This position is based on the full faith and credit clause in the American Constitution. In light of the full faith and credit doctrine imported into Canada in *Morguard Investments Ltd. v. De Savoye* and the *Uniform Enforcement of Canadian Judgments Act*, it may be that this is an approach for uniform class action legislation that should be seriously considered.

However, the availability of an expanded class action procedure in a number of provinces could result in several class actions involving the same defendant and the same issues being commenced in each jurisdiction. In some cases, this could undermine the goals of judicial economy that underlie class actions. These issues have not been resolved by the Ontario legislation.

One commentator has suggested that class members could be sub-classed into two groups made up of provincial residents and extra-provincial residents. Class members residing in the province under whose legislation the class action was filed, or whose cause of action arose in the jurisdiction would be subject to the ordinary opt out requirements of the Act. Extra-provincial class members would be required to opt in in order to be part of the class. This recommendation has been adopted in the British Columbia legislation.

Recommendation:

*Extra-provincial class members should be treated as a subclass and be required to opt in in order to be part of the class.

17. Defendant Class Actions

The typical class action involves the certification of a plaintiff class which then sues one or more individual defendants. There is little in the legal literature, and very few specific statutory provisions, that deal with actions where an individual plaintiff sues a class of defendants.

The provisions of the Ontario Act apply equally to plaintiff and defendant class actions. In British Columbia, as in Quebec, class proceeding legislation does not allow for defendant class action. This approach was adopted for several reasons.

Unless special rules were inserted denying them the right to opt out, in many cases defendant class members would be likely to opt out and force the plaintiff to bear the cost of bringing individual actions against them.

Another issue arises with respect to the binding effect of a class action judgment or settlement on a defendant class member. While the legislature has the right to terminate causes of action (the effect of a binding judgment on plaintiff class members), its right to subject absent defendant class members to the coercive power of the court may raise due process problems. In the American context, where constitutional due process and property rights are intertwined, this issue is of particular concern.

A third issue arising in defendant class actions involves the running of limitation periods. In plaintiff class actions, limitation periods are suspended for all class members when a certification application is brought. Applying this rule to defendants could result in unfairness in defendant class actions. Where certification is denied, members of a defendant class could be sued after the expiration of the original limitation period, even though they may not have had notice of the class action.

A final issue involves the selection of the representative defendant. While a representative plaintiff is self-selected, a party is unlikely to volunteer to act as a representative defendant and take on the burdens and risks of that role. This means a representative would have to be selected by the court or the plaintiff. An unwilling representative defendant could choose to inadequately represent the interests of the class in order to disqualify itself.

Recommendation:

*Class action legislation should not provide for defendant class actions.

FOOTNOTES

Footnote: 1 At page 210 of the 1977 Report.

Footnote: 2 At Volume I, page 291.

Footnote: 3 At page 100, 1988 Proceedings.

Footnote: 4 See Lauzon's article, "Lessons Learned and Experience Gained from Quebec Class Actions," in The Class Action Lawsuit ... One Year Later ... Legal, Procedural, Technical and Practice Issues, The Canadian Institute,

May 13, 1994.

Footnote: 5 While the drafters appreciate that "numerosity" has not quite made it into the Oxford Unabridged, it has become a term used extensively in the class action literature.

Footnote: 6 See also, Environment Committee of the Bay Inc. v. Alcan Electrolysis and Chemical Company Ltd., [1990] Q.L.R. 655 and Tremaine v. A.H. Robins Canada Inc., (30 October 1990), Quebec 200 - 09 - 000208 - 873 J.E. 90 - 1642 (C.A.). Both of these cases state common questions need

not predominate.

Footnote: 7 Quite recently, the Ontario Court of Justice, General Division, ruled on an appeal of the Abdool decision. Although a three judge panel upheld Montgomery J.'s decision to deny certification, Mr. Justice Moldaver disagreed with Mr. Justice Montgomery's interpretation of the "common questions" test. Moldaver
J. states that

I must respectfully disagree with Montgomery J.'s statement that the Act was not intended to be used in circumstances where the individual issues to be determined could be said to predominate the common issues. As will be seen, while I am of the view that individual issues ought not to be completely ignored when considering whether a "class proceeding would be the preferable procedure for the resolution of the common issues" as required under s. 5 (1) (d) of the Act, I cannot accept that the Legislature intended to incorporate the predominate issue test into the Act.

See, 21 O.R. (3d), at 471.

Footnote: 8 The possibility of granting representative status to certain legal persons may enable these groups to have negotiating power that benefits consumers and occasionally avoids the need for lawsuits. One example from Quebec illustrates this principle. In a letter addressed to the Fonds d'aide aux Recours Collectifs, the Automobile Driver Protection Association confirmed

that the threat of a class actions in Quebec had led to the resolution of two problems affecting many Canadian consumers. As of the fall of 1989, the Honda corporation stopped levying the $35 warranty transfer fee on its models. The APA showed that the resulting savings to consumers amounted to between $500,00 and $1 million per model-year. Similarly, in the summer of 1991, the Ford motor company introduced a program that saved owners of 1988 and 1989 Ford Tempos and Mercury Topazes with defective fuel pumps approximately $1 million. This program provided for an extension on the warranty on the pump as well as reimbursement for the repairs already undertaken by the consumer.

Footnote: 9 The phrase "seem to justify" has been interpreted by the Supreme Court of Canada to mean:

... there must be in the eyes of the judge a serious appearance of entitlement for which he would authorize the action, without having to rule on the

merits in law of conclusions based on the facts presented.

; See, Quebec Regional Public Transit Users' Committee
; v. Quebec City Transit Commission, [1981] 1 S.C.R. 424.

Footnote: 10 The Courts have ruled on the intervention of a member of the group in Chateauneuf v. The Singer Company of Canada Ltd., [1990] Q.L.R. 216, and Fortier v. Attorney General of Quebec, 6 February 1991, Quebec, 200 - 06 - 000001 - 894, J.E. 91 - 575.

Footnote: 11 Section 32 directs the court to consider whether to require individual claims in order to apportion an aggregate award that is to be distributed individually.