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Commissioners:

Clifford H.C. Edwards, Q.C., *President*
John C. Irvine
Hon. Mr. Justice Gerald O. Jewers
Eleanor R. Dawson, Q.C.
Hon. Pearl K. McGonigal

Administrator:

Suzanne Pelletier

The Commission offices are located at 1210-405 Broadway, Winnipeg, Manitoba R3C 3L6. TEL. (204) 945-2896, FAX (204) 948-2184, E-mail: lawreform@jus.gov.mb.ca

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CHAPTER 1

INTRODUCTION

> *Given the high cost of individual litigation, everyone is looking for alternatives. Mediation and other forms of alternative dispute resolution represent real opportunities, but not in every case. Mass torts, particularly those involving multiple jurisdictions, are unlikely to be resolved otherwise than through litigation. Class proceedings can bring down the per unit cost of litigation, while enhancing access to justice. Can any jurisdiction do without this?*[1]

A. ACCESS TO JUSTICE

One of the recurring themes in recent years in jurisdictions around the world has been that of "access to justice". This has been evidenced by, for example, Lord Woolf's Report, *Access to Justice*, in the United Kingdom (Interim Report June 1995, Final Report July 1996); the Australian Access to Justice Advisory Committee Report, *Access to Justice: An Action Plan* (1994); the Canadian Bar Association Systems of Civil Justice Task Force *Report* (August 1996); and the Ontario Civil Justice Review (*First Report* March 1995, *Supplemental and Final Report* November 1996). Closer to home, the Manitoba government commissioned the Manitoba Civil Justice Review Task Force, which delivered its *Report* in September of 1996.

A finding common to all of these reports, and others, is that the "average citizen's" access to justice is unacceptably limited in a number of ways. One of the ways in which access has been limited has been the difficulty encountered by individuals who may collectively have experienced significant loss, but who individually cannot justify the cost of litigation to obtain compensation. As the Civil Justice Review Task Force noted in 1996:[2]

> One of the recurring themes the Task Force heard during the course of public meetings held in Winnipeg and other centres throughout Manitoba was that it takes too long and costs too much to litigate disputes in court.
>
> The Task Force heard expressions of frustration from many persons who had been embroiled in legal disputes, the delays that occur, the cost of the litigation and the pressure that the litigation itself brings to bear on the parties.

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[1] A.J. Roman, "Is It Time to Change the Law on Class Actions in Manitoba?", *Isaac Pitblado Lectures* (1996) VIII-7.

[2] *Manitoba Civil Justice Review Task Force Report* (1996) 7.

Nor are financial disincentives the only factors inhibiting redress in many cases; often there are social or psychological reasons why people fail to pursue legal remedies to which they are entitled. In Australia, a recent report stated:[3]

> In recent years there has been heightened awareness of the sad reality that, for most members of the public, access to the courts is beyond their reach as a result of the high cost of litigation. Class actions can enhance access to justice by opening the 'doors' of our courts to those with individually non-recoverable claims or whose claims would not have led to individual proceedings because of social or psychological barriers.

The South African Law Commission noted in 1995:[4]

> Class actions … are part of the worldwide movement to make access to justice a reality. This movement commenced in the early 1970s and recognises that it is of little use for people to have legally enforceable rights if they are unable to enforce such rights. Uneducated and unsophisticated people generally do not understand what their rights are, do not know how to go about enforcing rights of which they are aware, do not know where to get legal advice or assistance and cannot afford lawyers' fees. More sophisticated people, who do have a better understanding, frequently allow claims to go unenforced because the value of their claims [does] not warrant the high legal costs.… The result is that people who breach the law to the detriment of others often get away with their illegal actions and those who suffer harm as a result have no redress.
>
> Class actions … make it possible for concerned individuals and organizations to approach the court in order to claim relief … on behalf of others who, for the reasons mentioned above, would not be able to enforce their rights themselves.

The need for a mechanism to deal with these problems is growing. As the National Consumer Council said in its submission to Lord Woolf's Inquiry:[5]

> "As we become an increasingly mass producing and mass consuming society, one product or service with a flaw has the potential to injure or cause other loss to more and more people. Yet our civil justice system has not adapted to mass legal actions. We still largely treat them as a collection of individual cases, with the findings in one case having only limited relevance in law to all of the others."

In jurisdictions around the world the response to this issue of limited access to justice

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[3]Victorian Attorney-General's Law Reform Advisory Council, *Class Actions in Victoria: Time For A New Approach* (Report, 1997) §2.5 (hereinafter referred to as VLRAC Report).

[4]South African Law Commission, *The Recognition of a Class Action in South African Law* (Working Paper 57, 1995) §1.3-1.4 (hereinafter referred to as SALC Working Paper).

[5]Lord Woolf**,** *Access to Justice* (Final Report, 1996) 223, §1 (hereinafter referred to as Lord Woolf Report).

has been, increasingly, the introduction of legislation to facilitate—indeed, to permit—the bringing of class proceedings by representative individuals. Lord Woolf suggested that the legal system in England and Wales required overhaul in order to deal properly with multi-party actions. He stated:[6]

> Unlike the position in some other common law countries, there are no specific rules of court in England and Wales for multi-party actions. This causes difficulties when actions involving many parties are brought. In addition to the existing procedures being difficult to use, they have proved disproportionately costly. It is now generally recognised, by judges, practitioners and consumer representatives, that there is a need for a new approach both in relation to court procedures and legal aid. The new procedures should achieve the following objectives:
>
> (a) provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;
>
> (b) provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;
>
> (c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner.

While access to justice is only one of the three goals listed by Lord Woolf, it is a key goal and one that is clearly shared by many law reformers and governments. The Commission is of the opinion that the potential for enhancing access to justice for the citizens of Manitoba, and accomplishing the other goals set out by Lord Woolf, through the introduction of class proceedings legislation merits careful consideration, and to that end has prepared this Report.

B. CLASS PROCEEDINGS LEGISLATION

Class proceedings legislation does not create any new legal liabilities. Rather, it creates a procedural device that allows a representative plaintiff to assert, on behalf of other plaintiffs, tortious, contractual, or other claims that the law already recognizes, but which an individual plaintiff could not litigate because of the prohibitive expense.

In some cases, like mass accidents involving serious bodily injury, individual

[6] *Id.*, at 223, §2.

litigation may be economically feasible because of the large damages awards available. Nevertheless, the use of class proceedings to establish the defendants' liability can not only result in an efficient use of judicial resources, but also avoid inconsistent outcomes.

Even though they may not create new liabilities, however, class proceedings are quite different from other civil claims because, among other things: the proceedings directly affect persons not before the court (that is, all who may have a common claim); judges are more involved in managing the case, in part to protect the absent plaintiffs; and novel evidentiary and remedial rules often apply.

Modern class proceedings, a term which includes proceedings commenced either by action or application, may be brought in Québec (since 1979),[7] Ontario (since 1993),[8] and British Columbia (since 1995)[9]. The remaining Canadian provinces, including Manitoba, still operate under archaic rules which only permit class proceedings in very limited circumstances. The Uniform Law Conference of Canada adopted a *Uniform Class Proceedings Act* in 1996. The current United States Federal Courts Rule permitting such proceedings was adopted in 1966, and replaced a similar rule that had been in place since the early 1950s.

C. OUTLINE OF REPORT

The central issues in this Report are:

1. Should Manitoba adopt a class proceedings regime?

2. If so, what should the defining features of that regime be?

Chapter 2 of the Report will outline the current Manitoba law on multi-party proceedings, provide a brief overview of class proceedings legislation in the "reformed" jurisdictions, and describe the types of situations in which class proceedings have been used in those jurisdictions.

Chapter 3 will then outline the reasons advanced for and against class proceedings including access to justice, efficient use of judicial resources, windfalls for lawyers, and the effects on Manitobans of class proceedings regimes in other jurisdictions.

Chapter 4 will propose and discuss the features of a class proceedings regime.

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[7] *Act respecting the class action*, S.Q. 1978, c. 8 (in force 19 January 1979).

[8] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and *Law Society Amendment Act (Class Proceedings Funding), 1992*, S.O. 1992, c. 7.

[9] *Class Proceedings Act*, R.S.B.C. 1996, c. 50, proclaimed in force 1 August 1995.

Finally, Appendix A is the proposed Class Proceedings Act incorporating the Commission's recommendations.

D. ACKNOWLEDGMENTS

This Report was made possible by a grant from the Manitoba Law Foundation; the Foundation has, as part of its mandate, the promotion of law reform and has, through its grants to the Manitoba Law Reform Commission, made a significant contribution to the improvement of the laws of Manitoba. The Commission has been a recipient of grants from the Foundation since its inception in 1986 and we gratefully acknowledge their important support of this and other projects.

The Commission wishes to thank Professor Karen Busby of the Faculty of Law at the University of Manitoba, and Mr. Jonathan G. Penner, an independent researcher, who prepared this Report. The Commission also wishes to thank Kyle Dear, Blane Morgan and Marlaine Lindsay, who assisted in the preparation of the Report.

CHAPTER 2

THE EXISTING REGIMES

This first part of the Report begins by describing the existing options for Manitoba residents who might be in a position to take advantage of class proceedings legislation. We then provide a broad overview of the class proceedings legislation in those jurisdictions which have adopted modern regimes. Finally, we review the variety of circumstances in which class proceedings have been employed in those jurisdictions.

A. MULTI-PARTY PROCEEDINGS IN MANITOBA

The following section reviews the current Manitoba provisions dealing with multi-party proceedings. Although Manitoba has no "class proceedings" legislation as that term has been used in this Report, it does have a number of provisions that permit and circumscribe proceedings involving multiple participants.

1. Class Action Rule

The class action rule[1] in Manitoba has remained essentially unchanged since it was first developed as a rule of the equity courts. That rule became part of the English civil procedural rules, and was received into Canadian civil procedure in common law jurisdictions. The current rule provides, as it has for more than a century, as follows:[2]

> Where there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

Class actions were devised by the Court of Chancery for reasons of convenience. As Lord Macnaghten, in *Duke of Bedford v. Ellis*[3] stated:

> The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties

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[1]The proceeding described as a class action in the Manitoba Rules is described in some common law jurisdictions as a representative action. The origin of both representative actions and class actions is the same, the Court of Chancery. Similar too, as discussed *infra*, are the problems associated with using either rule to support a modern class proceeding. The term "representative action" now has a specific meaning in Manitoba which is somewhat more expanded than the original Chancery rule.

[2]*Queen's Bench Rules*, Man. Reg. 553/88, as amended, R. 12.01.

[3]*Duke of Bedford v. Ellis*, [1901] A.C. 1 at 8 (H.L.).

> interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice", to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience; for the sake of convenience it was relaxed.

The Williston Committee, which was charged with reforming the Ontario *Rules of Civil Procedures*, stated in its 1981 preliminary report that "we are convinced that the present procedure concerning class actions is in a very serious state of disarray."[4] This dismal assessment was affirmed by the Supreme Court of Canada in *General Motors of Canada Ltd. v. Naken.*[5] Naken, the owner of a Firenza, a car plagued with problems, sued General Motors on her own behalf and on behalf of almost 5000 other Firenza owners. She argued that the relatively small amounts in question coupled with the high cost of proving causation would not justify each individual owner commencing an action against General Motors, and that a class action was the only practical way to have the matter litigated.

The Supreme Court of Canada held in *Naken* that the class action rule (the same rule currently in force in Manitoba) was simply inadequate to accommodate Naken's action. The rule's deficiencies included, amongst others, the lack of provisions for opting out, service of notice, costs, modification of the discovery rules and approval of settlements, and the uncertain application of limitation periods and the *res judicata* doctrine. In short, the historic rule was not up to the task of modern, complex claims. In the absence of provisions to regulate these and other issues, the Court held that class actions pursuant to such a rule should be restricted to the very narrow situation where a number of conditions were met, including: (a) the principal issues of law and fact are the same for each plaintiff; (b) the class is clear and finite; (c) there is a discernible fund or asset against which the claim can be made; and (d) the plaintiffs claimed the same remedy. The Court concluded by stating that the case was a further illustration of the need for a comprehensive legislative scheme for the commencement and conduct of class actions.

Manitoba's current class action rule is virtually identical to the historic rule under consideration in *Naken*, and therefore contains the same deficiencies and limitations identified in that case. The class action rule was one of the very few areas left completely untouched when Manitoba's *Queen's Bench Rules* were revised and re-enacted in 1988.

Former Chief Justice Monnin stated in *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells Ltd.*[6] that "while we wait for legislation on the matter [of class actions] or for specific practice rules which have not yet evolved, Q.B.R. 56 [now Rule 12.01] must not be rendered useless". Nonetheless, it appears that only a handful of class actions have been

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[4]As quoted in Holmested and Watson, *Ontario Civil Procedure*, vol. 2 (looseleaf service) at 12-13.

[5]*Naken v. General Motors of Canada Ltd.* (1983), 144 D.L.R. (3rd) 385 at 410 (SC.C.).

[6]*Ranjoy Sales & Leasing Ltd. V. Deloitte, Haskins & Sells Ltd.*, [1985] 2 W.W.R. 534 (Man. C.A.)

filed in Manitoba in the last ten years[7] and there are very few other situations in Manitoba in the history of this rule where a class action has been permitted to proceed.

Class actions have proceeded in *Bartmanovich v. Manitoba Crop Insurance Corporation*[8] (a claim brought by 41 Manitoba producers against the corporation for breach of the producer contract); *Kucheravy v. MacLeod Stedman*[9] (a claim by former employees against members of the board of directors for vacation pay); and *Nelson House Indian Band v. Young*[10] (an action by the beneficiaries of a trust fund, which had disappeared, against the trustees of the fund).

Class actions were *not* permitted to proceed in *Gehman v. Salvation Army Grace General Hospital*[11] (in a claim for pay equity payments, the Court held, amongst other things, that the interests of various employees might not be the same) and *Moutinho v. Modern Building Cleaning Inc.*[12] (in a claim for breaches of *The Employment Standards Act*, including failure to pay overtime, the Court held, amongst other things, that the specific facts giving rise to each claim were likely to be different). The appropriateness of a class action representing all farmers issued certificates by the Wheat Board was not raised in *M-Jay Farms v. Canada Wheat Board*[13] but the claim was dismissed as failing to show a cause of action.

In the three cases where class actions have been permitted in the last ten years (*Bartmanovich*, *Kucheravy* and *Nelson House*), counsel, parties, and the court proceeded without the benefit of concrete rules to facilitate and direct such complex litigation. The *Ranjoy Sales* case[14] was subjected to an unsuccessful motion to require separate, individual actions on the ground that some of the investors may have had more knowledge than others and therefore were contributorily negligent. Subsequently, the case settled without a trial.

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[7]Under the current regime, class actions do not require any form of leave to proceed. However, given the restrictive nature of the current regime, it can be assumed that most class actions will be subject to a preliminary challenge by the defendant on the appropriateness of the proceeding.

[8]*Bartmanovich v. Manitoba Crop Insurance Corporation*, [1995] 7 W.W.R. 560 (Man. Q.B.), affirmed, [1996] 2 W.W.R. lxxix (note) (Man. C.A.).

[9]*Kucheravy v. MacLeod Stedman* (18 January 1994), No. CI-93-01-72953 *per* Master Bolton, affirmed, [1994] 6 W.W.R. 763 (Man. Q.B.), *per* Schulman J.

[10]*Nelson House Indian Band v. Young* (18 June 1997) No. CI-95-01-93750 *per* Kennedy J. (Man. Q.B.).

[11]*Gehman v. Salvation Army Grace General Hospital* (11 June 1997) No. CI 96-01099203 *per* Master Lee (Man. Q.B.).

[12]*Moutinho v. Modern Building Cleaning Inc.*, [1998] M.J. No. 137 (Q.B.).

[13]*M-Jay Farms v. Canada Wheat Board*, [1997] M.J. No. 462 (C.A.).

[14]*Ranjoy*, *supra* n. 6.

2. The 1988 Rules

In 1988 the rules on joinder of proceedings and on parties were expanded. Under the former rules, joinder of plaintiffs was only permitted if the claims arose from the same occurrence or transaction and gave rise to a common legal question. Now, claims by different plaintiffs may be joined if they arise out of the same transactions or occurrence, where there is a common question of law, or where joinder may promote the convenient administration of justice. The new rules also clarified various rules on parties; for example, it is now clear that collective entities without formal legal personalities (such as First Nations bands and Hutterite colonies) can commence proceedings under the authority of a representative order or pursuant to the new rule on proceedings by or against unincorporated entities.

While the newly expanded joinder and parties rules are very important, they are not a substitute for a class action. Some brave souls have attempted joinder of a significant number of plaintiffs, each of whom is then required to fully participate in the litigation, as were 239 of the original 337 plaintiffs who joined together in *Armstrong v. Attorney General (Canada).*[15] But such litigation is cumbersome, expensive, and can raise ethical questions for lawyers, especially in the event of inter-client conflict. Exceptionally patient and well-organized lawyers and clients aside, joinder of 5000 Firenza owners in one action is, quite simply, logistically impossible.

Similarly, consolidation of actions is not a practical solution to the pre-trial problems that arise when there are numerous plaintiffs, nor does this device facilitate settlement. *Lytton v. Barrett*[16] involved a claim which arose following the successful suit by Leilani Muir[17] against the Alberta government. Muir had been sterilized without her consent, and as a result was awarded close to $1 million. Subsequently, 276 plaintiffs joined in four different actions (the number of plaintiffs later increased to over 700) to make similar claims. They sought to have the actions consolidated because of the existence of common questions, such as the constitutionality of the relevant legislation and the common location (most sterilizations occurred at the same institution). In contrast, the government sought to have each case severed. The judge refused to grant either motion, stating that they were premature until after discoveries had been conducted.

Representative orders in Manitoba are available only with respect to the matters delineated in Rule 10 of the *Queen's Bench Rules*:[18]

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[15] *Armstrong v. Attorney General (Canada),* [1997] M.J. No. 26 (Q.B.).

[16] *Lytton v. Barrett*, [1996] A.J. No. 895 (Q.B.).

[17] *Muir v. Alberta* (1996), 132 D.L.R. (4th) 695 (Alta. Q.B.).

[18] *Queen's Bench Rules,* Man. Reg. 553/88, R. 10.

(a) the interpretation of a deed, will, agreement, contract or other instrument, or the interpretation of a statute, order in council, order, rule, regulation, by-law or resolution;
(b) the determination of a question arising in the administration of an estate or trust;
(c) the approval of a sale, purchase, settlement or other transaction;
(d) the approval of an arrangement under section 59 of the Trustee Act;
(e) the administration of the estate of a deceased person; or
(f) any other matter where it appears necessary or desirable.

Many of the cases where class proceedings would be useful, however, such as consumer claims, creeping disasters, mass accidents, or claims against the government, would not come within the specific narrow categories of the representative order rule. Even if such cases could be covered by the discretionary final provision, the rule contains many of the same deficiencies identified by the Supreme Court of Canada as barriers to a broadly-based class proceeding: no provisions for opting out, service of notice, costs, modification of discovery rules and approval of settlements, and the application of limitation periods and *res judicata*. The Manitoba rule on representative orders therefore could not be used as a substitute for class actions except in rare cases.

3. Test Case Litigation

Leading or test case litigation, where one claim out of numerous similar claims is pursued in order to obtain a finding of liability that may be applied to the other claims, is of limited utility in multi-party litigation. The plaintiff does not owe any legal obligation to have regard to the impact of their case on future litigation by others, and the lawyer is bound to obtain the most favourable result for the client—even if such a result may create a precedent which is not useful, or is potentially harmful, to other similar litigants. Furthermore, test cases are often settled on terms favourable to the plaintiff without a resolution of the underlying issues (such as admissions of liability, amendments of legislation, or changes in government programming) that gave rise to the litigation in the first place. For example, A.H. Robins Co. Inc. offered to settle (and did settle) the seven Dalkon contraceptive shield cases being pursued by one lawyer for $4.6 million dollars, more than the amount the plaintiffs had requested, after that lawyer obtained a broad discovery order against the company. According to Richard Sobol,[19] the defendant was anxious to settle because compliance with this order would have revealed that the company had deliberately destroyed files, and had known that its product was unsafe, but had refused to issue strong warnings because of the impact such warnings would have had on profits. Ironically, these settlements were so well publicized that more claims were filed and the documents A.H. Robins had hoped not to produce ultimately did see the courtroom light. Subsequently, thousands of claims were filed, and the potential damages were so

[19]R.B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* (1991) 19-22.

overwhelming that A.H. Robins ultimately sought bankruptcy protection.

The American experience also indicates that the original litigants tend to reap a damages windfall, especially if punitive damages are ordered. For example, the first plaintiffs in American IUD cases received multi-million dollar damages awards; in contrast, many of the class claimants whose cases were part of the bankruptcy protection proceedings settled for damages of a few thousand dollars.[20]

Test case litigation is not binding on the determination of either liability or damages except as between the parties named in the litigation. Naturally, a judicial resolution of test case litigation, particularly on the issue of liability, can influence the parties' willingness to settle. One cannot help but think that the Supreme Court of Canada's decision in *Dow Corning v. Hollis*,[21] where the Court upheld a $95,000 award for damages to the plaintiff arising out of the rupture of breast implants manufactured by the defendant, and rejected third party liability against the doctor and hospital, had an impact on the willingness of Dow Corning and other breast implant manufacturers to settle Québec and Ontario class proceedings involving similar claims.[22]

But leading or test cases do not always facilitate settlement in subsequent similar litigation. As noted earlier, in 1996 the Alberta government was ordered to pay almost $1 million in damages and costs to a woman who was sterilized while she was a teenager in a provincial mental institution. The government did not appeal this decision. Two years later, without any consultation with the 700 plaintiffs, and after trial dates for the first post-*Muir* cases were set, the Alberta government introduced a bill whereby each claimant would be paid $150,000 (inclusive of fees and disbursements), and invoked the *Charter*'s "notwithstanding" clause to insulate the bill from a *Charter* challenge. Following a public outcry, the bill was withdrawn; however, at the press conference withdrawing the bill, the Premier stated that these actions mainly benefitted lawyers and that an alternative approach to resolving these claims had to be found.[23]

Given all of these limitations, reliance on leading or test cases is clearly not a

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[20] *Id*, at 14-17.

[21] *Dow Corning v. Hollis* (1995), 129 D.L.R. (4th) 609, [1995] (S.C.C.).

[22] See *Serwaczek v. Medical Engineering Corp*. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.). See also M. Campbell, "Implant Suit Brings $35-Million Settlement, Dow to Pay Women in Québec, Ontario", *The Globe and Mail* (3 April 1998) A5. The settlement is subject to approval by an American bankruptcy court. Note that the issue of liability in the ruptured implant cases, involving claims for removal and relatively low damages, are much more straightforward than the causation issues that arise in claims alleging that the implants have led to more serious health problems, such as auto-immune diseases.

[23] It should be noted, however, that the government had vigorously contested liability in all 700 cases, and that government lawyers had no instructions to enter settlement negotiations. Nor did the Premier note that the government's lawyers had opposed (unsuccessfully) the plaintiffs' lawyers attempts to streamline the proceedings by moving to have joined actions severed from each other, and had also opposed (successfully) a motion to have the actions consolidated, arguing that discoveries of all 700 plaintiffs were necessary: *Lytton v. Barrett*, *supra* n. 16 [and accompanying text].

substitute for class proceedings.

4. Standing and Intervention Rules

Other methods for dealing with multi-party litigation, such as the rules on standing or intervention, are of limited utility.

(a) Public interest standing

Under the rules set down by the Supreme Court of Canada, public interest standing is only available if the validity of legislation is called into question, the plaintiff is directly affected or has a genuine interest in its validity, and there is not another reasonable and effective way to bring the issue before the court.[24] Class proceedings do not usually require a determination of the validity of legislation, and their liability issues are normally heavily dependent on findings of fact, such as causation, foreseeability, or contractual interpretation. The rules on standing, therefore, are a totally inadequate substitute for class proceedings.

(b) Intervention

Rule 13 of the *Queen's Bench Rules*[25] permits a person to apply for leave to intervene, either as a party or as a friend of the court, under certain circumstances. Intervention is most useful when novel legal points, rather than factual issues, are raised. In any event, the Manitoba courts have so narrowly interpreted the current intervenor rules as to give them little meaning.[26]

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[24]*Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

[25]*Queen's Bench Rules*, Man. Reg. 553/88, R. 13.

[26]K. Busby, "Interventions Under the New Manitoba Rules" (1989-90) 11 Adv. Q. 372.

5. Conclusion

In conclusion, the current Manitoba rules on multi-party proceedings are a patchwork of provisions intended to deal with specific problems, and not an adequate substitute for a comprehensive class proceedings regime. The Supreme Court of Canada made it clear in *Naken*[27] that the existing "class action" rules are woefully inadequate to the task of dealing with class proceedings, and those rules are rarely used. Rules on joinder and adding parties are useful, but cannot replace class proceedings because they can result in cumbersome and expensive proceedings—precisely what class proceedings legislation is designed to avoid. Test case litigation puts inordinate power in the hands of the "test" plaintiff, and does not necessarily facilitate the settlement of subsequent litigation. Finally, the rules on standing and intervention simply do not have much relevance to the situations that class proceedings are able to address.

B. CLASS PROCEEDINGS LEGISLATION IN OTHER JURISDICTIONS

This section briefly reviews some of the legislation governing class proceedings in jurisdictions other than Manitoba, and summarizes and highlights the differences among them.

1. The United States

While the earliest American rules on class actions were modeled on the Court of Chancery rules, American courts were the first common law jurisdictions to permit modern class actions. The most influential of these rules, Rule 23 of the United States Federal Rules of Civil Procedure (referred to in this Report as the "U.S. Federal Rules"), was substantially broadened in the early 1950s and then again in 1966.[28] (While Rule 23 seems to be under constant study, it has not been amended since 1966.) The United States, either in the federal or the state courts, has been long favoured as a destination by forum-shopping plaintiffs because of the availability of not only class actions, but also the plaintiff favouring rules and practices on contingency fees, civil jury trials, various strict liability doctrines for tort actions, and the lavish use of exemplary and punitive damages.

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[27] *Naken*, *supra* n. 5.

[28] Most, if not all, of the American states also have class action rules, and most of these are similar to the U.S. Federal Rules. The United States Federal Courts have a much broader jurisdiction than their Canadian counterparts, and a significant percentage of class action suits are filed in those courts.

2. Other Canadian Provinces

Québec led the way in Canada with the *An act respecting the class action*,[29] which came into force in 1979. The Québec legislation is very similar to the U.S. Federal Rules. It did not meet with an enthusiastic response from either courts or commentators when it was introduced. According to Potter and Renée, the courts initially adopted a restrictive approach to class actions, perceiving them as an exceptional and unjustified judicial measure. More recently, Québec courts have taken a more liberal approach.[30]

Ontario debated the question of class proceedings for more than a decade, digesting the preliminary Williston Report,[31] the Ontario Law Reform Commission Report on *Class Actions*[32] (1982), and the Report of the Attorney General's Advisory Committee on Class Action Reform[33] (1990) before it finally passed the *Class Proceedings Act, 1992*,[34] which came into force on 1 January 1993. In 1995, British Columbia passed the *Class Proceedings Act*.[35] The Uniform Law Conference of Canada adopted the *Uniform Class Proceedings Act*[36] at its 1996 meeting. The Ontario statute, which the British Columbia and Uniform Acts closely followed, "represents a significant departure from the United States/Québec model, as a conscious effort to avoid the weaknesses of that model".[37] The details of the legislation in the reformed Canadian jurisdictions and U.S. Federal Rule 23 will be discussed more fully later in Chapter 4 of this Report.

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[29]*An act respecting the class action*, S.Q. 1978, c. 8 (in force 19 January 1979).

[30]S. Potter and J-C. Renée, "Class Actions—Québec's Experience" in *Insight, New Class Proceedings Legislation*, April 11, 1991, as cited in G.D. Watson and M. McGowan, *Ontario Civil Practice* (1997).

[31]Holmested and Watson, *supra* n. 4.

[32]Ontario Law Reform Commission, *Class Actions* (Report, 1982) (hereinafter referred to as OLRC Report).

[33]Ontario, Attorney General's Advisory Committee on Class Action Reform, *Report* (1990). This report, which contained, substantially, the final draft of the Ontario class proceedings legislation, is founded on the unanimous recommendations of the Advisory Committee, whose membership included representatives of the Canadian Federation of Independent Business, the Canadian Manufacturers' Association, the Retail Council of Canada, the Ontario Chamber of Commerce, the Consumers' Association of Canada, the Canadian Environmental Law Association, Energy Probe, Advocates' Society, the Canadian Bar Association of Ontario, and the Insurance Bureau of Canada.

[34]*Class Proceedings Act, 1992*, S.O. 1992, c. 6. This Act established the procedures for class proceedings. *Law Society Amendment Act (Class Proceedings Funding), 1992*, S.O. 1992, c. 7, providing for funding, and comprehensive new court rules, came into force at the same time.

[35]*Class Proceedings Act*, R.S.B.C. 1996, c. 50, proclaimed in force 1 August 1995.

[36]Uniform Law Conference of Canada, *Proceedings of the Seventy-eighth Annual Meeting* (1996) 43. The Uniform Act was many years in the making, having first been approved in principle in 1988 at the Seventieth Annual Meeting of the Uniform Law Conference. It is also available at http://www.law.ualberta.ca/alri/ulc/acts/eclass.htm.

[37]A.J. Roman, "Is It Time to Change the Law on Class Actions in Manitoba?", *Isaac Pitblado Lectures* (1996) VIII-1.

No other Canadian province has adopted a comprehensive class proceedings regime. Most provinces still have archaic class action rules, and some have not yet adopted more expansive joinder rules. Very few class actions are commenced in these jurisdictions.[38]

3. Other Jurisdictions

Australia has adopted class proceedings legislation at the federal level and at some state levels, and both the English and Scottish courts are considering revising their class or grouped proceedings rules.

4. Conclusion

Since the three most populous Canadian provinces have introduced class proceedings legislation, the vast majority of Canadians now have access to modern class proceedings regimes. Both the Ontario and the British Columbia regimes[39] have been interpreted as permitting certification of a class covering all affected individuals in Canada. Manitoba plaintiffs can (and have) opted into British Columbia class proceedings.[40] The American courts have assumed the jurisdiction to certify foreign classes. In *In re Silicone Gel Breast Implant Product Liability Litigation*,[41] an Alabama court excluded Ontario and Québec residents because those jurisdictions had their own class action legislation—but included other Canadian residents as foreigners subject not only to the judgment but on the much less favourable terms for non-Americans.[42] In short, any resident of Manitoba may be included in class proceedings regimes which have an extra-Manitoba aspect even if such a proceeding could not be commenced in this jurisdiction. Accordingly, any discussion of whether Manitoba ought to adopt a class proceedings regime must consider whether Manitobans should be content to leave proceedings respecting mass claims to Ontario, British Columbia, Québec, and American federal and state courts, plaintiffs, and lawyers.

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[38]A Quicklaw review indicates that reasons for decision in cases involving class actions have been issued in fewer than 10 cases in all of the unreformed jurisdictions combined (excluding Manitoba) in the last 10 years.

[39]*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 127 D.L.R. (4th) 552 (Ont. Gen. Div.), leave to appeal to Div. Ct. refused (1995), 129 D.L.R. (4th) 110; *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3rd) 7347 (Gen. Div.); *Harrington (Guardian ad litem of) v. Royal Inland Hospital* (1995), 131 D.L.R. (4th) 15 (B.C.C.A.).

[40]See also, for example, *Rebizant v. Greenwood*, [1998] M.J. No. 142 (Q.B.), where five plaintiffs filed a suit in Manitoba arising out of defective jaw implants. Some of the plaintiffs had also joined American settlements and the British Columbia class actions.

[41]*In re Silicone Gel Breast Implant Product Liability Litigation*, (1994) US Dist LEXUS 12521 (N.D.Al 1 Set 1994).

[42]Note contra, *Bersch v. Drexel Firestone Inc*. 519 F.2d 974 at 986 (2d Cir. 1975).

The clear purpose of existing Canadian class proceedings regimes is to permit class proceedings in a wide range of circumstances. The regimes all share various features that assist in achieving this objective, including:

- Certification: All proceedings must be certified as appropriate for a class proceeding regime. However, with the exception of Québec, certification standards are liberal and relatively undemanding. If the standards are met, the court does not have a general discretion to certify or not certify.

- Common resolution of common issues: Common factual and legal issues are to be resolved in a common proceeding even if there are significant issues that are not common to all the class members, such as individual damages calculations.

- Opting out and *res judicata*: A plaintiff may take the initiative to remove himself or herself from the litigation. Class members who do not take this step are then bound by the outcome, and individual claims on the common issues will be subject to the *res judicata* rule. The tolling of limitation periods is usually suspended during the opt out period.

- Court involvement: Courts are highly involved in many aspects of class proceedings, both to ensure that the class is properly represented and to help tailor the other rules, particularly discovery rules, to the particular claims presented.

- Aggregate damages assessment and distribution: The court may make an aggregate assessment of damages and may specify procedures for determining individual claims.

- Costs and fees: The modern regimes contain cost and fee provisions that are designed to ensure that the representative plaintiff is not required to assume a burden of costs which would, in effect, preclude their participation, and to ensure that lawyers will be willing to take on class proceedings on behalf of representative plaintiffs.

C. SOME EXAMPLES OF CLASS PROCEEDINGS

This section of the Report reviews the different situations in which class proceedings have been used in jurisdictions that have permitted such proceedings.[43] Tort and contract law have both proven to be fertile ground for claims, as has the field of commercial law. Many class proceedings have been brought against governments, although governments have also benefited from the use of this procedure. Ultimately, the variety of situations in which

[43]For a comprehensive review of Ontario case law, see G. Watson, "Is the Price Still Right? Class Proceedings in Ontario" (unpublished paper presented at The Administration of Justice in Commercial Disputes Conference, Toronto, Ontario, 15-18 October 1997). Many of the examples noted in this section are discussed in Watson's paper in more detail.

class proceedings have been brought has been limited only by the ingenuity of legal practitioners and the infinite complexity of human interaction.

1. Tort-based Claims

Class proceedings in tort cases include claims arising from single incident mass accidents where people who are gathered together (for example, as travelers, spectators, workers, or neighbours) suffer losses from the same occurrence. Class proceedings respecting such claims have been filed in the reformed jurisdictions arising out of subway accidents, train derailments, and environmental disasters. Mass accidents are highly suited to class proceedings because even where, given the significant damages, it is economically feasible to have each person who suffered losses litigate separately, the liability issues are identical and shared among each of the plaintiffs. A class proceeding therefore results in judicial and legal economies and avoids inconsistent outcomes.

Tort-based claims for bodily injury arising from consumer products (for example, tobacco and asbestos) or, more commonly, medical products (for example, intra-uterine devices, breast implants, contaminated blood, jaw implants, silver mercury fillings, and heart pacemakers) have also been filed as class proceedings. These cases, often described as "creeping disaster" cases, have the highest profile because of the large numbers of people involved, the serious nature of the physical injuries alleged, and the fact that the amounts claimed may bankrupt the defendant(s).

Unlike the mass disaster claims, however, the plaintiffs' only connection to each other in the creeping disaster claims is injury and loss from the same product. Difficult factual and legal issues arise among the plaintiffs because the products may have been used at different times and in different circumstances, causation and the nature of the injury sustained may vary, different limitation periods may apply, and third party claims may arise. The requisite degree of commonality for court approval of a class proceeding has been the subject of litigation in Canada. For example, the lack of commonality has resulted in a refusal in Ontario to certify one of the blood contamination cases (HIV[44]) while other blood contamination cases (Hepatitis B[45] and Hepatitis C[46]) have been certified.

Other tort-based class proceedings commenced in provinces with modern class proceedings regimes include claims of group defamation, nuisance, the principle in *Rylands*

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[44]*Sutherland v. Canadian Red Cross Society* (1994), 112 D.L.R. (4th) 504 (Ont. Gen. Div.).

[45]*Anderson v. Wilson* (1998), 156 D.L.R. (4th) 735 (Ont. Div. Ct.), leave to appeal granted, [1998] O.J. No. 1864 (C.A.).

[46]*Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C. S.C.). Part of the claim was struck out: *Endean v. Canadian Red Cross Society*, [1998] B.C.J. No. 724 (C.A.).

v. Fletcher, various statutory torts, damage claims for breach of *Charter* rights,[47] claims arising from illegal strikes, negligent house construction, and negligent misstatement. In contrast, a nuisance class action[48] in Newfoundland was not permitted to proceed under an unreformed class action rule where a landlord sued on behalf of himself and 22 commercial tenants (with their consent) after the City of St. John's allegedly caused the landlord's property to be flooded.

2. Contractual Claims

Contractual class claims have involved, of course, the prototypical consumer claims for defective products (for example, defective toilets, house siding, plastic blinds, and heaters). Such claims usually involve relatively small amounts of money, and are not feasible to pursue on an individual basis, particularly if technical evidence is required. *Chace v. Crane Canada*,[49] a class proceeding in British Columbia, was a subrogated claim brought by an insurer on behalf of its clients after their homes were subject to water damage from defective toilets manufactured by the defendant. According to the plaintiffs' lawyers, the defendant had settled a number of the claims for significantly compromised amounts because it recognized that individual claims were not likely to be pursued in the civil courts.[50]

Other contractual claims involve misrepresentations (for example, in the provision of services), wage and wrongful dismissal claims, and disputes over franchise agreements. Two class proceedings currently before the Ontario courts involve educational institutions; one was filed by students and arises out of the faculty strike at York University and the other alleges the inadequacy of a trade school's technological equipment. In the first Ontario class proceeding to go to a trial, the plaintiff representing a class of 544 condominium owners who claimed interest on various deposits and tax refunds against the developer was awarded $2.6 million on behalf of the class.[51] In 1997, 200 Québec residents recovered the costs of a vacation which took them not, as promised, to a tourist area, but to an isolated and violent

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[47]In *Québec v. Syndicat national des employés de l'hôpital St-Ferdinand* (1996), 138 D.L.R. (4th) 577 (S.C.C.), the Supreme Court of Canada affirmed a damages claim in a class action on behalf of the patients at a hospital who suffered during an illegal strike. In contrast see *Québec (Attorney General) v. Guimond* (1996), 138 D.L.R. (4th) 647 (S.C.C.), where the claim for indemnification from the government for 50,000 persons who were jailed for non-payment of fines was dismissed on motion because the plaintiff could not establish a "serious colour of right". The propriety of the class was not in issue, although the Supreme Court indicated that a class action was not useful when the basis for relief was the challenge of a law.

[48]*West End Electronics v. St. John's (City)* (1992), 9 C.P.C. (3rd) 100 (Nfld. T.D.).

[49]*Chace v. Crane Canada Inc.* (1996), 26 B.C.L.R. (3rd) 339 (S.C.).

[50]See B.L. Prapley, "Class Actions: A Device for Insurers in Subrogated Claims" in *Insurance Law Newsletter* at http://www.casselsbrock.com/inss97.html.

[51]See *Windisman v. Toronto College Park Limited* (1996), 132 D.L.R. (4th) 512 (Ont. Gen. Div.), additional reasons at (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.).

part of Honduras where they endured thefts, muggings and power black-outs.

Employees suing for bonuses and vacation pay have been certified as a class proceeding;[52] another case, involving wrongful dismissal and unpaid wages arising out of a merger of two convenience stores, was certified and settled.[53] In contrast, a class action in Manitoba, on behalf of the employees of a cleaning company alleging a denial of rights under *The Employment Standards Act*,[54] including claims for overtime payments, was not permitted to proceed as a class action because the judge did not think that matters could be "addressed effectively and fairly in the same action."[55] The defendant's motion to strike out the portions of the style of cause and of the pleadings pertaining to the class action was successful.

3. Commercial Law

Securities cases arising out of a breach of fiduciary obligations, a failure to disclose, or negligent or misleading representations are very common in the United States because of the obvious plaintiff class: shareholders. American law, unlike Canadian law, imposes strict liabilities for misstatements, and plaintiffs are not required to show reliance on the statements to support a damages claim. "Fraud on the marketplace" (that is, information that is wrong, even if it is not relied upon by the plaintiff) is actionable in some American jurisdictions. While some characterize private class actions as essential to the effective functioning of securities law, others consider it legalized extortion.[56]

Securities class proceedings claims in Canada, while not unknown,[57] are not common. This situation could change following a report from the Toronto Stock Exchange which recommended a statutory provision for civil liability for a misrepresentation in a continuous disclosure system.[58] Currently there is ongoing discussion arising from this report on what standard of conduct might be actionable, although none of the proposed standards approach the American strict liability standard. The suggested standards range

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[52]*Atkinson v. Ault Foods Ltd.*, [1997] O.J. No. 5222 (Gen. Div.).

[53]*Gagne v. Silcorp Ltd.* (unreported, court file 97-CU-12094) (Ontario) as noted in Watson, *supra* n. 43.

[54]*The Employment Standards Act*, C.C.S.M. c. E-110.

[55]*Moutinho, supra* n. 12.

[56]S. Sharpe and J. Reid, "Aspects of Class Action Securities Legislation in the United States" (1997) 28 Can. Bus. L.J. 248 at 354. See also J. Chapman, "Class Proceedings for Prospectus Misrepresentations" (1994) 73 Can. Bar Rev. 492.

[57]See, for example, *Maxwell v. MLG Ventures Limited* (1995), 3 C.P.C. (4th) 360 (Ont. Gen. Div.) and *Carom v. Bre-X Minerals Ltd.*, [1998] O.J. No. 1428 (Gen. Div.), which discuss whether or not the actions met the test for certification set out in s. 5(1) of the *Class Proceedings Act.*

[58]Toronto Stock Exchange, *Responsible Corporate Disclosure: A Search for Balance* (1997).

from a broadly actionable standard of "facts which a reasonable person would believe would be likely to affect the market price," to a much narrower standard of "would be substantially likely to be considered important to a reasonable investor in making an investment decision". From a practical perspective, whatever the final standard, and assuming that is it adopted by securities regimes across the country, civil claims respecting securities claims are unlikely to be filed in jurisdictions that do not have a class proceedings regime.

Apart from the potential for such securities proceedings, there are currently few commercial law class proceedings commenced in Canadian jurisdictions. A derivative action by shareholders was not permitted to go ahead as a class action in Ontario because the *Canada Business Corporations Act*[59] already provided for a specific (and therefore preferable) proceeding designed to deal with such claims.[60] Anti-trust suits commenced as class actions by small businesses against larger corporate suppliers are common in the United States, but are unknown in Canada. The federal *Competition Act*[61] already permits class actions for those harmed by criminal conduct such as illegal pricing, misleading advertising, and conspiracy. However, this section has generated little, if any, litigation. Similarly, *The Fraudulent Conveyances Act*[62] contemplates suits by one creditor on his own behalf and on behalf of other creditors where there has been a fraudulent preference or transfer as against the creditors. However, the class action aspects of this legislation are not often used.

4. Claims Against Governments

Class proceedings against governments are not uncommon, including, for example, the contaminated blood cases. The Ontario Law Reform Commission found that the largest proportion of class actions in the United States involved actions against governments arising from breaches of civil rights and claims for equitable remedies (like injunctions or declarations) on the grounds that the government had wrongfully acted or refused to act and had thereby infringed the civil rights of the class as a whole.[63] Other situations where governments have been or could be a defendant in class proceedings include those arising from prison riots, a variety of *Charter* breaches, and Aboriginal residential schools policies. One Australian scholar posits that class proceedings may be useful in judicial review

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[59]*Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 190.

[60]*Rodgers Broadcasting Limited v. Alexander* (1994), 25 C.P.C. (3rd) 159 (Ont. Gen. Div.).

[61]*Competition Act*, R.S.C. 1985, c. C-34, s. 31.1.

[62]*The Fraudulent Conveyances Act*, C.C.S.M. c. F160.

[63]OLRC Report, *supra* n. 32.

proceedings and taxation matters.[64]

Governments have also been the beneficiaries of class actions. The British Columbia government participated in a class action in Texas to recover payments it had made to workers who had been injured working with asbestos[65] and the *Nantais* proposed settlement (involving defective heart pacemakers) included a payment of $1.8 million to provincial health plans.[66]

5. Other Claims

Some real estate class claims have also been filed arising from condominium contracts, Aboriginal land claims, golf club equities, and mobile home park rentals. Other miscellaneous cases include claims regarding breach of copyright and devolution of pension plan surpluses.

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[64]V. Morabito, "Taxpayers and Class Actions" (1997) 20 Univ. N.S.W. L.J. 372.

[65]See *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), 102 D.L.R. (4th) 96 (S.C.C.).

[66]T. Claridge, "Heart Patients Settle Class Action, Canadians Who Get Defective Pacemaker Part to Share in $23.1 Million", *The Globe and Mail* (6 October 1997) A1.

CHAPTER 3

THE NEED FOR REFORM

This part of the Report considers more closely whether there is a need for reform of the existing "class proceedings" regime in Manitoba.

A. RATIONALES FOR PERMITTING CLASS PROCEEDINGS

Three rationales are usually offered for the expansion of class proceedings: improved access to justice for plaintiffs, more efficient use of judicial resources, and providing a mechanism for accountability. These goals were described in *Hollick v. Toronto (Metropolitan)*[1] as follows:

> It is well established that the *Class Proceedings Act* has 3 main goals:
>
> > (I) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;
> > (ii) improved access to the courts for those whose actions might not otherwise be asserted. This involved claims which might have merit but legal costs of proceeding were disproportionate to the amount of each claim and hence many plaintiffs would be unable to pursue their legal remedies;
> > (iii) modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations.

Another rationale for introducing class proceedings legislation in Manitoba, given the intra-Manitoban application of other class proceedings, is the possibility that the rights of Manitobans are being compromised by the unavailability of a class proceedings regime in this province.

Finally, fears that class proceedings foster unmerited litigation and function only, or primarily, to line the pockets of lawyers need to be examined.

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[1] *Hollick v. Toronto (Metropolitan),* [1998] O.J. No. 1288 (Gen. Div.) para. 19.

1. Access to Justice

Access to justice has been described as "the cornerstone of class proceedings."[2] As noted in the Introduction to this Report, numerous studies, including the reports of the Manitoba Civil Justice Review Task Force[3] and the Canadian Bar Association Systems of Civil Justice Task Force,[4] have noted the lack of public confidence in the ability of the justice system to deal efficiently and economically with civil actions by individuals. The availability of class proceedings is one tool to deal with claims that otherwise might be too small, too complex, or too risky for a single plaintiff to take on individually. The *Naken* case is a classic example: the costs of proving the validity of the claim of manufacturing or design defects in an automobile or in other consumer products will often be higher than the amount of the claim, particularly if no personal injury has resulted. A sophisticated jurisprudence on tort and contract law means little if there is no practical, economical method of asserting and enforcing a claim. It is sobering to realize that Manitobans could not, from a practical perspective, assert many of the tortious, contractual, commercial or other claims described earlier in this Report.

The push to introduce class proceedings is, perhaps, more attenuated in the Canadian context than the American because of greater public access to public and administrative compensation schemes, most notably universal medical care and employment insurance. Nonetheless, fault-based principles remain the cornerstone for compensation, and therefore judicial mechanisms ought to be in place to give effect to claims that are best dealt with through class proceedings.

Does the class action device actually produce benefits for individual class members and the public? The United States Federal Judicial Center undertook a study[5] of all class actions (except the mass tort class actions) that were terminated between 1 July 1992 and 30 June 1994 in four federal district courts. Across the four districts, the median level of individual recoveries ranged from $315 to $528 and the maximum awards ranged from $1,505 to $5,331 per class member. Without an aggregative procedure like the class action, it is unlikely that many of these cases would have been commenced as individual actions because the cost would have exceeded any possible recovery. At best, the parties would have compromised their claims and settled for much less. The study also found no evidence of "professional" class action plaintiffs: very few people served as the class representative

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[2] J.J. Camp and S. Matthews, "Actions Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50", in Continuing Legal Education Society of B.C., *Torts—1998 Update* (1998) 4.1.06.

[3] *Manitoba Civil Justice Review Task Force Report* (1996) 7.

[4] Canadian Bar Association, *Systems of Civil Justice Report* (Executive Summary, 1996).

[5] T.E. Willging, L.L. Hooper and J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996).

more than once and no one ever served on more than two occasions.

Class proceedings in the creeping disaster cases, like defective medical products, can also operate to ensure an equitable division of assets. *Nantais v. Telectronics Proprietary*, the pacemaker class action which was certified as a national class pursuant to the Ontario regime has, according to news reports,[6] been settled for $23.1 million. This figure is the full amount of the defendant's North American insurance coverage and the lawyer for the plaintiff's class is recommending acceptance of the settlement for this reason. Individual claimants who are still alive will receive about $10,000, while those who have had their pacemakers removed will get at least $15,000. A fund has been set up against which those who have suffered very serious injuries may make a claim. These amounts, had the cases been litigated individually and assuming liability, would very likely have been higher, but the class action results in a fairer, and more expeditious, distribution of the assets among all the eligible members.

While novel claims have been asserted and summarily rejected in Canada, such as the group defamation action brought on behalf of veterans against the Canadian Broadcasting Corporation for its program, "The Valour and the Horror,"[7] there is little evidence that abusive or vexatious claims are being filed here. The only example to date, *Smith v. Canadian Tire Acceptance Limited*,[8] was a class action that involved allegations that the defendant had contravened the federal *Interest Act* by exacting excessive rates of interest on credit cards which had been issued to their customers. The defendant sought an order for costs against two non-parties, on the grounds that they were the true plaintiffs of the lawsuit even though they were not named. They were the instigators of the proceedings, had retained counsel and paid the commencement costs, and had solicited funds from cardholders (members of the class) to pay for it. The fundraising was comparable to selling shares in the lawsuit as the "return" was contingent on the amount of the original contribution. The non-parties had planned to keep a percentage of any award made in favour of the class. The improper nature of this case was denounced by the motions judge through a costs award jointly and severally against the non-parties and a reminder that, in appropriate circumstances, costs may be awarded directly against counsel.

Finally, it should be mentioned that modern class proceeding regimes permit a defendant to apply to have a plaintiff class certified, although defendants rarely pursue this

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[6]T. Claridge, "Heart Patients Settle Class Action, Canadians Who Get Defective Pacemaker Part to Share in $23.1 Million", *The Globe and Mail* (6 October 1997) A1. See also *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 127 D.L.R. (4th) 552 (Ont. Gen. Div.), leave to appeal to Div. Ct. refused (1995), 129 D.L.R. (4th) 110 (Ont. Div. Ct.).

[7]*Elliot v. Canadian Broadcasting Corporation* (1993), 108 D.L.R. (4th) 385 (Ont. Gen. Div.), additional reasons at (1994), 24 C.P.C. (3rd) 143 at 169, affirmed (1995), 125 D.L.R. (4th) 534 (Ont. C.A.), leave to appeal to S.C.C. refused (1996), 131 D.L.R. (4th) vii (note) (S.C.C.). See also *McCann v. Ottawa Sun* (1993), 24 C.P.C. (3rd) 170 (Ont. Gen. Div.).

[8]*Smith v. Canadian Tire Acceptance Limited* (1994), 118 D.L.R. (4th) 238 (Ont. Gen. Div.), affirmed (1995), 26 O.R. (3rd) 95 (C.A.), leave to appeal to S.C.C. refused (1996), 29 O.R. (3rd) xv (note) (S.C.C.).

option.[9]

In summary, therefore, a modern class proceedings regime operates to ensure the widest possible access to justice for people who have suffered losses as the result of someone else's fault, particularly where those losses are not large enough in financial terms to justify involvement in the expensive process of litigation.

2. Efficient Use of Judicial Resources

The Ontario Law Reform Commission noted:

> There is no real disagreement that class actions can achieve judicial economy where all class members have individually recoverable claims.… Class actions aggregating individually recoverable claims are beneficial not only to plaintiffs, but also to defendants, since such actions reduce defence costs by eliminating the need to assert common defenses in each individual suit.[10]

Joining together people who have suffered similar losses arising out of similar events and litigating the common issues not only has the advantage of avoiding inconsistent outcomes, but is an effective and efficient use of judicial resources.

Class proceedings do require significant judicial involvement and implicitly result in less autonomy for lawyers. As the lawyer is representing not just the plaintiff but a plaintiff who is representative of the class, the court will scrutinize many aspects of the case including modifying discovery rules, approving fee arrangements, and monitoring settlements. The U.S. Federal Rule even requires the court to determine whether counsel has the wherewithal to undertake the case!

Manitoba's judges have shown a greater willingness in recent years to be more involved in the cases before them when such involvement facilitates settlement, results in early final resolution, or streamlines trials. While the initial response of some members of the bench and bar to mandatory pre-trial conferences in the 1980s was lukewarm, there are now few who question the utility of such conferences. The summary judgment rule, introduced in 1989, which requires judges to take a "good hard look" at the merits of the case (often early in the proceedings), has been very successful. Some judges have proved to be excellent mediators; early indicators suggest that the family court case management project is very successful, and Rule 20A (expedited actions for claims less than $50,000), introduced in December 1996, appears to be working well. Finally, the Rules Committee is circulating draft comprehensive case management rules which are expected to come into

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[9]C. Mauro, "Class Actions: The Defence Perspective" (1994) 5 C.I.L.R. 27.

[10]Ontario Law Reform Commission, *Class Actions* (Report, 1982) 118 (hereinafter referred to as OLRC Report).

force in 1999. These successes should alleviate fears that judges should not or cannot take a more active role in litigation.

The United States Federal Judicial Center study on class actions found that class actions typically took two to three times longer from filing to disposition and consumed five times as much judicial time as typical civil cases.[11] As the U.S. Federal Rule certification motions are lengthy, factually complicated, and subject to frequent appeals, certification applications consume much more time in that jurisdiction than certification motions in the Canadian reformed jurisdictions. (Certification standards in the U.S. Federal Rules, for example, require a review of the merits of the case, something the Canadian common law regimes do not require.) Even so, it can still be safely predicted that Canadian cases will also consume more judicial resources than a typical civil case. In spite of this, however, it must be borne in mind that if each plaintiff litigated separately the hearings would be costly and duplicative and would cumulatively consume far more judicial resources.

Some examples of class proceedings that have been commenced in Ontario that might have been feasible as individual claims include the medical products "creeping disasters" such as the pacemakers (*Nantais*),[12] breast implants[13] and tainted blood claims (*Sutherland*),[14] and a condominium investment scheme (*Abdool*).[15] Such cases, prosecuted as class actions, will result in significant judicial economies through the avoidance of a series of individual suits. Creeping disaster class actions were not permitted in the United States until thousands of asbestos-related claims resulted in hundreds of individual trials on the issue of causation. The hotly contested, repetitious trials tested the capacity of the judicial system. When the intra-uterine device litigation threatened to turn into another debacle following the first series of claims, which resulted in multi-million dollar awards for the plaintiffs, the United States Federal Courts reversed their earlier decisions against permitting class actions respecting these mass tort claims.[16]

One of the reasons given by the Ontario Court of Appeal for refusing to certify the *Abdool* case, however, was that the class members' claims were individually viable. This reason for not certifying an action is not found in the Ontario legislation, and the British Columbia and Uniform Acts have been drafted to avoid the possibility of such an outcome.

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[11]Willging, Hooper and Niemic, *supra* n. 5.

[12]*Nantais*, supra n. 6.

[13]There are numerous breast implant cases in Canada. See, *e.g.*, *Bendall v. McGhan Medical* Corp. (1993) 14 O.R. (3rd) 734 (Gen. Div.).

[14]*Sutherland v. Canadian Red Cross Society* (1994), 112 D.L.R. (4th) 504 (Ont. Gen. Div.).

[15]*Abdool v. Anaheim Management Ltd.* (1995), 121 D.L.R. (4th) 496 (Ont. Div. Ct.).

[16]See *Re A.H. Robins Co. Inc.*, 880 F. 2d 709 (4th Circ., 1989).

Sutherland,[17] a tainted blood case, was refused certification on numerous grounds, including disparity of issues and the possibility of third party claims. As a consequence, there are at least 84 individual tainted blood cases before the Ontario courts and another possible 300 cases forthcoming. (Ironically, in *E. v. Australian Red Cross and others*,[18] the Court lamented that the class proceedings legislation had not (yet) been introduced and therefore the cases could not be determined together on the common issues but would have to proceed separately.) As Kent Roach has noted,

> … judicial fears of aggregating claims in class actions may have the unintended effect of imposing greater costs on the judicial system by requiring a multiplicity of actions over time that could have been more efficiently determined in one complex proceeding.… Canadian judges in both standing and class actions may too readily dismiss aggregation in public law litigation as a drain on judicial resources in the particular case when aggregation may be the most efficient judicial response to mass wrongs.[19]

But the *Abdool* and *Sutherland* cases are exceptions. According to Watson,[20] the Ontario experience to date has shown that most cases where certification motions have been decided on the merits are, in fact, certified, even where the plaintiffs' cases could be individually litigated.

Few plaintiffs opt out of class proceedings. According to the United States Federal Judicial Center study, one person or more opted out in 36% to 58% of the cases.[21] However, only 0.1% to 0.2% of the total membership of the class opted out in those cases, and 75% of the opt-out cases had 1.2% or fewer class members opt out. Moreover, like other civil proceedings, the vast majority of class proceedings are settled before they go to trial. Fewer than 4% of the class proceedings filed in the United States Federal Courts go to trial.[22] It is interesting to note that the Canadian medical products cases referred to above (pacemakers, breast implants, contaminated blood) either have already settled or will, in all likelihood, settle.

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[17]*Sutherland*, *supra* n. 14.

[18]*E. v. Australian Red Cross* (1990-91), 99 A.L.R. 601.

[19]K. Roach, "Fundamental Reforms to Civil Litigation" in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, vol. 2 (1996) at 414-415.

[20]See G. Watson, "Is the Price Still Rights? Class Proceedings in Ontario" (unpublished paper presented at The Administration of Justice in Commercial Disputes Conference, Toronto, Ontario, 15-18 October 1997) for a comprehensive review of Ontario case law. Only two other cases have not been certified: *Rodgers Broadcasting Ltd. v. Alexande*r (1994), 25 C.P.C. (3rd) 159 (Ont. Gen. Div.) (shareholder derivative action more appropriate) and *Ziegler v. Sherkston Resorts Inc*. (1996), 4 C.P.C. (4th) 225 (Ont. Gen. Div.), additional reasons at (21 April 1997), Doc. 95-CQ-63751 (the dispute was within the exclusive jurisdiction of the rent board).

[21]Willging, Hooper and Niemic, *supra* n. 5. The percentages varied across the four jurisdictions studied.

[22]Willging, Hooper and Niemic,. *supra* n. 5.

The existence of class proceedings has also had a hand in the development of broadly-based early settlement schemes or alternative dispute resolution mechanisms. For example, all federal and provincial Ministers of Health have announced that they are willing to compensate those people infected with hepatitis C through blood transfusions from 1986 to 1990.[23] The offer should, if the amounts are sufficient, be accepted by those infected between 1986 and 1990, the class with the strongest legal claim, leaving the class with a weaker legal claim (those infected before 1986) to maintain the litigation on their own. This announcement was made relatively soon after class proceedings were instituted on behalf of those infected with hepatitis C. The subway disaster class proceedings (*Godi*[24]) and wrongful dismissal class proceedings arising out of layoffs after a merger (*Gagne*[25]) have been resolved by an agreement to hold mini-hearings on damages.[26]

In conclusion, class proceedings clearly assist in maximizing the efficient use of judicial resources. Manitoba's judges are quite capable of taking on the "hands on" role required of them by a class proceedings regime, and that role undoubtedly results in systemic savings of judicial time and effort.

3. Accountability

The Report of the Ontario Attorney General's Advisory Committee on Class Action Reform stated that

> . . . the presence of effective remedies of any sort inevitably must contribute to a sharper sense of obligation to the public by those whose actions affect large numbers of people.… An effective class action procedure has the potential to contribute to improved compliance with such obligations.[27]

Some would argue that such goals are better accomplished through substantive social or legal changes like safer working practices, better research and pre-market testing standards, and more strict liability offences. The Scottish Law Commission rejected the goal of defendant behaviour modification as reason to expand class proceedings (although it agreed that such an expansion was a good idea for other reasons) stating that the purpose of a civil

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[23]This is the period during which tests that could have detected the presence of Hepatitis C were used in other jurisdictions, but not used in Canada.

[24]*Godi*, (unreported, court file 95-CU-89529) (Ontario).

[25]*Gagne v. Silcorp Ltd.* (unreported, court file 97-CU-12094) (Ontario) as noted in Watson, *supra* n. 20.

[26]As noted in Watson, *supra* n. 20, at 33.

[27]Ontario, Atttorney General's Advisory Committee on Class Action Reform, *Report* (1990) 17.

action, even a class proceeding, is to obtain compensation.[28]

On the other hand, does a class proceedings regime force a defendant to settle because the stakes of going to trial are far too high? While medical and epidemiological research permits more accurate analysis of potential risks and causes of injury, this concern may, nonetheless, have merit for some of the creeping disasters claims. For example, class counsel in a letter to class members recommending acceptance of the pacemaker settlement (the total settlement package exceeded $21.3 million) stated, among other reasons, that the defendant's liability was not clear.[29] Yet, the highly publicized class actions where the defendants ultimately faced bankruptcy proceedings, including the asbestos, intrauterine device, and ruptured breast implant cases, were only commenced after various plaintiffs acting individually in different parts of the United States were awarded multi-million dollar judgments. Liability, therefore, in the subsequent class proceedings was clear (at least pursuant to the verdicts of a number of juries), and settlement was the only realistic option for the defendants.

Where there is little jurisprudential support for the claims asserted, the defendant can, of course, test the waters by bringing a motion either to dismiss or for summary judgment. Another part of the answer to the "settle or sink" dilemma resides in a recognition of the uncertainty of tortious standards for services, such as investment advice or securities disclosures, and products, particularly medical products, that are subject to various forms of testing and government approval. Legislative clarity respecting tortious standards may be a better way of dealing with this issue than inhibiting civil recourse by restricting it to individual plaintiff-driven litigation.

Additionally, civil jury trials, which may be motivated by the well intentioned, but legally insupportable, "sympathetic-plaintiff-deep-pocket-defendant" theory of compensation, are almost never used in Manitoba.[30]

Another concern is that the spectre of class proceedings will raise professional liability insurance premiums to astronomical heights. According to one 1994 report,[31] the average partner in a large American accounting firm pays between $100,000 and $150,000 in annual liability insurance premiums because of the possibility of a securities class action suit. In Canada, the accountants' insurance liabilities are still significant, although much lower—between $25,000 and $35,000 per year. However, as already noted, fault-based compensation is and remains a cornerstone of civil liability; insurance will always be a cost

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[28]Scottish Law Commission, *Multi-Party Actions* (Report #154, 1996) §2.23 (hereinafter referred to as SLC Report).

[29]As noted in Watson, *supra* n. 20, at 33, n. 59.

[30]Section 64 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, provides that only actions for defamation, malicious arrest, malicious prosecution, or false imprisonment are to be tried with a jury, unless otherwise ordered by a judge.

[31]B. Jorgensen, "Eager Lawyers Cruise for Corporate Cash", *The Globe and Mail* (27 January 1994) B1.

of doing business. And again, this problem is not resolved by, in effect, preventing lawsuits by plaintiffs, but by ensuring that the actionable standard for professional conduct is clear.[32]

Accountability of wrongdoers, in sum, will undoubtedly be enhanced by the introduction of class proceedings legislation in Manitoba. Although there is some risk that defendants may be forced to settle particular class proceedings because they cannot afford the risks of a trial, that risk is minimal in Manitoba, and is better addressed through legislative reform of tortious standards than by depriving aggrieved parties of an efficient method of providing access to the justice system.

B. APPLICATION OF EXISTING REGIMES TO MANITOBANS

As noted earlier, the Ontario class proceeding regime has been interpreted as permitting certification of a class covering all potential plaintiffs regardless of residency. The British Columbia legislation also permits the certification of national classes[33] although, unlike under the Ontario legislation, non-resident plaintiffs must take steps to opt into the class. American courts have also assumed jurisdiction to certify foreign classes, and have made awards which favoured American plaintiffs over foreign plaintiffs. For example, Dow Corning filed a reorganization plan in August, 1997 with the Michigan Bankruptcy Court which, among other things, proposed that non-American plaintiffs receive only 40% of what their American counterparts would receive, and that the medical costs of removal for American women only would be covered.[34] Ontario and Québec lawyers were able to negotiate a more favourable settlement[35] (because class actions were already pending in those jurisdictions), but it is not clear whether any Manitoba women would be included in this settlement.

Permitting Manitobans to commence class proceedings here, rather than forcing them to rely on those brought in other jurisdictions, and avoiding the possibility of less favourable terms for Manitobans simply because this jurisdiction is without a class proceeding regime, are two strong reasons for adopting a class proceeding regime in Manitoba.

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[32]See the discussion *infra* on proposed standards for securities liabilities.

[33]See for example *Harrington v. Dow Corning* (1996), 22 B.C.L.R. (3d) 97 (S.C.), supplemented (1997), 29 B.C.L.R. (3d) 88 (S.C.), in which the Court approved an application to include in the class women who had been implanted anywhere in Canada (outside Ontario and Québec), or who had been implanted anywhere and were now resident anywhere in Canada (outside Ontario and Québec).

[34]As noted in Acheson & Co., *Breast Implant Newsletter* (5 September 1997), http://www.achesonco.com.binews09.htm. It is not clear whether the court accepted this proposal.

[35]See M. Campbell, "Implant Suit Brings $35-Million Settlement, Dow to Pay Women in Québec, Ontario", *The Globe and Mail* (3 April 1998) A5. This settlement also needs to be approved by the U.S. Bankruptcy Court and the Ontario and Québec Courts.

Judicial and academic opinion[36] supports the view that judicial decisions in class proceedings in jurisdictions with class proceedings regimes, including judicially approved settlements, should be recognized by domestic courts and therefore are *res judicata* and binding on non-resident or foreign plaintiffs who did not opt out.

In particular, recent Supreme Court of Canada jurisprudence[37] on conflicts of law strongly supports the principle that, as a matter of constitutional federalism, federally appointed courts should reflect and foster Canadian federalism by co-operating with each other. If litigation has "a real and substantial connection" (a term not fully defined) to a province, that province's courts may assume jurisdiction over the litigation, and this assumption should be tolerated and accepted by courts in other provinces even if those provinces also have a real and substantial connection to the case. The effect of this is that Manitoba courts are likely to recognize and enforce a class proceeding decision from an Ontario court that affects Manitoba residents, as long as the proceeding had a real and substantial connection with Ontario, even if Manitoba would have been a preferable jurisdiction from the point of view of the class members resident in Manitoba.

A frustrating aspect of the U.S. Federal Rule class action procedure, particularly for corporate defendants in creeping disasters cases, is the inability to bring all claimants together at one time and to have the matter settled without first having to apply for bankruptcy protection. Unlike the Canadian jurisprudence, American law on the relationship among state courts and between state courts and United States Federal Courts is very complicated, and the United States does not have a doctrine like the Canadian doctrine of comity flowing from constitutional federalism. The "real and substantial connection" test supports the idea that one court can exercise jurisdiction over a class action affecting a Canadian class and that other courts would be obliged to respect this assumption of jurisdiction. An important exception, as Janet Walker[38] has noted, is that it is still questionable whether the Crown in the right of one province can be sued in the courts of another province, although she argues that the spirit of the recent Supreme Court of Canada jurisprudence suggests that such suits should be entertained.

Even where a court has jurisdiction pursuant to the "real and substantial connection" test, it may refuse to exercise that jurisdiction if there is a more convenient or appropriate forum elsewhere. Judicial economy and convenience to a party are significant factors in establishing a real and substantial connection to the forum. The benefits of consolidating matters to avoid the potential for a multiplicity of actions and inconsistent results has been

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[36]See J. Dixon, "The *Res Judicata* Issue in England of a United States Class Action Settlement" (1997) 46 Int. & Comp. L.Q. 134; J. Walker, "Interprovincial Sovereign Immunity Revisited" (1997) 35 Osgoode Hall L.J. 380; and G. McKee, unpublished paper, referred to in Watson, *supra* n. 20, and the judicial references contained in these sources.

[37]*Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.); *Hunt v. T&N plc* (1994), 109 D.L.R. (4th) 16 (S.C.C.); *Tolofson v. Jensen* (1994), 120 D.L.R. (4th) 289 (S.C.C.).

[38]Walker, *supra* n. 36.

held to be a factor supporting jurisdiction in a single court where a claim might otherwise need to be tried in the courts of several provinces.[39] In *Nantais*, the Court held that it was "eminently sensible … to have questions of liability of these defendants determined as far as possible once and for all for all Canadians."[40] Additionally, the fact that one party has already engaged counsel and is deeply involved in litigation in one jurisdiction is a strong factor in favour of having all related or similar litigation heard in the same jurisdiction.[41] Therefore, even if Manitoba courts could assume jurisdiction over litigation pursuant to the real and substantial connection test, the absence of a class proceeding regime in Manitoba would be a significant factor in determining that Manitoba is not a convenient forum for litigation, even for an opting-out litigant.

In conclusion, residents of a province that has not introduced modern class proceedings regimes are denied advantages available to other members of a potential class. They are subject to be bound by decisions made in another jurisdiction, without necessarily having had any opportunity to participate in the proceeding. Not only should Manitobans be able to choose to conduct class proceedings that affect them in the courts of Manitoba, they need a mechanism to avoid being bound to unfavourable settlements.

[39]*Nantais, supra* n. 6 and *Harrington, supra* n. 33.

[40]*Nantais, supra* n. 6, at 347.

[41]*Spiliada Maritime Corp. v. Cansulex Ltd.* (1986), [1987] A.C. 460, [1986] 3 All E.R. 843 (H.L.).

C. ENTREPRENEURIAL LAWYERS?

Approximately 30 class proceedings are commenced annually in Québec, and about 13 cases a year in Ontario,[42] although the number of Ontario cases will likely increase as more lawyers become familiar with class proceedings practice. When the Ontario Act was introduced, many feared (based on ideas about the American system) that the new regime would encourage frivolous litigation or open the "proverbial floodgates of litigation".[43] For example, one author predicted:

> If the American experience serves as a guide, the [Ontario] Act will foster a new breed of entrepreneurial advocate. He or she will, for example, review offering documents in pending transactions, searching for a misrepresentation or a promise that has not or cannot be kept. The advocate will then commence a class proceeding in the hope of achieving a swift settlement. In the American model such advocates may cease to perform a service function. They become aggressive participants in the process, they take the initiative, develop causes of action, fund the disbursements on a speculative basis, and seek out and identify the necessary plaintiffs.[44]

However, a comprehensive review of all class proceedings filed in the first five years since the Ontario legislation was introduced[45] reveals that these concerns are unfounded.

> Many of the factors which operate in the United Sates to encourage immoderate class proceedings do not exist in Canada; these factors include the rarity of civil juries and strict liability torts, the costs rule, and lower general damages awards. Additionally, there has been a steady and substantial decline in cases filed in the United States, both absolutely, and as a percentage of all actions. Class actions are no longer perceived as a special problem in the United States[46]. While there will always be spectacular cases where someone attempts to abuse the system, the Federal Judicial Center study of all class proceedings (in four Federal Court Districts for a two year period) found that there was no pattern of situations where actions produced nominal class benefits in relation to lawyers fees. In fact, fee recovery rarely exceeded the normal 33% contingency fee. Moreover, there were few fee-related appeals and all of these appeals related to a claim for a counsel fee.

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[42]Watson, *supra* n. 20, at 8, n. 11.

[43]See P. Iacano, "Class Actions and Products Liability in Ontario: What Will Happen?" (1991-92) 13 C.I.L.R. 99.

[44]S.J. Simpson, "Class Action Reform: A New Accountability" (1991) Adv. Soc. J. 19.

[45]G.D. Watson, "Class Proceedings" in G.D. Watson and M. McGowan, *Ontario Civil Practice* (1997).

[46]A.J. Roman, "Is It Time to Change the Law on Class Actions in Manitoba?", *Isaac Pitblado Lectures* (1996) VIII-2.

Smith v. Canadian Tire,[47] discussed previously, is probably the only Canadian case to date that could be described as an abuse of the class proceeding regime, and the Court made it clear in that case that such proceedings would not be tolerated. As already noted, the Court also made it clear that costs would, in an appropriate case, be awarded against a lawyer commencing such proceedings.

Ensuring that lawyers will be willing to take the risk of commencing a class proceeding creates a dilemma which is central to the concern over frivolous litigation: the fees must be lucrative enough so that lawyers will take on the case even with the risk that they will not get paid and be saddled with disbursements, yet not so lucrative that the fees are seen as a bonanza to an unscrupulous lawyer. Similarly, plaintiffs have significant disincentives to act as a representative party: they stand to gain nothing more than any other similarly situated plaintiff, yet they could face liabilities for fees, disbursements, and adverse costs. Modern class proceedings will not be used unless the regime provides mechanisms to resolve these problems.

No Canadian jurisdiction has adopted a comprehensive system of legal aid funding for class proceedings. Both Ontario and Québec, however, have litigation funds to which plaintiffs may apply at the outset of the case. If the application is approved, the plaintiff will be reimbursed for disbursements and indemnified against any adverse costs awards. In Ontario, legal fees cannot be recovered from this fund, but in Québec they can. The provincial governments provide the original capital for the funds, but the funds generate new capital by taking 10% of the proceeds of any successful indemnified litigation.

Anecdotal evidence suggests that lawyers are very cautious when deciding which cases they will take on. David Klein, a lawyer who has represented plaintiffs in British Columbia class proceedings, states that he takes on about one case out of ten considered.[48] He and his partners evaluate a case on both financial and legal criteria, asking such questions as: whether the case is likely to be certified; whether, in particular, there are common issues; whether there are enough people to make the case worthwhile; and, whether the defendant can pay. Very few applications are made to the Ontario fund.[49] This may be because lawyers are only taking on cases which they are sure they can win and therefore, absent the risk, they (and presumably their clients) do not want to bother with forfeiting 10% of any award.

All fee arrangements must also be approved by the courts, and given that the lawyer represents a class, not just a friendly client, the Canadian and American courts have not (with some exceptions) shied away from a thorough evaluation of proposed fees. (Watson even suggests that the plaintiff class should now be represented independently on fee

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[47]*Smith*, *supra* n. 8.

[48]J. Cummins, "Class Actions Come of Age", *The National* (Mar./Apr. 1998) 10.

[49] J. Campion and V. Stewart, "Class Actions: Procedures and Strategies" (1997) 19 Adv. Q. 20 at n. 96.

approval motions.[50]) Ontario permits a modified contingency fee arrangement, similar to the "lodestar" method that has been used in the United States when class settlements produce non-quantifiable benefits (such as an injunction).[51] The fee is based on a multiplier: the hourly rate adjusted for complexity and carrying costs multiplied by risk—usually between 1.0 and 2.0 (although it can be as high as 4.5). The multiplier fee may be topped-up by a counsel fee, if appropriate.

The experience in Ontario and British Columbia, therefore, suggests that Manitoba need not be concerned about an explosion of litigation driven by entrepreneurial lawyers if a class proceedings regime is introduced. There are a significant number of factors constraining the type of rapacious behaviour that observers have decried in the United States, and even in that country the problem is more one of perception than reality. Lawyers are entitled to be remunerated appropriately when they assume the risk of a class proceeding being unsuccessful, but judicial supervision of fee arrangements will ensure that the remuneration received is not out of proportion to the risk assumed.

D. CONCLUSION

A modern judicial system requires a procedure for dealing with claims involving large numbers of parties. Mass disaster and creeping disaster claims place intolerable strains on a system that is not equipped to cope with them. Likewise, consumer protection claims and claims against governments require recourse to a procedure that can fairly balance the claims of large numbers of plaintiffs against the procedural entitlements of defendants.

Not the least important rationale behind the introduction of class proceedings legislation is the need to provide a means of redress to people whose injuries are insufficient, except in the aggregate, to make pursuing compensation in the judicial system economically feasible. As well, the judicial system is being called on to do more and more with fewer and fewer resources, and class proceedings can help ensure that those resources are used as efficiently as possible. Class proceedings legislation will also hold wrongdoers accountable for wrongs that might not be pursued by individual victims, thereby enhancing the fairness of society as a whole.

The fact that Manitobans are now liable to have their rights affected by class proceedings brought in other jurisdictions, and possibly to be prejudiced as a result, is another reason for the introduction in Manitoba of a modern class proceedings regime.

Finally, fears that introduction of such a regime may result in an explosion of spurious and extortionate litigation by entrepreneurial lawyers are, in the Commission's

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[50]Watson, *supra* n. 20, at 29.

[51]*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 33.

opinion, unfounded.

Manitoba's existing "class proceedings" procedures are insufficient to the tasks required of a modern class proceedings system, having been designed to solve other types of problems. The most populous jurisdictions in Canada have all, in recent years, adopted class proceedings legislation designed specifically to deal with the issues discussed in Chapter 2 of this Report. The Commission is therefore of the opinion that Manitoba should take steps to provide its citizens with the protection of a modern class proceedings regime. The specific features of that regime will be discussed in Chapter 4.

RECOMMENDATION 1

Manitoba should adopt a statutory class proceedings regime.

CHAPTER 4

DEFINING A CLASS PROCEEDINGS REGIME

This part of the Report will address some preliminary issues relating to the general or defining features of a class proceedings regime. It is largely based on a comparison of the Canadian common law regimes (Ontario and British Columbia), the Uniform Law Conference's Uniform Act, the U.S. Federal Rules, and the Québec regime which offer valuable insights into the operation of a class proceedings regime. As well, several reports have been prepared in recent years in other jurisdictions on the topic of class proceedings, and the Commission has drawn on those reports to provide a balanced view of what a Manitoba class regime could look like.

A. GENERAL OBJECTIVES

It must be kept in mind that there is little point in adopting a class proceedings law which appears to permit such actions but which, practically speaking, precludes them. The Ontario, British Columbia, and Uniform Acts take pains to ensure that barriers to class actions (particularly barriers identified in the American or Québec jurisprudence, or in decisions like that of the Supreme Court of Canada in *Naken*[1]) are removed or minimized. As discussed in more detail below, this objective is accomplished through liberal certification standards (including a specific enumeration of factors that are not bars to certification) and a careful consideration of financial arrangements, including the rules on costs, fee arrangements, and funding mechanisms.

A number of other issues also need to be considered, including: class membership; the operation of *res judicata* and the tolling of limitation periods; judicial involvement in pre-trial proceedings; evidence principles specific to class proceedings; and the assessment and distribution of aggregate damages.

1. Appropriate Court

A preliminary observation is necessary regarding the level of court that will adjudicate class proceedings. Clearly the Court of Queen's Bench, the province's superior court, will administer and adjudicate any class proceedings. There is a real possibility, however, that in a significant number of cases the financial amounts at stake for the individual members of a class would fall within the jurisdiction of the Small Claims Division

[1] *Naken v. General Motors of Canada Ltd.* (1983), 144 D.L.R. (3rd) 385 (S.C.C.).

of the court. That division, however, is not well suited to the complexity of class proceedings, particularly the significant "hands-on" judicial involvement that will be required. Permitting class proceedings to be brought in the Small Claims Division would have the potential to seriously impair the operation of that Division, which is designed to provide an expeditious and informal resolution of claims.[2] The Commission is therefore of the opinion that class proceedings should not be permitted in the Small Claims Division.

RECOMMENDATION 2

Class proceedings should be permitted to proceed only in the Court of Queen's Bench (General Division), and not in the Small Claims Division.

2. Statutory or Regulatory Introduction

Before entering into a discussion of the content of a class proceedings regime, we must consider whether the regime ought to be introduced by way of legislation, or merely by amending the existing rules of court.

The adoption of a class proceedings regime, if seen mainly as a rule on parties, does not entail a substantive change in the law, but only introduces a mechanism by which pre-existing rights may be exercised. Accordingly, many of the changes contemplated in this Report are within the power of the Rules Committee under *The Court of Queen's Bench Act.*[3] The U.S. Federal Rule has always been judge-made, and the Scottish Law Reform Commission was of the view that even an expansive class proceedings regime was within the court's rule-making power.[4]

On the other hand, adoption of a class proceedings regime is a significant step, and potentially controversial. The regime does contemplate the possibility of introducing some changes which are better seen as substantive rather than procedural, including, for example: suspension of limitation periods; revision of the *res judicata* principle; adoption of evidence principles specific to class proceedings; and the introduction of aggregate assessment of damages. For this reason, Canadian jurisdictions that have introduced modern class proceedings regimes have proceeded by way of legislation rather than rules amendment, with incidental rules flowing out of the legislation promulgated by the statutory Rules Committee to come into effect simultaneously with the legislation.

The Ontario Law Reform Commission recommended that a class actions procedure

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[2]*The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, s. 1(3).

[3]*The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 92.

[4]Scottish Law Commission, *Multi-Party Actions* (Report #154, 1996) §4.9 (hereinafter referred to as SLC Report).

be introduced in that province by way of statute, rather than rules under the *Judicature Act*. It gave two reasons for this recommendation: first, the difficulty of distinguishing between substantive and procedural law; and second, the introduction of such a procedure raised "many important and controversial issues that deserve to be debated fully in the Legislative Assembly, rather than passed by way of regulation...."[5]

We are in agreement with that position, and therefore recommend that the Government proceed with the introduction of class proceedings through the enactment of legislation, and not simply by relying on the Queen's Bench Rules Committee. Some rules, of course, will have to be adopted or revised by that Committee in order to properly implement our recommendations.

RECOMMENDATION 3

The recommendations in this Report should be introduced by legislation, with incidental rules flowing out of the legislation drafted by the Queen's Bench Rules Committee to come into effect simultaneously with the legislation.

3. Applicability of Rules

A preliminary observation is also necessary regarding the applicability of the existing rules of court. In Ontario, the rules of court "apply to class proceedings,"[6] and in British Columbia they "apply to class proceedings to the extent that those rules are not in conflict with this Act"[7] (this is the same wording used in the Uniform Act). Obviously, there is no reason to re-invent the wheel and create unnecessary confusion by applying a different set of rules to class proceedings than are applied to other civil actions.

There have, however, been attempts in recent years to streamline civil procedure in the Manitoba courts, which have involved the introduction of new rules that are not found in either Ontario or British Columbia. Rule 20A of the *Queen's Bench Rules*,[8] introduced in December 1996 to expedite the prosecution of modest civil claims, applies on its face to all actions in which less than $50,000 is claimed. The rule imposes case management on actions to which it applies, and limits the application of many of the normal procedural rules, such as the discovery process. Unfortunately, this rule is simply not appropriate for class proceedings, despite the fact that in most cases the claim of each individual member of a

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[5]Ontario Law Reform Commission, *Class Actions* (Report, 1982) 306 (hereinafter referred to as OLRC Report).

[6]*Class Proceedings Act, 1992,* S.O. 1992, c. 6, s. 35.

[7]*Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 40.

[8]*Queen's Bench Rules*, Man. Reg. 553/88, R. 20A.

class is likely to be less than the threshold amount. It has none of the detailed procedural rules and safeguards of a modern class proceedings regime, and simply was not designed to deal with such situations.

Similarly, proposed Rule 78, which may be effective as early as January 1999, is another case management rule intended to apply to virtually all non-family civil proceedings brought in the Court of Queen's Bench. There are good reasons for attempting to ensure consistency of procedure among different types of claims in the court, and it may be possible to make class proceedings work within the Rule 78 procedure. Nevertheless, class proceedings have their own unique requirements, and it is likely preferable to ensure that the case management procedure applicable to class proceedings takes these requirements into account. The Rule 78 procedure, therefore, ought not to be applied to class proceedings.

RECOMMENDATION 4

Class proceedings should not be subject to Rules 20A or 78 of the Court of Queen's Bench Rules, but the Rules should in all other respects apply to class proceedings to the extent they do not conflict with the class proceedings legislation.

4. Reliance on Existing Models

A final preliminary matter is that of the form that Manitoba's class proceedings legislation ought to take. The Ontario class proceedings regime is generally regarded by other law reform commissions and legislators as the model to emulate. It has been adopted, with some minor changes, by both British Columbia and the Uniform Law Conference of Canada.

Any class proceedings legislation adopted in Canadian common law provinces in the future will almost certainly be based on the existing legislation in Ontario and British Columbia. The Chairman of the British Columbia Law Reform Commission stated in 1997:

> Canadian interest in class action legislation is quickening and it now seems likely that any legislation that emerges in the other common law provinces of Canada will adhere to the Ontario/British Columbia model.[9]

Furthermore, consistency among provincial procedural regimes can be, in itself, a desirable quality. The Manitoba rules of court, for example, are already, in most respects, identical to the Ontario rules, which were in turn modeled on the Nova Scotia rules. Consistency is even more desirable where, as with class proceedings, the actions themselves can have extra-territorial implications and where differences among the regimes may

[9]A.L. Close, Q.C., "British Columbia's New Class Action Legislation," (1997) 28 Can. Bus. L.J. 271 at 277.

encourage forum shopping by plaintiffs.

We are of the opinion that there are excellent reasons for the adoption of class proceedings legislation that has been implemented and found to work effectively in other Canadian jurisdictions. As later discussed in further detail, we are also of the opinion that certain shortcomings that have been identified in the Ontario and British Columbia legislation have been dealt with by the Uniform Law Conference in the preparation of its Uniform Class Proceedings Act.

RECOMMENDATION 5

The legislation implementing the Commission's recommendations should be based on the existing Canadian common law statutory regimes, and in particular on the Uniform Class Proceedings Act.

B. CERTIFICATION

One of the key issues to be considered with respect to a class proceedings regime is whether and how actions must be certified by the court before they are permitted to proceed. In some jurisdictions, there is no certification requirement: class actions are permitted to proceed as long as they meet a specific statutory description.[10] In most, however, court approval is required before a claim is allowed to proceed. This approach is the one employed in both Ontario and British Columbia, as well as in the Uniform Act.

The questions to be considered in connection with certification are:

1. Should there be a certification requirement? If so,
   (a) when should an application for certification be made and considered by the court?
   (b) what factors ought to be considered by the court in deciding whether or not to certify a proceeding?
2. Whether or not there is a certification requirement, should the court be entitled to decertify a class proceeding?

[10]The Australian federal procedure is an example of such a procedure. It permits a class action where seven or more persons have similar claims with substantial common issues of fact or of law: *Federal Court of Australia Act 1996* (Cth) Part IVA, s. 33C(1).

1. Mandatory Certification

Requiring that all proceedings be certified enables all parties to know from an early stage whether the litigation is appropriate for a class proceeding, thus protecting both defendants, who might otherwise face an unwarranted and unduly onerous burden, and potential class members, whose ability to file separate actions may be foreclosed once the class action proceeds. As well, a certification motion provides an opportunity for the common issues and classes (and sub-classes) to be defined and approved, and the representativeness of the named plaintiff to be evaluated. The existing class proceedings regimes in Ontario, Québec, British Columbia, and the United States, as well as those recommended in Scotland,[11] England,[12] and South Africa,[13] all require certification of a class proceeding. Only in Australia have legislators and law reformers seen fit to dispense with mandatory certification.[14]

The disadvantages of a certification requirement include the costs and delay of the certification motion; in the United States, certification battles are, in most cases, the chief battle of the litigation. The Australian Law Reform Commission rejected the need for a certification requirement based in part on an argument that there was "no value in imposing an additional costly procedure, with a strong risk of appeals involving further delay and expense, which will not achieve the aims of protecting parties or ensuring efficiency."[15]

The Ontario Law Reform Commission, on the other hand, noted:[16]

> The universality of ...[a certification] requirement appears to reflect a consensus among the drafters of class action procedures that class actions are sufficiently different from individual proceedings to require a special judicial filter to weed out class actions that are contrary to the interests of the class members, the defendant, or the public.

It is the Commission's opinion that it is preferable to require certification of a class proceeding in order to ensure that only those actions that ought properly to be resolved using

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[11]SLC Report, *supra* n. 4, at §4.19.

[12]Lord Woolf, *Access to Justice* (Final Report, 1996), c. 17, 227 and 229-230, §§16 and 24-26 (hereinafter referred to as Lord Woolf Report).

[13]South African Law Commission, *The Recognition of a Class Action in South African Law* (Working Paper 57, 1995) §6.17 (hereinafter referred to as SALC Working Paper).

[14]Victorian Attorney General's Law Reform Advisory Council, *Class Actions in Victoria: Time For A New Approach* (Report, 1997) 46 (hereinafter referred to as VLRAC Report).

[15]Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report #46, 1988) 63-64 (hereinafter referred to as ALRC Report).

[16]OLRC Report, *supra* n. 5, at 281.

the class proceedings process are allowed to proceed under it. This will ensure that the process is not employed inappropriately.

RECOMMENDATION 6

Class proceedings, once filed, should not be allowed to proceed until they have been certified by the court.

(a) Appeals of certification orders

Under U.S. Federal Rule 23, defendants have no right of appeal against a certification order, and plaintiffs may not appeal a denial of certification without leave. Québec, where the certification requirements are more like the U.S. Federal Rule than the Canadian common law regimes, does not permit appeals of certification motions by the defendant. In Ontario, plaintiffs can appeal a denial of certification as of right, but defendants require leave to appeal a certification order. British Columbia permits certification appeals by either party as of right, although the Court of Appeal in that province has indicated that it will be very reluctant to interfere with a decision on certification.[17] Under the provisions of the Uniform Act, both plaintiffs and defendants require leave to appeal a decision respecting certification.

The Ontario Law Reform Commission recommended that both parties be entitled to appeal a decision respecting certification as of right.[18] The Scottish Law Commission similarly disagreed with the Ontario legislation's requirement that defendants be required to obtain leave to appeal a certification order:[19]

> Such a requirement may be thought to be justifiable on the ground that the financial and other resources of the defenders in a class action are likely to be superior to those of the representative pursuer, or of the class as a whole, and that the defenders should be discouraged from delaying the progress of the action by appealing the grant of certification. We consider, however, that all decisions disposing of applications for certification or decertification are of sufficient importance to justify appeal without leave.

A review of the appeal provisions in the Canadian and United States class proceedings legislation pointed out, however, that in Québec defendants were originally given the right to appeal a certification order, but this right was subsequently repealed

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[17]*Campbell v. Flexwatt Corp.* (7 November 1997), Vancouver No. CA122124 (C.A.).

[18]OLRC Report, *supra* n. 5, at 821.

[19]Scottish Law Commission, *Multi-Party Actions: Court Proceedings and Funding* (Discussion Paper #98, 1994) §7.92; confirmed in SLC Report, *supra* n. 4, at §4.150.

because it was perceived to be too onerous.[20]

The Ontario Law Reform Commission also recommended that class members be permitted, with leave, to appeal the denial of a certification order if the representative party fails to do so, or abandons an appeal once launched.[21]

It is our opinion that it would be inappropriate to deny any party the right to appeal an order regarding certification. We are also of the opinion, however, that permitting appeals as of right may impede the ability of the class proceedings regime to accomplish one of its primary goals, that of judicial efficiency. The Commission therefore recommends that appeals from certification orders be available to both plaintiffs and defendants, but only with leave of a judge of the Court of Appeal.

We further are of the opinion that it would be appropriate, in keeping with the recommendation of the Ontario Law Reform Commission and the provisions of the Canadian common law regimes, for a member of a class to be permitted, with leave, to appeal any order if the representative party fails to do so.

RECOMMENDATION 7

Appeals from certification decisions should be available to both plaintiffs and defendants, but only with leave of a judge of the Court of Appeal.

RECOMMENDATION 8

Members of a class should be permitted, with leave of a judge of the Court of Appeal, to appeal any order if the representative party fails to do so or abandons an appeal after filing it.

2. Timing of Certification Motions

In Québec a representative plaintiff "cannot institute a class action except with the prior approval of the court obtained on motion." This differs from all other existing class proceedings regimes, which permit a proceeding to be filed *before* seeking the court's approval.

The U.S. Federal Rule requires that certification motions be brought "as soon as practical after commencement" of the proceedings. Ontario and British Columbia, and the Uniform Act, require that the certification motion be brought, generally, within 90 days after

[20]J. Campion and V. Stewart, "Class Actions: Procedures and Strategies", (1997) 22 Adv. Q. 20 at 41.

[21]OLRC Report, *supra* n. 5, at 822.

a defence has been filed.

The Scottish Law Commission recommended that applications for certification should be made within 14 days after a defence has been filed.[22] The Ontario Law Reform Commission recommended a 90 day time limit for filing the certification application, and stated:[23]

> We believe that an early disposition of the certification application will help to ensure that the interests of the defendant and the absent class members are safeguarded. In the case of the defendant, it will minimize any adverse consequences resulting from the launching of a class action against him, by making possible an early resolution of a putative class action. With respect to absent class members, if certification is denied, an early disposition will afford them an opportunity to evaluate or re-evaluate the advisability of taking other steps to secure relief. In addition, the time limit that we shall propose may help to ensure that the court deciding the issue of certification is not confronted with an action that has become stale.

Watson's review of the first five years of Ontario class proceedings practice revealed that certification decisions had been made in only 16 of the approximately 60 class proceedings filed.[24] It appears that either defendants are slow to file defences, or that certification motions are not being filed as required by the rule or, if filed, are not being heard expeditiously. Given the complexity of class proceedings and the general desirability of avoiding court proceedings where the parties can work out the arrangements themselves (subject to, for class proceedings, court approval), the lack of certification applications is not necessarily cause for concern. Nevertheless, a rule that provides for a relatively short time period for filing the motion provides protection for those parties who need a judicial mechanism for moving proceedings along.

The Commission has considered the question of the timing of certification motions, and is of the opinion that requiring such motions to be brought prior to the initiation of proceedings would create unnecessary problems for plaintiffs where, for example, expiry of a relevant limitation period is imminent. We also believe that a period of 90 days is both necessary and sufficient, given the complex nature of many class proceedings. We are therefore of the opinion that the practice in other Canadian jurisdictions is appropriate, and ought to be employed in Manitoba.

RECOMMENDATION 9

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[22]SLC Report, *supra* n. 4, at §§4.22 and 4.25.

[23]OLRC Report, *supra* n. 5, at 421.

[24]G. Watson, "Is the Price Still Right? Class Proceedings in Ontario" (unpublished paper presented at The Administration of Justice in Commercial Disputes Conference, Toronto, Ontario, 15-18 October 1997) 12.

Plaintiffs should be required to bring a motion for certification of a class proceeding after filing their originating process within 90 days of the close of pleadings.

3. Certification Requirements

All class proceedings regimes set out certification requirements, which enable the courts to determine which actions are appropriate to that special procedure. The issue is not *whether* to set out certification requirements, but *what* those requirements ought to be.

The American and Québec experience has demonstrated that unduly vague or restrictive certification rules result in the focus of the litigation being on whether certification is appropriate, rather than getting on with determining the merits of the case. In contrast, the Canadian common law regimes are designed to permit certification except where a case is clearly not appropriate as a class proceeding.

Although in Ontario the experience to date indicates that most class proceedings subjected to certification motions have, in fact, been certified,[25] British Columbia courts appear to date to have been somewhat more conservative in their approach.[26]

In addition to setting out certification requirements, the Ontario, British Columbia, and Uniform Acts also respond to the fact that in the past courts have restricted the availability of class actions by relying on a number of rules that automatically bar the availability of the procedure, including the barriers identified in *Naken.*[27] To prevent the resurrection of those barriers, the class proceedings Acts in the Canadian common law jurisdictions specifically enumerate factors that will *not* operate as a barrier to certification of a class proceeding. The enumerated factors include: the relief claimed will require individual assessment; the relief claimed relates to separate contracts; different remedies are being sought for different class members; and the number and identity of class members are not ascertainable.

Commentators in British Columbia have pointed out, with respect to their provincial legislation:[28]

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[25]Certifications have been granted in 12 of the 16 Ontario cases where the motions have been completed: *id.* at 12.

[26]A Quicklaw review suggests that only slightly more than half (6 of 10) of the certification motions brought to date in British Columbia have been successful.

[27]*Naken*, *supra* n. 1.

[28]J.J. Camp and S. Matthews, "Actions Brought Under the Class Proceedings Act, R.S.B.C. 1996, c. 50", in Continuing Legal Education Society of B.C., *Torts - 1998 Update* (1998) 4.1.02.

> In most cases, the only contentious issues are whether there are common issues, and, if so, whether the class proceeding is the preferable procedure for resolution of the common issues.

It should be noted as well that certification motions may proceed on consent, where the defendant sees the class proceeding as being in its own interest. Consent motions have been used, for example, where the parties have simultaneously submitted a settlement proposal to the court.

In the following sections, we will review the nature of the certification requirements that should be included in Manitoba's class proceedings legislation.

(a) Judicial discretion

The British Columbia and Uniform Acts provide that, if the certification requirements are satisfied, the judge "must" certify the action, and the Ontario Act provides that a judge "shall" certify, whereas the U.S. Federal Rule merely provides that a judge "may" certify. The Scottish Law Commission considered the question of whether a residual discretion was desirable, and concluded:[29]

> [W]e think that it is inherently unsatisfactory that although an applicant may satisfy the court, the court is able (without assigning any reason) to decline to certify. The criteria should be drafted in such a manner which directs the court's attention to all relevant matters, without the need to rely on an unspecific residual discretion to withhold certification.

We are similarly of the opinion that it is undesirable for the court to be able to deny certification if an applicant is able to satisfy the certification criteria.

RECOMMENDATION 10

Certification of class proceedings should be mandatory if the criteria set out in the legislation are satisfied.

(b) Consideration of the merits

The Québec regime requires the certification judge to consider the merits of the claim in deciding a certification application. At the very least this requirement involves an examination similar to that contemplated on a motion to strike pursuant to Queen's Bench Rule 25.11; at worst, it may involve a motion akin to a summary judgment motion. Either

[29]SLC Report, *supra* n. 4, at §4.42.

motion requires the production of evidence[30] at a very early stage in the litigation, and pre-certification discovery has been permitted in order to facilitate the development of an evidentiary basis for this motion. Additionally, this requirement demands the presentation of potentially complex arguments on the merits of the case, arguments that may have little or nothing to do with the appropriateness of a class proceeding.

The Ontario Law Reform Commission recommended that an applicant for certification ought to be required to satisfy the court that "the action has been brought in good faith and that there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the class."[31] The South African Law Commission also suggested that the applicant be required to establish at least a *prima facie* case.[32]

For the most part, the American class action regimes provide that the applicant need not demonstrate the merits of the case in order to obtain certification, although some American jurisprudence does require an inquiry into the merits of the plaintiff's claim.[33] Ontario, British Columbia, and the Uniform Act merely require the court to find that the claim discloses a cause of action. Even this cursory examination was rejected as too onerous by both the Scottish Law Commission[34] and Lord Woolf, who said, "There is no need for the court to take a view of the merits at the certification stage."[35]

Defendants in Canadian common law jurisdictions who are concerned about the merits or *bona fides* of the proceeding can and have[36] brought separate motions to strike or for summary judgment prior to the certification motion. We are of the opinion that these options are sufficient to protect defendants from unmeritorious class proceedings. The class proceeding rule, therefore, need not incorporate a merit requirement into the certification criteria.

We are also of the opinion, however, that it ought to be open to the court to dismiss

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[30]Other than a motion to strike for failure to disclose a reasonable cause of action pursuant to Rule 25.11(d), in support of which no evidence can be filed.

[31]OLRC Report, *supra* n. 5, at 323.

[32]SALC Working Paper, *supra* n. 13, at 62-63.

[33]Campion and Stewart, *supra* n. 20, at 31.

[34]SLC Report,, *supra* n.4, at §4.31.

[35]Lord Woolf Report, *supra* n. 12, at 229, §25.

[36]For example, in *Smith v. Canadian Tire Acceptance Limited* (1994), 118 D.L.R. (4th) 238 (Ont. Gen. Div.), affirmed (1995), 26 O.R. (3rd) 95 (C.A.), leave to appeal to S.C.C. refused (1996), 29 O.R. (3rd) xv (note) (S.C.C.), *McCann v. Ottawa Sun* (1993), 24 C.P.C. (3d) 170 (Ont. Gen. Div.), and *Garland v. Consumers' Gas Co.* (1996), 30 O.R. (3d) 414 (C.A.), affirming (1995), 122 D.L.R. (4th) 377 (Ont. Gen. Div.), additional reasons at (1995), 22 O.R. (3d) 767 (Gen. Div.).

a certification application where the applicant has clearly failed to establish a cause of action. This will tend to accomplish the goal of judicial economy by eliminating the need for the defendant to bring a further motion to strike the claim, when such a motion will inevitably succeed.

RECOMMENDATION 11

The plaintiff should be required to establish on a certification application that his or her pleadings disclose a cause of action.

(c) Numerosity

The U.S. Federal Rule requirement that the class be "so numerous that joinder … is impractical" is the subject of constant litigation on just how numerous the class in fact is, and when the case crosses over to the realm of the impractical. Although the Québec requirement is not quite so onerous ("where the composition of the group makes joinder difficult or impractical"), it gives rise to similar problems. The Canadian common law jurisdictions avoid these problems by all but removing a numerosity requirement: the class need only be composed of "two or more persons". This was the same formula recommended by the South African Law Commission.[37]

The Australian Law Reform Commission recommended, and the Australian government implemented, stipulation of a minimum number of persons who could form a class. That Commission suggested:

> Establishing a minimum number would promote the efficiency of the procedure and ensure that cases are not grouped where joinder or consolidation is more appropriate. While the choice of any figure in these circumstances is arbitrary, the Commission considers that the grouping procedure should be available so long as there are at least seven group members plus the principal applicant, making eight in all.[38]

The Scottish Law Commission, on the other hand, recommended a model closer to the U.S. Federal Rule: the court should consider whether there are so many potential plaintiffs that it would be impracticable for them to sue together in a single conventional action.[39] The Ontario Law Reform Commission recommended adopting the language of the then existing Rule 75, requiring that the proposed class be composed of "numerous

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[37]SALC Working Paper, *supra* n. 13, at 61.

[38]ALRC Report, *supra* n. 15, at 61.

[39]SLC Report, *supra* n. 4, at §4.32.

persons".[40]

We do not believe that any substantial benefit would be gained by imposing a particular "numerosity" requirement on a representative plaintiff. As the Australian Law Reform Commission noted, any number would of necessity be arbitrary. We are in accord with the position of the other Canadian common law jurisdictions, and take the position that so long as there is more than a single identifiable plaintiff, the group ought not to be prevented from taking advantage of the class proceedings regime.

RECOMMENDATION 12

There need only be an identifiable class of two or more persons in order for a proceeding to be certified as a class proceeding.

(d) Presence of common issues

A requisite condition to certification in any class proceedings regime is the presence of "common issues". In Ontario, British Columbia, and the Uniform Acts these are expressly defined as

> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

This definition is essential in the face of the *Naken* decision, which restricted class actions to cases where the principal issues of law and fact are identical.[41] This meant that class proceedings could not be certified if some class members had issues that differed from those of other class members.

As will be discussed below,[42] the Canadian common law regimes also make it clear that the existence of individual issues (*i.e.*, issues that are not shared by all members of the class) is not a barrier to a class proceeding. The effect of the new regimes is that the "common issues" need not be determinative of all the issues between the parties; that is, the class action may proceed even if other issues will remain to be resolved once the common issues have been dealt with. The British Columbia Court of Appeal stated in *Campbell v.*

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[40]OLRC Report, *supra* n. 5, at 331.

[41]*Naken*, *supra* n. 1.

[42]Under "Matters Not a Bar to Certification," *infra* 57.

Flexwatt:[43]

> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

The Québec Act requires that an action raise "identical, similar or related questions of law or fact". The South African Law Commission recommended that applicants be required to establish that "there are sufficient issues of fact or law which are common to the claims (or defences) of members of the class to make the class action an appropriate method of proceeding."[44]

The U.S. Federal Rule requires that common issues "predominate" over individual issues before a claim can be certified. This requirement has led to detailed and speculative arguments in United States Federal Courts on the factual and legal issues of cases at certification hearings. Moreover, prior even to discovery, how could one know whether particular factual issues would predominate? This procedural requirement has proven to be one of the most unsatisfactory aspects of U.S. Federal Rule class action procedures.

While the Ontario Law Reform Commission recommended that common issues had to "predominate" for a class proceeding to be certified, that language is not in the Ontario Act. The Act simply requires that "the claims or defences raise common issues". In *Abdool v. Anaheim Management Ltd.*,[45] however, the Court imposed the "predominate" requirement on the basis that it was implied by the legislation. To avoid this outcome, the British Columbia and Uniform Acts are very explicit that "predominancy" is not a consideration. Those Acts require that the "claims raise common issues, whether or not those issues predominate over issues affecting only individual members."

We consider that the approach of the British Columbia and Uniform Acts is preferable to that of the Ontario Act, and preferable as well to the U.S. Federal Rule. We believe that there is no reason for the court to inquire into whether common or individual issues "predominate," given that the class proceedings regime should be available whenever it is appropriate to determine *any* common issue, provided that the certification requirements are otherwise met. Further, as will be discussed in the next section, one of the questions the court is to consider in determining whether class proceedings are preferable is whether

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[43]*Campbell*, *supra* n. 17, at para. 53.

[44]SALC Working Paper, *supra* n. 13, at 60.

[45]*Abdool v. Anaheim Management Ltd.* (1995), 121 D.L.R. (4th) 496, (Ont. Div. Ct.).

individual issues do predominate over the common issues.

RECOMMENDATION 13

A class proceeding should be certified if the claims of the class members raise a common issue, defined as:
(a) a common but not necessarily identical issue of fact; or
(b) a common but not necessarily identical issue of law that arises from common but not necessarily identical facts,
whether or not the common issue predominates over issues affecting only individual members.

(e) Preferability

The U.S. Federal Rule requires that before a class action can be certified the court must find that a class proceeding is "...superior to other available methods for the fair and efficient adjudication of the controversy." The Ontario and Uniform Acts provide that the proceeding should be certified if that "would be the preferable procedure for the resolution of the common issues". The British Columbia provision is slightly different: certification should occur if it "would be the preferable procedure for the fair and efficient resolution of the common issues".

The Canadian common law regimes are therefore different from the U.S. Federal Rule in two key respects. Class proceedings need only be a "preferable," not a "superior," method of proceeding (although the precise difference between these terms is not necessarily obvious). As well, class proceedings need only be preferable respecting the *common issues*, and not all of the issues between the parties.

The Ontario Law Reform Commission recommended including a "superiority" requirement in the Ontario class proceedings legislation. The three reasons it gave for this recommendation were: (1) class actions can impose burdens on the judiciary and the administration of justice; (2) the different costs regime recommended by the Commission for class actions; and (3) to provide class members with additional protection of their interests.[46]

The Scottish Law Commission recommended that the certification criteria should require that "the adoption of a group proceedings procedure is preferable to any other available procedure for the fair, economic and expeditious determination of the similar or

[46]OLRC Report, *supra* n. 5, at 401-402.

common issues."[47]

The South African Law Commission suggested:

> The word 'appropriate' rather than 'preferable' is suggested because there may be cases in which, ideally, it would be preferable for individual members of the class to pursue their own claims, but where, practically, this is not feasible.[48]

We see no reason to depart from the terminology of "preferable" adopted by the Canadian common law jurisdictions. Objections to certification based on the criterion of preferability are likely to succeed only infrequently, as there are few situations where another procedure would be "preferable" to a class proceedings for the resolution of the common issues, if only because such procedures are uncommon.[49]

RECOMMENDATION 14

Class proceedings should be certified if they would be the preferable procedure for the fair and efficient resolution of the common issues.

(f) Listing of factors

The Ontario Law Reform Commission recommended that a list of factors be included for the court to consider when determining whether a class proceeding would in fact be "preferable" to other methods of proceeding.[50] The drafters of the Ontario Act, however, chose to omit that list of factors. The Canadian Bar Association submission to the British Columbia government preceding the introduction of that province's Act strongly recommended that the list ought to be included:

> Furthermore, as a general point, we believe that judges should be given detailed guidance by the drafters of the legislation as to what factors should be taken into account by them as they determine the issues involved in the crucial question of certification. The fact that the *Ontario Act* lacks specific guidelines on the issue of determining whether a class action is the preferable procedure has, in our view, led

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[47]SLC Report, *supra* n. 4, at §4.33.

[48]SALC Working Paper, *supra* n. 13, at 42.

[49]A shareholders' derivative action might fall into this category, as might disputes that are governed by administrative schemes, like a complex residential landlord-tenant situation. The latter would, of course, be outside the court's jurisdiction to consider in any event.

[50]OLRC Report, *supra* n. 5, at 416.

to a lack of consistency in the first series of certification cases in that province.[51]

The British Columbia Act does in fact enumerate the factors recommended by the Ontario Law Reform Commission, in subsection 4(2), as follows:[52]

> 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 the following:
>
> (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 the 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 practical or less efficient;
> (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.

In *Endean v. Canadian Red Cross Society*,[53] the fact of this enumeration was considered by the Court:

> [The American] approach has been rejected in our statute, which reduces the question of predominance to one of several factors for consideration and, in s. 27, sets out procedures for the determination of individual issues. In my view, the intention behind these provisions of the Act is to put more emphasis on the goal of access to justice than on that of judicial economy.

We consider that the enumeration of specific criteria, similar to those adopted in British Columbia, is an appropriate and desirable method of providing the courts with direction as to when a class proceeding is "preferable" to other methods of proceeding. We are therefore of the opinion that Manitoba's class proceedings legislation should contain a provision similar to British Columbia's subsection 4(2).

RECOMMENDATION 15

The court should be directed to consider the following issues when

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[51]Canadian Bar Association, British Columbia Branch, Committee on Class Action Legislation, *Submission to the Ministry of the Attorney General of British Columbia on Proposed Class Action Legislation* (1994) 8.

[52]*Class Proceedings Act*, R.S.B.C. 1996, c. 50, proclaimed in force 1 August 1995, s. 4(2).

[53]*Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.). Part of the claim was struck out: *Endean v. Canadian Red Cross Society*, [1998] B.C.J. No. 724, paras. 53-54 (C.A.).

deciding whether a class proceeding is preferable to other methods of proceeding:

(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 the 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 practical 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.

(g) Suitability of the representative plaintiff

A final requirement that the court is typically required to consider on a certification application is whether the representative plaintiff can properly represent the class. The Ontario Law Reform Commission noted:

> Without a doubt, the absence of any obligation on the class representative to satisfy the court that he will adequately protect the interests of the absent class members is one of the most glaring deficiencies of the present Ontario class action Rule.[54]

In the United States, the U.S. Federal Rules require that the "representative parties [be able to] fairly and adequately protect the interest of the class," and the court must find that: "the attorney for the representative parties will adequately represent the interests of the class"; the representative party does not have a conflict of interest; and he or she has or can acquire adequate financial resources to assure that the interests of the class will not be harmed. A further requirement is that "the claims or defences of the representative parties are typical of the claims and defenses of the class".[55]

In Québec, the representative party must simply be "in a position to represent the members adequately," and need not even be a member of the class.[56]

The Ontario Act requires that the representative "would fairly and adequately represent the interests of the class", "has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class

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[54]OLRC Report, *supra* n. 5, at 348.

[55]*United States Code*, Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A.

[56]*Act respecting the class actions*, S.Q. 1978, c. 8, art. 1022.

members of the proceeding" and "does not have, on the common issue for the class, an interest in conflict with the interests of other class members"[57]. That Act also provides for the appointment of representatives of sub-classes whose members have claims or defences that are not shared by all class members where "the protection of the interests of the sub-class members requires that they be separately represented".[58]

The British Columbia and Uniform Acts are functionally identical to the Ontario Act, except that (like Québec) they permit the representative party to not be a member of the class, but "only if it is necessary to do so in order to avoid a substantial injustice to the class".[59]

The Scottish Law Commission recommended that "the final criterion for certification should be that the proposed representative party, having regard in particular to his financial resources, will fairly and adequately represent the interests of the group in relation to those issues which are common to the group".[60]

The South African Law Commission suggested that the court should consider:

> (a) the ability of the representative adequately to represent the interests of the class;
> (b) whether the representative has interests which are likely to conflict with the interests of the class;
> (c) the ability of the representative to make satisfactory arrangements with regard to the funding of the action and the satisfaction of any order of costs which may be made against it;
> (d) the ability of the representative to manage the litigation.[61]

That Commission also discussed at length the question of whether a person or organization that is not a member of the class should be permitted to act as a representative party, and strongly agreed that such be allowed.[62] It suggested that this avoids potential legal fictions, where a purely nominal plaintiff is put forward by a person or organization that is the real impetus behind the litigation, and also permits an organization with a *bona fide* interest in pursuing the litigation to do so, even if it has no actual stake in the outcome. An example might be an organization such as the Canadian Association of Consumers, which could have a valid interest in pursuing a claim on behalf of consumers, even if it will not

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[57]*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1).

[58]*Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(2).

[59]Uniform Law Conference of Canada, *Class Proceedings Act* (1997), s. 2(4).

[60]SLC Report, *supra* n. 4, at §4.36.

[61]SALC Working Paper, *supra* n. 13, at 64.

[62]SALC Working Paper, *supra* n. 13, at 28-32.

itself benefit from the litigation.

We have considered the various recommendations discussed above, and are satisfied that the requirements set out in the British Columbia and Uniform Acts are reasonable, desirable, and adequate for Manitoba's purposes. A class proceeding ought not to be allowed to proceed if the representative party is not in a position to "fairly and adequately represent" the class, and the court must be empowered to ensure that this criterion is met prior to certification. At the same time, there are persuasive reasons not to require that the representative *necessarily* be an actual member of the class he or she has applied to represent.

RECOMMENDATION 16

Representative parties should be required to satisfy the court that they will be able to "fairly and adequately" represent the class. They need not, however, necessarily be members of the class themselves.

(h) Matters that are not a bar to certification

As noted earlier, the Canadian common law class proceedings regimes recognize that courts restricted the availability of class actions under the Chancery rule by creating a number of bars to the procedure and that, as a result, class actions were (and in Manitoba still are) only available in very specific situations. To avoid this outcome, those jurisdictions enacted a provision that specifically enumerates five factors that will not operate as a bar to class actions. This "not-bars" provision implicitly reaffirms the policy underlying the modern regimes: common issues should be considered in common proceedings.

The opening part of the relevant section in the Ontario legislation ("the court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds") was considered in 1995 by the Divisional Court in *Abdool.*[63] In a controversial ruling, the Court held that certification could not be refused if only one of the factors listed in this section was present in the case, but that if more than one such factor was present the combination of factors could be grounds to refuse certification.

The *Abdool* decision creates a situation where the factors listed in the section, which were intended to be deemed irrelevant to the court's decision to certify a class proceeding, become relevant if the defendant can show that two or more exist. Most class proceedings, like *Abdool,* contain more than one of the factors listed in the "not-bars" section. Indeed, it would not be unusual to have a case that contains all five factors, as do many consumer

[63]*Abdool, supra* n. 45.

products cases (such as *Naken*[64]), employment wage and benefit cases (such as *Gagne* [65]), creeping disasters (such as *Nantais*[66]), and securities cases (such as Bre-X). The decision in *Abdool* compromises both the principle that class proceedings should be permitted unless clearly inappropriate and the policy objective of keeping certification motions relatively uncomplicated.

We should note that some recent Ontario decisions have indicated a desire to depart from the reasoning in the *Abdool* decision. Jenkins J. in *Bunn v. Ribcor Holdings Inc*.[67] stated at paragraphs 35-36:

> In *Nantais v. Telectronics Proprietary (Canada) Limited* (1995), 40 C.P.C. (3d) 245 (Gen. Div.), Brockenshire J. at p. 256 held:
>
> > "I think, in the context, 'any' should be read as 'anyone or more'. I would hope that a subsequent amendment to the section would remove any confusion."
>
> In *Anderson v. Wilson* (1997), 32 O.R. (3d) 400 at p. 406, I agreed with Brockenshire J.:
>
> > "It is my opinion that a fair reading of s. 6, in giving effect to the spirit of this remedial legislation, the proper interpretation of this section should be that 'any' should be read as 'any one or more'."

Section 7 of the British Columbia legislation attempts to preclude the outcome in *Abdool* by stipulating that "the court must not refuse to certify a proceeding merely because of *one or more of the following*". The Uniform Act's wording is slightly different but achieves the same purpose: "by reason only of one or more of the following".

In our opinion, the rationale behind the "not-bars" section in the Canadian common law jurisdictions is key to the success of class proceedings legislation. We are also of the opinion that the outcome of the *Abdool* decision ought to be avoided in Manitoba, and as a result consider it highly desirable to adopt the wording of the Uniform Act.

RECOMMENDATION 17

The following matters should not be considered by the court, individually or in the

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[64]*Naken*, *supra* n. 1.

[65]*Gagne v. Silcorp Ltd.* (unreported, court file 97-CU-12094) (Ontario) as noted in Watson, *supra* n. 24.

[66]*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 127 D.L.R. (4th) 552, leave to appeal to Div. Ct. refused (1995), 129 D.L.R. (4th) 110.

[67]*Bunn v. Ribcor Holdings Inc.*, [1998] O.J. No. 1790 (Gen. Div.).

aggregate, in determining whether a class proceeding ought to be certified:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

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

(d) the number of class members or the identity of each class member is not known; and

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

4. Decertification

Whether or not a certification requirement is implemented, it is necessary to consider whether, and on what bases, the court ought to be permitted to *de*certify a class proceeding after it has been commenced. It is certainly possible that after proceedings have been commenced and certified, circumstances may change and the class proceeding may cease to be the appropriate method of proceeding. In such situations, the court should be empowered to decertify and make appropriate orders.

In order to make the class proceedings system as efficient as possible, however, the possibilities for decertification ought to be restricted. Otherwise, time and resources will be wasted in dealing with superfluous motions brought by defendants attempting to have the claims against them decertified. The Australian federal procedure, as discussed above, does not require certification of class proceedings. It does, however, set out detailed rules on the circumstances that may justify the court in decertifying a class proceeding. The Victorian Law Reform Advisory Council considered these rules to be "undesirable" because "they have generated unnecessary litigation,"[68] and recommended:

> The power of the court to order the termination of class suits which satisfied the prerequisites for such suits must be limited as much as possible.[69]

The U.S. Federal Rule merely provides that a certification order "may be altered or amended before the decision on the merits".[70] The Ontario, British Columbia, and Uniform Acts, on the other hand, permit decertification if the court is satisfied that the preconditions to certification are no longer met. This same structure was recommended by the Scottish

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[68]VLRAC Report, *supra* n. 14, at 47.

[69]VLRAC Report, *supra* n. 14, at 48.

[70]*United States Code*, Fed. Rules Civ. Proc. Rule 23(c)(1), 28 U.S.C.A.

Law Commission,[71] which noted:

> [T]he certification of an action as a class action is perceived as a means of facilitating the pursuit of remedies by parties through the courts and should not be an irreversible process if, in the course of proceedings, it becomes apparent that the classification as a class action is inappropriate.[72]

The Commission is of the opinion that the procedure adopted in the Canadian common law jurisdictions is an appropriate method of implementing and controlling the decertification procedure. That procedure balances the need to ensure that claims that have been inappropriately certified do not continue, on the one hand, with the need to limit unnecessary and wasteful interlocutory litigation over the appropriateness of the certification.

RECOMMENDATION 18

The court should be entitled, at any time following certification, to decertify a class proceeding on the basis that it no longer meets the criteria for certification.

C. CLASS MEMBERSHIP

Once the certification procedure has been established, the next important step is to determine how the court decides who constitutes the "class" in the class proceeding, and what the implications of that decision are.

1. Class Identity

Clearly it is fundamental to any class proceeding that all concerned be able to identify who will be bound by a determination in the proceeding, and who stands to benefit from the proceeding. Equally clearly, this must be done as early as possible in the proceeding so that those who do not fall within the defined class have early notice that they are not included in the proceeding.

When an application to certify is brought, the applicant will be required to define the class that he or she purports to represent. While that definition may or may not be accepted by the other party and the court, it will certainly serve as a necessary starting point for the court's inquiry into whether certification is appropriate.

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[71]SLC Report, *supra* n. 4, at §4.46.

[72]SLC Report, *supra* n. 4, at §4.44.

The U.S. Federal Rule requires the court, on a certification application, to "include and describe those whom the court finds to be members of the class," whether or not the certification application is granted. In Ontario, a certification order must "describe the class," while in British Columbia and under the Uniform Act it must "describe the class in respect of which the order was made by setting out the class's identifying characteristics."

The Ontario Law Reform Commission was of the opinion that:[73]

> [A] class definition that would enable the court to determine whether any person coming forward was or was not a class member would seem to be sufficient. In our view, this is the law at present, and no explicit standard for a class definition is necessary.

The Australian Law Reform Commission recommended that it should be possible to amend the description of the group to add persons with causes of action arising subsequent to the filing of the claim, in appropriate circumstances.[74] This is dealt with in Ontario, British Columbia, and the Uniform Act (as well as in the U.S. Federal Rules) by permitting the court to amend its certification order at any time.

It is clear to the Commission that any certification order made by the court must describe, as clearly as possible, the class that is to be represented in the proceeding. The provisions included in the British Columbia and Uniform Acts appear to best promote this goal. We also agree with the Ontario Law Reform Commission that no explicit standard for a class definition is necessary.

RECOMMENDATION 19

As part of its certification order, the court should be required to describe the class in respect of which the order was made by setting out the class's identifying characteristics.

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[73]OLRC Report, *supra* n. 5, at 373.

[74]ALRC Report, *supra* n. 15, at 67.

2. Sub-classes

Even where an identifiable class exists, it may be that there are persons within the class who have issues that are common to each other, but not to the other members of the class. An example was given by the Australian Law Reform Commission:[75]

> An example of a sub-group issue can be found in the Federal Court case of *Milner v. Delita Pty Ltd*. [[1985] 9 F.C.R. 299]. The respondents invited the applicants to invest in a project for growing and processing guava fruit. The Court found that the respondents had contravened s 52 of the Trade Practices Act 1974 (Cth) and that the loss to the applicants might include the cost of borrowing money to invest in the project or the cost of determining an earlier investment and, perhaps, other losses. The applicants were divided into three groups
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> - those who invested in the guava projects by using money specifically borrowed for that purpose and no other money
> - those who invested in the guava projects by using both money specifically borrowed for that purpose and money derived from other sources and
> - those who did not borrow at all for the purpose of investing in the guava projects.
>
> The respondent submitted that the applicants who fell within the last category, or the middle category so far as non-borrowed money was concerned, could not establish any nexus between the conduct of the respondent in contravening s 52 and the alleged claim for damages by way of interest. Thus, a 'sub-group' issue arose, that is, whether those applicants using non-borrowed money were nevertheless entitled to their notional loss of interest. If this case were to occur in grouped proceedings, the Court and the sub-group members would have to consider the appointment of a sub-group member as a further principal applicant to argue these issues for other sub-group members.

In a situation such as that described, it may well be desirable for the court to create one or more "subclasses," each of which has its own representative, to ensure that the issues common to the subclass are properly represented to the court.

The U.S. Federal Rule provides that "[w]hen appropriate … a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."[76]

Ontario, British Columbia, and the Uniform Act have similar wording, providing that

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[75]ALRC, *supra* n. 15, at 75-76.

[76]*United States Code*, Fed. Rules Civ. Proc. Rule 23(c)(4), U.S.C.A.

the court may provide for subclasses in its certification order if:

> … a class includes a subclass whose members have claims 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....

In respect of each such subclass, the court must include the same provisions in its order that it includes with respect to the main class, including describing the subclass and naming its representative.

The Ontario Law Reform Commission recommended against the inclusion of a specific provision dealing with subclassing, suggesting that it would "unnecessarily complicate matters".[77] It is the Commission's opinion, however, that expressly providing the court with the ability to identify and deal with subclasses is highly desirable. The Canadian common law jurisdictions have developed an appropriate method of providing the court with that ability, and we recommend adopting that method.

RECOMMENDATION 20

The court should be permitted to certify subclasses if it is satisfied that doing so is necessary to protect the interests of the members of identifiable subclasses with common issues that are not common to the class as a whole.

3. Opting In or Opting Out?

Another fundamental characteristic of a class proceedings regime is the manner in which it deals with members of the class. In some jurisdictions, persons must "opt in" to the class once it has been certified; otherwise, they will neither be bound by the court's decision in the case nor entitled to benefit from it. In other jurisdictions (the majority), once a class has been certified, every person who falls within the court's description of the class is bound by the outcome of the class proceeding unless they notify the court, within a set time period, that they do not wish to be treated as part of the class. The question whether to design an "opt in" or "opt out" regime was described by the Ontario Law Reform Commission as "one of the most controversial issues in the design of a class action procedure."[78]

An opt in rule creates a regime that respects the principle that a person should not be involved in legal proceedings, even indirectly, as a plaintiff without their express consent.

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[77]OLRC Report, *supra* n. 5, at 454.

[78]OLRC Report, *supra* n. 5, at 467.

The Scottish Law Commission, in recommending such a procedure, described the arguments in favour:[79]

- it preserves the liberty of the individual to choose whether to bring an action;
- a person who desires not to litigate should not find himself willy-nilly "roped in" to a class action;
- it reduces the possibility of the litigation becoming unmanageable.

An opt in rule, however, creates a regime that is arguably little more than a permissive joinder device. Adoption of such a procedure would not involve a fundamental change in the way that Manitoba courts deal with the situations that class proceedings legislation is designed to address. On the topic of the opt in requirement, the Ontario Law Reform Commission concluded:[80]

> In our view, the incorporation of an opt in requirement … would be fundamentally inconsistent with the access to justice rationale that we have endorsed as a basic justification for an expanded class action procedure in Ontario..... Since we believe that the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, class members should not be denied whatever benefits are secured by the class action by failing to act at this stage of the proceedings.

The advantages of an opt out rule include the following: it should result in greater finality for defendants, who need not be concerned about further lawsuits by parties as yet unknown; it will capture unsophisticated claimants who through ignorance, timidity or unfamiliarity with legal proceedings would not take the steps required to become included; and, plaintiffs who wish to opt out, for whatever reason, are still free to do so if they wish. As stated by the Australian Law Reform Commission:[81]

> A requirement of consent will effectively exclude some people from obtaining a legal remedy. It may also undermine the goals of efficiency and avoidance of a multiplicity of proceedings. *All* these policies can only be served by enabling proceedings to be commenced in respect of all persons who have related claims arising from the same wrong without requiring their consent, while protecting their rights and preserving their freedom of choice.

The Victorian Law Reform Advisory Council recommended that opting out should

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[79]SLC Report, *supra* n. 4 at §4.50.

[80]OLRC Report, *supra* n. 5, at 484-485.

[81]ALRC Report, *supra* n. 15, at 50 [emphasis in original].

only be possible with the court's approval:[82]

> Some of the criteria that should be taken into account by the court include:
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> (a) the effect of opt outs on the ability of the remaining class members to vindicate their legal rights;
> (b) the size of the claims of the members who wish to opt out; and
> (c) whether there are any 'strategical and tactical considerations requiring individual control.'

The Ontario Law Reform Commission also recommended that the court's approval be required before a class member could opt out of the proceedings, and recommended a list of factors the court should be required to consider:[83]

> (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.

In both South Africa[84] and England, it has been recommended that the court should have the option of adopting either an opt in or opt out procedure in any given case, depending on the circumstances. Lord Woolf stated:[85]

> It has generally been considered that there would be difficulties in this jurisdiction in taking forward cases on an 'opt-out' basis because of the cost sharing rules, but the experience of 'opt-in' registers with cut-off dates has not been altogether positive or, indeed, helpful in resolving the allocation of costs, particularly since most multi-party actions are legally aided. …
>
> The court should have powers to progress the MPS [("multi-party situation")] on either an 'opt-out' or an 'opt-in' basis, whichever is most appropriate to the particular circumstances and whichever contributes best to the overall disposition of the case. In some circumstances it will be appropriate to commence an MPS on

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[82]VLRAC Report, *supra* n. 14, at 49.

[83]OLRC Report, *supra* n. 5, at 491.

[84]SALC Working Paper, *supra* n. 13, at 66-67.

[85]Lord Woolf Report, *supra* n. 12, at 235-236, §§42 and 46.

an 'opt-out' basis and to establish an 'opt-in' register at a later stage.

The Canadian regimes, and the U.S. Federal Rule, permit those who do not want to be bound by the outcome of a class proceeding to opt out of the class proceeding before a date fixed by order. The Québec regime specifies that the normal opt-out period should be between 30 days and six months after the date of notice to members. A party who opts out is free to commence his or her own individual proceeding, and the tolling of limitations periods is suspended during the opt out period.[86]

British Columbia and the Uniform Act bind plaintiffs resident within the province who do not opt out; non-residents may choose to opt in and, if they do so, they are bound by the judgment.[87] Québec and Ontario judgments bind all those plaintiffs who do not opt out (including, presumably, non-residents[88]).

The Commission has considered the various procedures recommended and implemented, and is of the opinion that an opt out procedure similar to that in British Columbia and under the Uniform Act is best suited to achieve the goals of our recommended class proceedings regime. We prefer the opt out to the opt in model recommended in Scotland because the opt out model is "the more effective means to ensure that the barriers to justice, which class actions are intended to overcome, are reduced."[89] That model will ensure the broadest possible access to justice, and simultaneously maximize the efficiency of the judicial system.

RECOMMENDATION 21

Members of a class in a proceeding that has been certified should be bound by any decision on the common issues in the class proceeding unless they notify the court of their intention not to be bound within a time period specified in the certification order.

[86]This topic is discussed at length below, under "Tolling of Limitation Periods", *infra* 71-72.

[87]This is discussed further in the next section.

[88]As discussed in the next section.

[89]British Columbia, Ministry of Attorney General, *Consultation Document: Class Action Legislation for British Columbia* (1994) 8.

4. Certification of a National or Foreign Class

As earlier noted,[90] the Ontario class proceedings regime probably permits certification of a class covering *all* potential plaintiffs regardless of their residence, the British Columbia regime permits the certification of national classes (although non-resident plaintiffs must take steps to opt into the class), while the American courts have assumed the jurisdiction to certify foreign classes. It is in order to consider whether Manitoba should include in its class proceedings legislation provisions permitting the certification of classes that include non-residents of the province.

A judgment of an Ontario court in a case in which a national class has been certified, assuming it is constitutional, would likely be binding on all claimants in Canada who have not opted out, regardless of their province of residence.

The Uniform Act, like the British Columbia legislation, is based on an opt out model of class proceedings for residents and on an opt in model for non-residents. This means that persons who match the characteristics of the class as set out in the certification order are, if residents, members of the class until they opt out of the proceeding and, if non-residents, not members unless they opt in. Both regimes require that the non-resident plaintiffs who opt in form a subclass, and that before anyone is permitted to opt in, a representative must be appointed for that subclass.

We are of the opinion that there is no compelling reason to preclude Manitoba courts from certifying class proceedings that include non-residents of the province, and that to enable them to do so would introduce a desirable reciprocity among provinces with class proceedings legislation. We are further of the opinion that the best procedure for doing so is the procedure adopted in Ontario, for two reasons. First, requiring non-residents to opt in to a proceeding will inhibit participation, and thereby limit access to justice, in the same manner that an opt in requirement would inhibit participation by Manitoba residents. The second reason an opt-in procedure is undesirable is the fact that, realistically, class proceedings involving classes composed of both residents and non-residents will tend to be brought in those jurisdictions that do not require non-residents to opt in.

RECOMMENDATION 22

The court should be permitted to certify classes that include non-residents of Manitoba.

5. Notice to Group Membership

[90]See earlier discussion in Chapter 3, "Application of Existing Regimes to Manitobans", at 30-32.

Once the court has certified a class proceeding, the question arises as to how the members of the class are to be informed of the existence and progress of the claim. If opting out, or in some cases opting in, is to be a realistic option, the potential class members must be informed of that option and of the need to make a decision.

The U.S. Federal Rule requires the representative plaintiff to give the "best notice practicable under the circumstances." In *Eisen v. Carlisle and Jacquelin*,[91] the United States Supreme Court held that the express wording of the rule required the representative plaintiff to give individual notice to each of 2 million potential class members, even though the representative plaintiff's own claim was only for $70, thus forcing the plaintiff to discontinue the action.

Lord Woolf noted in his Report:[92]

> In a multi-party action where there are many claims, each of which is small, there is little to recommend in a rule making notice to each potential claimant mandatory. The costs of identifying potential claimants, and preparing and sending the notice, will make the litigation as a whole uneconomic. In any event, where such claimants receive the notice and choose to opt out, they will receive nothing. Because with small claims it is uneconomic for them to litigate individually, they will almost invariably remain members of the group. In the United States, in small claims group actions, very few of the tens of thousands—in some cases millions—of potential claimants actually notified choose to opt out. Accordingly, courts must have the discretion to dispense with notice enabling parties to opt out having regard to factors such as the cost, the nature of the relief, the size of individual claims, the number of members of a group, the chances that members will wish to opt out and so on. …
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> . . . . Yet even if the court decides that notice must be given to members of a group, it should have a discretion as to how this is to be done—individual notification, advertising, media broadcast, notification to a sample group, or a combination of means, or different means for different members of the group. In each case the court must take into account the likely cost and benefit before deciding on the course of action.

The Ontario Law Reform Commission recommended that not only should the court have a discretion to determine whether notice should be given to the class, but the Act ought to provide that, *prima facie*, notice should be given "by advertisement, publication, posting,

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[91] *Eisen v. Carlisle and Jacquelin*, 94 S. Ct. 2140 (1974).

[92] Lord Woolf Report, *supra* n. 12, at 236-237, §§48 and 49.

or distribution".[93] The Victorian Law Reform Advisory Council suggested:[94]

> A discretionary notice regime, although it may result in some members not being aware of the existence of the representative proceeding, is clearly superior to other models as it is the most effective vehicle for the attainment of the access to justice goal. An admirable precedent for such a regime is provided by the Ontario Act.

On the other hand, the Scottish Law Commission took the position that all group members should be notified of the certification order, unless the court was of the opinion that this requirement ought to be dispensed with.[95]

Of course, class members will need notice of more than simply the initiation of the proceeding. As the proceeding wends its way through the judicial system, it will be necessary for other events to be brought to the attention of class members. The Australian Law Reform Commission recommended that the court should be able to order notice to be given at any time. As well, it recommended that as a general rule notice should be given to group members advising them of: (a) the commencement of proceedings and their options; (b) any application for approval of a fee agreement; (c) the paying of money into court; (d) any application to approve a settlement; and (e) any application to dismiss the proceedings for lack of prosecution.[96] Other recommendations included that the court should be able to: (a) order any party to give required notice, by whatever method is most appropriate and cost effective;[97] (b) determine who is to bear the cost of giving the notice;[98] and (c) determine who must provide information regarding the identity of group members.[99]

The Ontario Law Reform Commission suggested that class members should be notified of any final judgment, where they are required to identify themselves in order to benefit from the judgment.[100] It further suggested that in such circumstances, notice should be given to all class members by mail, unless the court decides that another method is more appropriate.

In Québec, the court simply "determines the date, form, and mode of publication"

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[93]OLRC Report, *supra* n. 5, at 511.

[94]VLRAC Report, *supra* n. 14, at 53.

[95]SLC Report, *supra* n. 4, at §§4.58-4.67

[96]ALRC Report, *supra* n. 15, at 81.

[97]ALRC Report, *supra* n. 15, at 82.

[98]ALRC Report, *supra* n. 15, at 83.

[99]ALRC Report, *supra* n. 15, at 83.

[100]OLRC Report, *supra* n. 5, at 513-515.

of notice to class members.

The Ontario, British Columbia, and Uniform Acts have notice provisions that are similar, although not identical, to one another. Essentially they provide that a representative party must provide notice of certification to all class members, unless the court considers it appropriate to dispense with notice on the basis of a number of factors. The legislation stipulates what information the notice must contain, and permits the court to order that notice be given by any of a number of means or combination of means. It also provides that notice must be given to class members when their participation is required to determine individual issues, and when the court considers it necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding. The legislation permits the court to order a party other than the representative party to give the required notice, and may make any order it considers appropriate as to the costs of giving notice.

These provisions, particularly as they appear in the Uniform Act, provide the court with sufficient flexibility to ensure that all class members receive adequate notice of the progress of the class proceeding, without the rigidity of the U.S. Federal Rule decried by Lord Woolf. They also provide the court with guidance as to which factors should be considered, examples of appropriate means of providing notice, and the flexibility to shift the cost of notice to the party best able to bear them in appropriate circumstances. Since the Uniform Act was approved however, access to and familiarity with the Internet has increased significantly. Therefore, we have also provided in section 19(4) of our proposed Act that notice may be given by Internet.

We are of the opinion that the notice provisions of the Uniform Act, with specific reference to notice by means of the Internet, are best suited to the class proceedings regime recommended for Manitoba.

RECOMMENDATION 23

The representative party should be required to give notice of the certification of the class proceedings to all members of the class, unless the court considers it appropriate to dispense with notice. The representative party should also be required to give notice to all class members when the court considers it necessary to protect the interests of any class member or party, or to ensure the fair conduct of the proceeding.

RECOMMENDATION 24

The court should have the authority to order a party to give the notice required of another party, and to make any order it considers appropriate as to the costs of any notice.

6. Tolling of Limitation Periods

Every province has limited the time period within which any cause of action must be sued on. If a suit is not filed within the statutory limitation period, the putative plaintiff will be barred from bringing a claim to enforce the cause of action. When a class proceeding is filed, a question arises as to whether the statutory limitation period ceases to run against those who are named as members of the class. What if the action is not certified? What if the class is redefined by the court so that some of the people who were in it initially are not finally included in it? What if, in the meantime, a limitation period has expired? What about potential members of the class who opt out of the proceeding at some point?

The Ontario Law Reform Commission noted:[101]

> As previously mentioned, the Commission sees the main policy objectives of class actions to be judicial economy and increased access to the courts. A general rule that the commencement of a class action suspends the running of limitation periods against absent class members, whether certification is granted or denied, would serve to promote the most efficient use of judicial resources. If the commencement of a class action did not have this effect, absent class members, where a class suit is filed shortly prior to the expiration of the statutory limitation period, would be forced to institute precautionary individual actions or to file formal motions to intervene as parties in order to preserve their legal rights. …
>
> It is also apparent that [not suspending limitation periods automatically] would militate against the policy of increased access to the courts and the vindication of small claims. It would be uneconomical for absent class members with individually nonrecoverable claims to incur the expense of filing precautionary motions to intervene. Furthermore, … [f]or the reasons advanced in support of [the] recommendation [against an opt-in mechanism], we are of the opinion that a class member should not be required to indicate formally his participation in a putative class action in order to avoid the adverse effects of the running of a statute of limitations.

U.S. Federal Rule 23 does not speak to the issue of limitation periods at all. In British Columbia and Ontario, the limitation period is suspended in favour of each class member on the commencement of a class proceeding unless and until one of certain specified events occurs, which has the effect of ending the class proceeding insofar as that class member is concerned. (This includes a decision by the class member to opt out of the proceeding.)

The Uniform Act has one significant difference from both the Ontario and British Columbia provisions. The Ontario rule *might* be broad enough to stop the tolling of

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[101]OLRC Report, *supra* n. 5, at 779-780.

limitation periods when a claim is filed, even if it is not ultimately certified. In British Columbia, however, the wording of the Act is such that limitation periods are only interrupted by the filing of proceedings that *are* ultimately certified, meaning that until the certification motion has been decided, it is an open question whether limitation periods have been suspended. The Uniform Act explicitly provides that a limitation period is suspended if a proceeding is commenced and it is reasonable for a person to assume that he or she is a class member for the purposes of that proceeding. If the proceeding is *not* certified, or if it subsequently becomes clear that the person in question is *not* actually a member of the class, the limitation period will resume running under the same circumstances that it would if the proceeding had in fact been certified as a class proceeding.

Unlike the Ontario and British Columbia legislation, the Uniform Act also includes a provision that addresses the issue of what happens if part, but not all, of a class is certified. The Act states that a limitation period will recommence if, and when, a court rules that a person never was a member of the class proceeding.

It is important that Manitoba's class proceedings legislation deal as clearly as possible with the issue of suspension of limitation periods for members of a class. It is our opinion that the Uniform Act does this in the most effective and comprehensive manner, and we are therefore of the opinion that that Act's provisions should be adopted in Manitoba.

RECOMMENDATION 25

Limitation periods should be suspended as against class members on the commencement of a class proceeding, whether or not the proceeding is ultimately certified, and should resume running against a class member when:

(a) the member opts out of the class proceeding;
(b) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding;
(c) a decertification order is made;
(d) the class proceeding is dismissed without an adjudication on the merits;
(e) the class proceeding is discontinued or abandoned with the approval of the court; or
(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

D. COSTS AND FEES

Critical to the success of a class proceedings regime is a satisfactory method of dealing with the legal fees and disbursements that become payable by representative parties. These issues are, in turn, inextricably bound up with the issue of how legal counsel are compensated for undertaking a proceeding on behalf of a class. These issues (discussed to

some extent at pages 33-35) must be addressed effectively if a class proceedings regime is to succeed in Manitoba.

1. Costs

The Ontario Law Reform Commission stated:[102]

> In our view, the question of costs is the single most important issue this Commission has considered in designing an expanded class action procedure for Ontario. As we shall explain later, the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilized at all.

In the words of the Commentary to the Uniform Act:[103]

> Normal costs rules pose barriers to bringing a class action. Although the whole class may benefit from the action, the representative plaintiff shoulders the burden of paying lawyers' fees and disbursements and will receive only a portion of the total costs back if he or she is successful. The representative plaintiff is also liable for any costs ordered by the court if the action is unsuccessful.

The Ontario Law Reform Commission recommended the adoption of a "no-costs" rule, similar to the American practice, under which neither party would normally be entitled to contribution from the other regardless of the success or otherwise of the proceeding.[104] This is generally seen as beneficial to plaintiffs, and as removing a barrier to potential class proceedings:

> The "no-way" costs rule is perceived to encourage class actions because a representative plaintiff is not deterred from proceeding by the threat of a large costs award.[105]

In the end, the Ontario government adopted a different procedure. It maintained the existing Canadian costs rule (under which the successful party is *prima facie* entitled to costs), but established a Class Proceedings Fund to which representative parties can apply for assistance in paying the cost of disbursements they have incurred. In any action in which the representative party has been granted such assistance, the Fund will indemnify him or her against any adverse costs award. As well, in exercising its discretion with respect to costs, the court is directed to consider whether the class proceeding was a test case, raised

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[102]OLRC Report, *supra* n 5, at 647.

[103]Uniform Law Conference of Canada, *Class Proceedings Act* (1997) 5C-35.

[104]OLRC Report, *supra* n. 5, at 704.

[105]Campion and Stewart, *supra* n. 20, at 41.

a novel point of law, or involved a matter of public interest.

A leading class actions practitioner in Ontario has suggested that the Ontario rules regarding costs are a significant disincentive for non-resident plaintiffs considering initiating a class proceeding in Ontario.[106]

> Unlike in the United States, Mr. Wagnerman and any other plaintiff will have a real exposure to pay significant legal costs because, in Ontario where contingency fees are not permitted, he must pay his own lawyers (subject, of course, to reimbursement of a portion of such costs if he is successful) and because he will also be exposed to pay the costs of the defendants if he is unsuccessful in certifying the action as a class proceeding or if he is unsuccessful on the merits. If asked, I would not recommend that he proceed in Ontario for these reasons alone.

In Québec, the rule that costs follow the cause has been maintained, although costs are only to be assessed on a minimal scale. As well, the special fund is available to indemnify class representatives against costs orders if they have successfully applied in advance for funding of their claim.

British Columbia has, in essence, adopted the rule recommended by the Ontario Law Reform Commission: parties are not entitled to costs regardless of their success, unless there has been "vexatious, frivolous or abusive conduct on the part of any party," "an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing the costs or for any other improper purpose," or "there are exceptional circumstances that make it unjust to deprive the successful party of costs".[107]

The Australian Law Reform Commission considered, but rejected, the idea of a "one-way" costs rule (under which the defendant would be unable to obtain an order of costs against the class plaintiff, but not vice versa). It stated:[108]

> While in practice a successful respondent may not be able to recover costs, even if they are ordered, the principle of a "heads I win, tails you lose" approach to costs is unacceptable, regardless of whether there is a certification procedure or not.

The Commission also rejected the "no costs" rule,[109] and recommended retention of

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[106]Affidavit of Harvey C. Strosberg, sworn 7 February 1997, filed in *Wagnerman v. Vassiliades*, N.J. Sup. Ct. Docket No. BUR-l-02401-96.

[107]*Class Proceedings Act*, R.S.B.C. 1996, s. 50, s. 37.

[108]ALRC Report, *supra* n. 15, at 110.

[109]ALRC Report, *supra* n. 15, at 111.

the rule that costs follow the event.[110] The Victorian Law Reform Advisory Council, on the other hand, recommended the American (and British Columbia) "no costs" rule.[111]

In the United Kingdom, the Scottish Law Commission recommended that the court should retain its discretion to apply the general rule that expenses follow success,[112] and Lord Woolf stated:[113]

> Other common law jurisdictions with a cost-shifting rule have not changed it when introducing special rules for multi-party actions. Multi-party actions are not so significantly different from ordinary litigation as to justify such a change.

The South African Law Commission recommended adoption of the Ontario rule that costs follow the cause, with discretion in the court to consider whether the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest.[114]

The Uniform Act provides two alternative costs rules, reflecting the differing approaches in Ontario and British Columbia. The drafters of the Uniform Act suggest that, as between the Ontario and British Columbia rules:[115]

> The approach adopted in each jurisdiction will depend to some extent on whether it establishes a fund to provide financial assistance to representative plaintiffs.

The Commission considers that the approach followed in British Columbia is best suited to Manitoba's situation. We will not be recommending that a fund be established to aid class members, and as a result it is most fair to prevent, in the ordinary course, any party to a class proceeding from collecting its costs from another party. This will ensure that potential plaintiffs are not deterred from launching a class proceeding by their potential exposure to a large costs award in the event the proceeding is unsuccessful, and as a result will enhance access to justice for potential claimants.

RECOMMENDATION 26

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[110]ALRC Report, *supra* n. 15, at 113.

[111]VLRAC Report, *supra* n. 14, at 68.

[112]SLC Report, *supra* n. 4, at §5.10.

[113] Lord Woolf Report, *supra* n. 12, at 239, §58.

[114]SALC Working Paper, *supra* n.13, at 47.

[115]Uniform Law Conference of Canada, *Class Proceedings Act*, (1997) 5C-35.

Unsuccessful parties should not be liable to pay costs unless:

(a) there has been vexatious, frivolous, or abusive conduct by a party;

(b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or

(c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

(a) Liability of class members

Even though costs will not *ordinarily* be payable, the class proceedings legislation should address the potential liability, if any, of class members other than the representative plaintiff for costs. Obviously, it would frequently be prohibitively complex and expensive to attempt to collect a share of costs from every member of a class, particularly where that class consists of thousands or even hundreds of thousands of people. Further, the effectiveness of the class proceedings legislation might be impaired if class members chose to opt out of a proceeding rather than face a potential costs liability.

Class members have no liability for costs (other than costs associated with the assessment of their own individual claims, should such be necessary) in the United States, the Canadian common law jurisdictions, and Québec. The Ontario Law Reform Commission also recommended that the representative plaintiff alone, and not absent class members, should be liable for costs associated with the certification hearing, the common questions stage of a class action, or on an interlocutory motion.[116]

In Scotland, because of the opt-in scheme it recommended, the Law Commission suggested that the court ought to be able to determine the liability of each group member for payment of a share of any expenses incurred by the representative plaintiff.[117]

We are of the opinion that there is no reason to depart from the rule followed in the United States and all the reformed Canadian jurisdictions.

RECOMMENDATION 27

Class members, other than the representative party, should not be liable for costs except with respect to the determination of their own individual claims.

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[116]OLRC Report, *supra* n. 5, at 749.

[117]SLC Report, *supra* n. 4, at §4.109.

2. Fees and Disbursements

As mentioned above, the flip side of the rules regarding costs are the rules that determine how the counsel representing the class are compensated for their efforts. The "normal" rule, of course, is that a party is responsible for paying whatever fees they and their counsel agree upon. In the context of a class proceeding, however, the counsel is being asked to represent more than one person, in a proceeding that will typically involve a great deal more time and effort than is involved in a "normal" claim. It may well be unreasonable to expect the representative party to assume all of those costs, regardless of the success of the proceedings and even though he or she is not required to contribute to the defendant's costs if the claim is unsuccessful.

What follows is a discussion of the various methods available to deal with this dilemma.

(a) Contingency fees and multipliers

In the United States, counsel are permitted to take on class proceedings (and other proceedings) on the basis of a contingency fee agreement, under which the lawyer does not receive payment of any kind unless the claim is successful. (The client may or may not, depending on the fee agreement, be responsible for disbursements incurred by the lawyer.) The amount to which the lawyer is entitled is either defined as a percentage of the amount recovered, or is determined through the "lodestar" method, described above at pages 34-35. The ability to use contingency fee agreements has facilitated the use of class proceedings in that jurisdiction, although some see it as an improper incentive to lawyers to instigate litigation.

In Québec, contingency fees are also permitted, and costs form a first charge on any monetary award payable as a result of the claim. In British Columbia and under the Uniform Act, a contingency fee agreement must be in writing and must, amongst other things, "state the terms under which fees and disbursements are to be paid," and "give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding". No such agreement is enforceable unless it is approved by the court. Again, fees and disbursements payable under an approved fee agreement will form a first charge on any monetary award made by the court in the proceeding.

The basic wording of the Ontario Act is very similar. The *Solicitors Act* and *An Act respecting Champerty*, S.O. 1897, c. 327, however, prohibit contingency fees in that province. The Ontario Act therefore provides that a lawyer and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success of a class proceeding. It also provides that the agreement may permit the lawyer to be paid a "base fee" based on the hours spent, multiplied by a multiplier approved by the court.

The Ontario Act does not specifically provide for a contingency fee based on a percentage of the amount of any recovery, and commentators generally assumed such a fee was not permitted under the Act. Earlier this year, however, Winkler J. in *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*[118] noted:

> I agree with the reasoning of Brockenshire J. [in *Nantais v. Telectronics Proprietary (Canada) Limited et al.* (1996), 28 O.R. (3d) 523 (Gen. Div.) that percentage fee agreements are permitted under the Act]. The scheme of the CPA seems to envisage that sections 32 and 33 operate independently of one another. Hence the duplicate provisions for court approval. Moreover, a restrictive construction of the Act is contrary to the policy of the statute, one of the purposes of which is to promote judicial economy. A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements which reward efficiency and results should not be discouraged.

It would appear, therefore, that even in Ontario percentage contingency fee agreements are permitted under the *Class Proceedings Act*. This is quite a departure from the recommendations of the Ontario Law Reform Commission. In its Report, the Commission did recommend that, notwithstanding the *Solicitors Act* and *An Act respecting Champerty*, representative plaintiffs and class lawyers should be entitled to enter into an agreement under which the lawyer would be entitled to receive his fees and disbursements only in the event of success in the action. However, the Commission also recommended that:[119]

> . . . in an agreement of the kind proposed above, a class lawyer and representative should not be permitted to specify the amount of the lawyer's remuneration nor its method of calculation—for example, by a gross sum, commission, percentage, or salary—and any attempt to do so should be void. Instead, it should be the task of a judge alone to assess the appropriate costs, relying on the same criteria that are now employed in the taxation of a solicitor's account, except that the judge should be obliged to include an amount that will compensate the lawyer for accepting the risk of non-payment in undertaking the litigation on this basis.

The Scottish Law Commission strongly opposed the introduction of percentage contingency fees in that jurisdiction, although it noted that "speculative fees", similar to the

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[118]*Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*, [1998] O.J. No. 1891 (Gen. Div.) §11.

[119]OLRC Report, *supra* n. 5, at 715.

lodestar method, are already permissible in Scotland.[120]

The South African Law Commission, on the other hand, suggested the adoption of the Ontario rule.[121]

The Victoria Law Reform Advisory Council recommended the approval of "uplift fees" (essentially the lodestar method), subject to court approval, but not contingency fees based on a percentage of the award or settlement.[122] It also recommended that fees and disbursements incurred ought to be a first charge on any monies recovered through the proceedings.[123]

In Manitoba, as in British Columbia, contingency fee agreements based on a percentage of an award or settlement are already authorized, by section 58 of *The Law Society Act*,[124] and have in fact been permitted for many years. The difficulties experienced in Ontario therefore need not concern us. Given the peculiar nature of class proceedings, however, it may be preferable to include within the class proceedings legislation certain provisions that deal specifically with contingency fee agreements in the context of class proceedings. Section 58 does not include a number of safeguards that are required in the class proceedings context; for example, it does not require court approval of any contingency fee agreement, nor does it provide that amounts owing under an enforceable agreement form a first charge on any settlement funds or monetary award; these and other amendments to the Rule should be incorporated into the class proceedings legislation.

Section 58 also provides for a mechanism by which a client may apply to the court for a declaration that a contingency fee agreement is not fair and reasonable to the client, within three months after the fee has been paid or retained by the lawyer. In the context of a class proceeding, any such application should be made to the judge who either presided over the trial or approved the settlement agreement.

Accordingly, the Commission is of the opinion that contingency fee agreements should be permitted in the context of class proceedings, and that section 58 of *The Law Society Act* should apply to class proceedings to the extent that the class proceedings legislation does not specifically affect its provisions. We further recommend that an application to the court for a declaration that a contingency fee agreement is not fair and reasonable to the client should be made to the judge who either presided over the trial or

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[120]SLC Report, *supra* n. 4, at §§5.12-5.14.

[121]SALC Working Paper, *supra* n. 13, at 49.

[122]VLRAC Report, *supra* n. 14, at 66.

[123]VLRAC Report, *supra* n. 14, at 62.

[124]*The Law Society Act*, C.C.S.M. c. L100.

approved the settlement agreement, whichever the case may be.

RECOMMENDATION 28

Section 58 of* The Law Society Act*, C.C.S.M. c. L100, should apply to proceedings brought under the class proceedings legislation except as provided in that legislation.

RECOMMENDATION 29

An application under subsection 58(4) of* The Law Society Act *should be made to the judge who either presided over the trial of the common issues or approved the settlement agreement, as the case may be.

RECOMMENDATION 30

Fees and disbursements payable under an agreement should form a first charge on any monetary award in the proceeding.

(b) Contributions to expenses

"Maintenance" has been defined as "the officious assistance of a third party, either by disbursing money or otherwise giving assistance to either party to a suit in which he himself has no legal interest," and was actionable at common law. The class proceedings legislation in force in Canada has made it possible, however, for non-parties to contribute to the legal costs involved in prosecuting a class proceeding.

Members of a class would probably not be prohibited from contributing to such costs in any event, as they certainly have a "legal interest" in the class proceeding, and solicitations for such support have been made in at least one proceeding in British Columbia.

In at least one Ontario case, however, outside investors with absolutely no legal interest in a class proceeding have provided funding for the costs of disbursements in the proceeding, and that arrangement has been approved by the court.[125] In return for foregoing any recourse against the representative party, the members of the class, and the law firm, the investors received a 20% return on their "investment". A similar attempt was, of course, condemned by the court in *Smith,*[126] but presumably what was really objectionable in that case was that two non-parties were planning to profit from the litigation without taking the risk of an adverse costs award by acting as representative parties themselves. As well, the

[125]J. Melnitzer, "Private investors help finance class action lawsuit", *Law Times* (15-21 December, 1997) 1.

[126]*Smith*, *supra* n. 36.

persons being asked to "invest" were being offered a return that was not a percentage return on their investment, but rather a proportional share in any eventual award.

The Australian Law Reform Commission recommended the abolition of the law of maintenance, and recommended permitting third parties to fund grouped proceedings so long as it is not done in consideration of a share of the proceeds.[127]

In many cases, there may be organizations that do not wish to act as representative parties, but would be prepared to provide funding to support a class proceeding that they see as being in the interests of their members.

In our opinion, representative parties should not be restricted in their ability to seek outside funding of their claim, so long as any such arrangement is subject to review and approval by the court. This is a logical extension of the current arrangements regarding contingency fee agreements, and will serve to enhance access to justice.

RECOMMENDATION 31

Representative parties should be permitted to seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class.

(c) Court approval

We have already discussed the importance of court approval of any fee agreements, but it is worth stressing again that such approval is absolutely necessary to prevent abuses of the system (such as that identified in *Smith*[128]). There are also questions, however, about when the court ought to be asked to approve such arrangements, and whether it ought to take a second look at a later stage of the proceedings.

The reality is that, if the court is asked to approve the fee agreement at the outset of the proceeding, it will be doing so largely in the dark, since at that point any estimate of the amount of time and effort involved in the case will be purely speculative, and the amount of any eventual award may be uncertain in the extreme. After a successful outcome, however, the court may unconsciously underestimate the degree of risk undertaken by the successful counsel, and as a result may set compensation inappropriately low:

> Approval should not be able to be sought after the proceedings have been concluded because the Court would not be able properly to assess the financial risk the lawyer

[127] ALRC Report, *supra* n. 15, at 129.

[128] *Smith*, *supra* n. 36.

> undertook and make adequate allowance for it at that stage. When a case has been successfully completed it would be natural for the Court to underestimate the risk of losing the case.[129]

Winkler J., on the other hand, suggested in *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*[130] that contingency fee agreements ought *not* to be approved until *after* the conclusion of the proceedings:

> However, it seems to me to be equally clear that ordinarily the fee arrangement ought not to be approved by the court until after the judgment is rendered on the common issues or the settlement concluded. It is only then that a court can be satisfied that it has all of the relevant facts before it necessary for approval of the fee arrangement. Given that a percentage arrangement represents a melding of a base fee and multiplier, the court will determine a reasonable percentage having regard to the degree of risk undertaken by counsel, the degree of success in the proceeding, and the other criteria enunciated in *Serwaczek v. Medical Engineering Corp*. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.).

Lord Woolf suggested that the court ought to have an ongoing role in monitoring the progress of not only the litigation, but the *costs* of the litigation:[131]

> Lawyers conducting multi-party litigation are entitled, of course, to reasonable remuneration but there are reports that working excessive hours and inflation of the time spent on a case are common abuses in multi-party action litigation in the United States. Where multi-party litigation in this country is legally aided, the Legal Aid Board has a duty to oversee the lawyers and to call a halt to this type of behaviour. Courts, too, have a role in this regard. I am recommending generally that costs should be actively considered by the judge throughout the case and that, if appropriate, a Taxing Master should also be involved throughout. Because of this continuing involvement, they will have a store of knowledge about the case. That involvement at the taxing stage will be invaluable. Moreover, if the lawyers know that the judge and his team managing the case may have an influence on their remuneration, this is likely to act as a strong incentive to proper and reasonable behaviour on their part.

Neither in Ontario nor in British Columbia, nor under the Uniform Act, is there any provision dealing with the timing of an application to the court for approval of a fee agreement. Watson suggests that this is an important issue:[132]

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[129]ALRC Report, *supra* n. 15, at 121.

[130]*Crown Bay Hotel Ltd.*, *supra* n. 118, at §12.

[131]Lord Woolf Report, *supra* n. 12, at 243-244, §74.

[132]Watson, *supra* n. 24, at 26 [italics in original].

> Is it reasonable, *i.e.*, fair to the class, to approve *in advance* flat amount contingency fees or percentage contingency fees? To be fair to the class (and to be acceptable in our society) I suggest class counsel fees must bear a reasonable relationship to the success achieved, the time and work expended and the risk undertaken by class counsel. When a contingency fee is approved *in advance* these factors cannot be taken into account and the subsequent award of such a fee may simply be unfair. For example, it is possible that the litigation may settle shortly after the fee is approved in advance so that the class counsel would reap a potentially huge fee for a very little expenditure of time or effort. But on the other hand a percentage fee fixed in advance may be attractive to class members who may find the multiplier fee incomprehensible and too uncertain; at least with a percentage they have some ground to decide whether to opt out because the lawyers' fees are "too rich".

Watson also makes the point that even when a contingency fee agreement has been approved in advance, the court can nevertheless, relying on its inherent jurisdiction, subsequently amend the terms of the agreement, as occurred in *Harrington (Guardian ad litem of) v. Royal Inland Hospital*[133] (a non-class action case).

It should be noted that the notice provisions in Ontario and British Columbia, and in the Uniform Act, require (unless the court orders otherwise) that when a proceeding has been certified as a class proceeding, the notice to be provided to all potential class members must include information about any agreements regarding fees and disbursements. Unless the fee agreement has been approved in advance by the court, such information will not be available at that point in the proceedings. Arguably, though, such information will be important to class members in making their decision whether or not to opt out of (or into) the proceeding.

We are of the opinion that in order to ensure that fee agreements are reasonable and fair to class members as well as class counsel, they ought to be submitted for approval prior to certification of the proceeding. As well, however, it must be open to the court to revisit the agreement at the conclusion of the proceeding to ensure that the agreement is still fair and reasonable in the light of all the circumstances.

RECOMMENDATION 32

Agreements regarding fees and disbursements should be approved by the court prior to, or simultaneously with, certification of the proceeding. The court should also have the authority, however, to amend the terms of the agreement if it is subsequently persuaded that those terms are no longer fair and reasonable in all of the circumstances.

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[133] *Harrington (Guardian ad litem of) v. Royal Inland Hospital* (1995), 131 D.L.R. (4th) 15 (B.C.C.A.).

3. Special Fund

As has already been mentioned, both Ontario and Québec have established special funds that are available to representative plaintiffs to offset some or all of the costs of prosecuting a class proceeding. In Québec, the fund will pay for both lawyers' fees and disbursements, while in Ontario it is strictly available to cover disbursements. In either province, a representative plaintiff who has been granted funding will be indemnified against any award of costs in the event the proceeding is unsuccessful. In the event the proceeding is successful, however, the representative plaintiff is required to reimburse the fund for the amount it paid out, plus 10% of the court-ordered award or settlement amount.

No such fund was established when British Columbia introduced its class proceedings legislation. Instead, a "no-way" costs rule was laid down.

The merits of a special fund were described by the Australian Law Reform Commission:[134]

> The grouped procedure is designed to provide access to legal remedies for people who might not otherwise be able to pursue their rights because of cost and other barriers. In the case of individually non-recoverable claims, a special fund available to provide support for the applicants' proceedings and to meet the costs of the respondent if the action is unsuccessful would assist people to obtain a legal remedy and would remove the risk of paying party-party costs if the action failed. Assuming that the total cost of proceedings was not excessive in relation to the amount in issue, it would be for these kinds of cases that a fund would be most helpful. In individually recoverable cases the fund could be used to assist with the additional costs which the principal applicant might otherwise have to bear thus promoting judicial economy by encouraging the grouping of these proceedings. Public funding would be an acknowledgement that there is a public purpose to be served by enhancing access to remedies where this is cost effective, especially where many people have been affected.

That Commission recommended the setting up of a special fund along the same lines as the Québec model,[135] as did the Victoria Law Reform Advisory Council.[136] Lord Woolf[137] and the South African Law Commission[138] both recommended a special fund similar to that established in Ontario. In Scotland, the Law Commission suggested that modifying the existing legal aid system was the most suitable means of providing financial assistance for

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[134]ALRC Report, *supra* n. 15, at 126-127.

[135]ALRC Report, *supra* n. 15, at 127.

[136]VLRAC Report, *supra* n. 14, at 70.

[137]Lord Woolf Report, *supra* n. 12, at 242, §68.

[138]SALRC Working Paper, *supra* n. 13, at 51.

group proceedings,[139] and stated:

> A contingency legal aid fund … is essentially a fund which takes a proportion of the money received by a successful pursuer to meet claims on the fund by unsuccessful pursuers. It may be seen as a form of mutual insurance.[140]

The Ontario Law Reform Commission, however, recommended strongly against the institution of a special fund:[141]

> For both philosophical and practical reasons, the Commission does not believe that public moneys should be used to fund class litigation. … [W]e believe that the financial responsibility for the conduct of class litigation … should be assumed by private citizens, rather than by the Ontario government.
>
> Our philosophical opposition is strengthened by practical considerations that we believe militate strongly against the establishment of a government fund to finance class actions. Any attempt to implement such a proposal would entail considerable expenditure of time and money in the organization and maintenance of an administrative structure that is capable of managing the fund and regulating access to it. From the Quebec legislation, it is evident that a scheme of public funding would require the institution of a procedure distinct from the class action procedure. … Finally, representatives of the fund might have to appear at those stages of the proceedings where costs are in issue.

As has been pointed out, little use has been made to date of the fund established in Ontario. Watson sees this as "somewhat surprising," and suggests that there may soon be a malpractice action against a class counsel whose client is ordered to pay costs and was not advised to apply for funding.[142] As suggested above, however, [143] this may simply be an indication that the actions that are proceeding are considered by counsel to be relatively likely to succeed, and therefore they are recommending to clients that there is no reason to forfeit 10% of their award in order to obtain funding for disbursements.

While a fund similar to that in place in Ontario or Québec may be a desirable method of ensuring access to justice for impecunious class representatives, it is unlikely that the government could or would make the necessary financial commitment in the present fiscal and economic climate. As well, such a regime would require the creation and funding of substantial administrative machinery. In any event, the contingency fee system available in

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[139]SLC Report, *supra* n. 4, at §5.50.

[140]SLC Report, *supra* n. 4, at §5.17.

[141]OLRC Report, *supra* n. 5, at 713.

[142]Watson, *supra* n. 24, at 32-33.

[143]See Chapter 3, at 34-35.

British Columbia, the United States, and Manitoba is equally likely to provide access to justice. It has been suggested, in fact, that such a contingency fee regime will actually tend to encourage more class proceedings than the Ontario regime.[144]

We do not believe, despite the attractiveness to potential plaintiffs of a special fund to cover the cost of disbursements and/or fees, that such a fund is a necessary component of a class proceedings regime in Manitoba. This is true in large part because of the availability of contingency fees in this province, and the availability of other methods of funding litigation, as has been demonstrated in Ontario.[145]

RECOMMENDATION 33

It is not necessary that a special fund be established to which potential representative plaintiffs can apply to offset the costs of a class proceeding.

E. MISCELLANEOUS ISSUES

In addition to the issues surrounding certification of class proceedings, and the costs and fees involved, there are a host of other questions that need to be resolved in order to construct a viable class proceedings regime. These issues include: defining the extent of the court's power to control the proceedings; how individual (as opposed to common) issues are dealt with; whether the same judge should hear all applications and the trial; guidelines for court approval of settlements; dealing with aggregate damages awards; replacement of the representative plaintiff; and discovery rules. The following sections will be devoted to an examination of these issues.

1. Court's Power to Control Conduct of Proceedings

The Canadian common law judicial system has traditionally been one in which the parties to a dispute control its progress through the system, subject only to the loosest control by the court itself. In recent years, however, this position has changed quite dramatically in many Canadian jurisdictions. In Manitoba, the new and proposed rules regarding case management, the rules on pre-trial conferences, and other "hands-on" judicial activism have created an atmosphere in which judicial intervention is seen as extremely important to the effective functioning of the system. The Manitoba Civil Justice Review Task Force recommended the implementation of a case management system in Manitoba, and endorsed

[144]Campion and Stewart, *supra* n. 20, at 43.

[145]For example, third party funding, as described earlier in this Chapter, at 80-81.

the following description of such a system in the Ontario Civil Justice Review report:[146]

> "It must operate under the model of caseflow management, a time and event managing system which facilitates early resolution of cases, reduces delays and backlogs, and lowers the cost of litigation. Caseflow management shifts the overall management of cases through the time parameters from the Bar—where it has traditionally been—to the judiciary, streamlines the process, permits the introduction of ADR [alternative dispute resolution] techniques, and creates an environment where judges, administrators and quasi-judicial officials can work together to integrate the various elements of the system into a coordinated whole."

This type of case management is even more important in the context of a class proceeding. As the Australian Law Reform Commission pointed out:[147]

> Grouped proceedings have a number of distinctive features which make the need for court management vital. Some of these features are
>
> - the existence of unidentified parties whose interests need to be protected
> - the need for administrative arrangements to be made for the giving of notice and the distribution of monetary relief
> - the need for procedures for the determination of sub-group issues and individual questions.
>
> The aim of court management is to ensure that justice is achieved for both parties as quickly and inexpensively as possible. Unfettered party control does not facilitate this aim, first because legal representatives are not obliged to plan the management of the case and secondly because each acts in the interests of their own client. In some cases a party's interests may be served by delays and procedural disputes. Further, without active court management, the interests of unidentified parties may not be taken properly into account.

Lord Woolf recommended in his report that "the designated judge in a multi-party action should be given wide ranging powers to control the litigation and to ensure that it is expeditiously and economically progressed".[148] The Scottish Law Commission recommended that the court ought to have a general power to regulate procedure as it sees fit, and specifically to make such orders as may be appropriate to ensure that the proceedings are conducted fairly and without avoidable delay.[149] The Ontario Law Reform Commission stated:

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[146]*Manitoba Civil Justice Review Task Force Report* (1996) 10.

[147]ALRC Report, *supra* n. 15, at 70.

[148] Lord Woolf Report, *supra* n. 12, at 231-232, §32.

[149]SLC Report, *supra* n. 4, at §4.85.

> In addition to the need to safeguard the interests of absent class members, the likely complexity of many class actions requires that the judge assume an active role in ensuring that such actions proceed expeditiously and efficiently.[150]

In Québec, the court "...may prescribe measures designed to hasten … progress and to simplify the proof, if they do not prejudice a party or the members".[151] Under U.S. Federal Rule 23(d), "the court may make appropriate orders determining … the course of proceedings or prescribing measures to prevent undue repetition or complication...." British Columbia and the Uniform Act have the same provision, in section 12:

> The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

This is similar, although not identical, to the Ontario provision. As well, all three Acts provide the court with the power to stay or sever any proceeding related to the class proceeding, on any terms the court considers appropriate.

We are of the opinion that the court clearly should have a central role in the management of a class proceeding, and to that end ought to be given broad powers to control the progress of the litigation.

RECOMMENDATION 34

The court should have the power to make any order it considers appropriate to ensure the fair and expeditious determination of a class proceeding, including the power to stay or sever any related proceeding.

2. Individual Issues

In many class proceedings, once the common issues have been decided there will remain individual issues specific to the individual class members that must be determined. The class proceedings regime must set out how those issues are dealt with.

U.S. Federal Rule 23 does not speak to the manner in which individual issues are treated. In Québec, the court is authorized to render judgment on individual claims. The Ontario, British Columbia, and Uniform Acts all have similar provisions dealing with the determination of individual issues, which provide that the court:

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[150]OLRC Report, *supra* n. 5, at 446.

[151]*Act respecting the class action*, S.Q. 1978, c. 8., art. 1008.

- may determine the issues itself, appoint others to conduct an inquiry and report back to the court, or, with the parties' consent, direct that they be determined in any other manner;
- must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice; and
- may dispense with any procedural step or authorize special procedural steps or rules.

This type of wide-ranging flexibility has been recommended in other jurisdictions as well. For example, the Australian Law Reform Commission recommended:[152]

> In accordance with the Court's function of managing the conduct of the proceedings, it should give directions concerning the conduct of individual issues by group members. The Court should have considerable flexibility in devising orders about the way in which these individual issues should be conducted. It should have the widest power to make orders, for example, about evidence or procedure. The Court and the parties should devise an appropriate procedure depending on
>
> - the complexity of the issue
> - the amount of the claim if monetary relief is involved
> - the number of adjudications which need to be made.

Lord Woolf similarly recommended that the court be given maximum flexibility to decide whether individual issues need to be decided, and the preferable method of handling those issues.[153] Similarly, the South African Law Commission recommended that the court should be expressly empowered to decide whether there are issues that need to be determined individually, and to give directions as to the procedure to be followed.[154]

The Commission agrees that the court should have the widest flexibility to determine how individual issues should be decided once it has dealt with the common issues.

RECOMMENDATION 35

The court should have the power to decide whether and how to determine individual issues once it has determined the common issue(s) in a class proceeding. The court should have maximum flexibility to decide how the individual issues will be determined, and to dispense with or impose any procedural steps or rules that it considers appropriate, consonant with justice to the class members and parties.

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[152]ALRC Report, *supra* n. 15, at 75.

[153]Lord Woolf Report, *supra* n. 12, at 228, 231-233, §§21, 32-37.

[154]SALRC Working Paper, *supra* n. 13, at 44.

3. Same Judge?

The Ontario, British Columbia, and Uniform Acts contain provisions stipulating that the judge who hears the certification motion will hear all other motions in the proceeding. If that judge becomes unavailable, another judge is to be appointed. In Ontario the judge who heard the certification motion may not preside at the trial of the common issues unless the parties consent; in British Columbia and under the Uniform Act, that judge may, but need not, preside at the trial of the common issues.

The Ontario Law Reform Commission recommended that a single judge be responsible for carriage of a class proceeding from its commencement, noting that this was a "strongly held view" in the United States.[155] Lord Woolf also recommended that a single judge should have control of the proceedings from an early stage:[156]

> I have proposed generally that complex cases requiring full hands-on judicial control should be assigned to a single judge. This is to ensure continuity of decision making and will be of particular importance in cases involving complex technical subject matter. The Law Society's Working Party similarly recommended the appointment of a designated High Court judge with power to transfer the proceedings to a designated Circuit judge if "damages were likely to be modest and/or the litigation has a particular connection with a given locality." The appointment of an alternate judge was also recommended.

Similarly, the case management procedures that have been introduced in Manitoba recently, including Rule 20A (on expedited actions) and the anticipated Rule 78 (on civil case management), require that a single judge be appointed to manage the case from its earliest stages until trial.

We are of the opinion that it is highly desirable in class proceedings litigation for all pre-trial procedures to be under the control of a single judge. This will ensure the greatest possible judicial efficiency as well as the most effective judicial control of the proceeding.

It would also be appropriate to permit that judge to hear the trial of the action, since by the time of trial he or she will have a thorough understanding of what will typically be a complex case. To permit the same judge to preside over the certification application and all interlocutory applications would ensure the most efficient use of judicial resources. If all parties agree, the same judge may preside over the trial of the common issues.

RECOMMENDATION 36

The judge who makes a certification order in a proceeding should hear all

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[155] OLRC Report, *supra* n. 5, at 456-460.

[156] Lord Woolf Report, *supra* n. 12, at 230, §27.

other applications in the proceeding. Where the parties agree, that judge should also be able to hear the trial of the common issues.

4. Court Approval of Termination of Proceeding

In order for the interests of class members to be adequately protected, all jurisdictions with modern class proceedings legislation require that any discontinuance or abandonment of a class proceeding, and any settlement agreement entered into between the representative plaintiff and the defendant, be subject to court approval.

In the United States, Rule 23 provides that:

> a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

In Québec, any settlement or discontinuance must be approved by the court, unless it is "unconditional in the whole of the demand". In Ontario, *any* proceeding commenced under the Act (whether certified or not) may be discontinued or abandoned only with the approval of the court. British Columbia and the Uniform Act clarify that court approval is required for discontinuance, abandonment, *or settlement* of a class proceeding, but extend that requirement only to certified class proceedings. Both British Columbia and the Uniform Act also make it clear that this requirement applies to the settlement, discontinuance, or abandonment of *sub-class* proceedings as well.

In discussing the requirement for court approval of settlements, Sharpe J. stated in *Dabbs v. Sun Life Assurance Co. of Canada:*[157]

> In my previous ruling I indicated that the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October, 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it

[157] *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (Gen. Div.) §30.

when compared to the alternative of the risks and costs of litigation.

Most who have considered this issue have recommended that court approval be required. The Ontario Law Reform Commission recommended that "any action commenced under the Act should not be settled, discontinued, or dismissed for want of prosecution without the approval of the court."[158] The Victorian Law Reform Advisory Council said that "[j]udicial approval of the settlement or discontinuance of class suits is essential,"[159] and the South African Law Commission recommended that any settlement of a class action require approval by the court. Lord Woolf recommended:[160]

> There is a strong case for court approval of all multi-party settlements, especially where the defendant offers a lump sum settlement, because:
> (a) it is necessary to ensure that the lawyers do not benefit themselves while obtaining minimal benefit for their clients, or, alternatively, profiting from the vulnerability of commercially sensitive defendants;
> (b) all members of the group are bound although they may be only indirectly represented;
> (c) a lump sum settlement must be fair although it explicitly does not try to match individual loss exactly.

The Australian Law Reform Commission was persuaded that the court should be involved in any settlement of the entire proceeding, to the extent of ensuring that all group members receive notice of the settlement, that the scope of the agreement has been adequately considered, and that appropriate methods of distributing the money and avoiding conflicts of interest have been devised. It was of the opinion, however, that if a representative plaintiff or a group member wished to settle his or her own individual claim, the court need play no role whatsoever.[161] These recommendations were implemented by the Australian federal government in its rules regarding representative proceedings.[162]

In Scotland, the Law Commission rejected the notion that the court should be required to approve the settlement or abandonment of a class action. It stated:

> It seems anomalous to impose on the judge a special and onerous task which he does not have in conventional litigation. Problems are likely to arise because the judge may not have adequate information to assess whether the proposed abandonment or settlement is reasonable. We appreciate the possibility that some or all of the absent

[158]OLRC Report, *supra* n. 5, at 806.

[159]VLRAC Report, *supra* n. 14, at 55.

[160]Lord Woolf Report, *supra* n. 12, at 245, §79.

[161]ALRC Report, *supra* n. 15, at 91.

[162]*Federal Court of Australia Act 1976* (Cth), Part IVA, ss. 33V and 33W.

> group members may be prejudiced by abandonment or settlement. However, members of the group gain advantages from using the procedure which they would not enjoy if they sued individually in a conventional action. They should allow for corresponding disadvantages inherent in group proceedings. The potential disadvantages underline the importance of ensuring the competence of the class representative and his legal advisers.[163]

We are not persuaded by the reasoning of the Scottish Law Commission. It is our opinion that class members are entitled to have the court scrutinize any proposed settlement of the class proceeding and approve it before it is binding on the class.

RECOMMENDATION 37

No settlement, discontinuance, or abandonment of a class proceeding should be permitted without the approval of the court.

(a) Standard to be applied

A court charged with the responsibility of approving a settlement of a class proceeding may wish to have some criteria to guide it in that task. The U.S. Federal Rule does not provide any guidance. Neither do any of the common law jurisdictions in Canada. Sharpe J. in *Dabbs v. Sun Life Assurance*[164] discussed this issue:

> While the role of the court with respect to certification is well defined by the *Class Proceedings Act, 1992*, the same cannot be said of the approval of settlements. Section 29 provides that "[a] settlement of a class proceeding is not binding unless approved by the court" but the Act provides no statutory guidelines that are to be followed.
>
> Experience from other situations in which the court is required to approve settlements does, however, provide guidance. Court approval is required in situations where there are parties under disability (see Rule 7.08(1)). Court approval is also required in other circumstances where there are affected parties not before the court (see *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 242(2) dealing with derivative actions). The standard in these situations is essentially the same and is equally applicable here: the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

Lord Woolf addressed the question of guidance for the court in approving settlement

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[163]SLC Report, *supra* n. 4, at §4.92.

[164]*Dabbs*, *supra* n. 157, §§8 and 9.

agreements as follows:[165]

> Experience elsewhere suggests that the court also has a role in cases which are before the court solely for settlement purposes. Experience, particularly in the USA, suggests that judicial oversight of settlements is not effective unless there are understood criteria for approval, which provide for cases which may be before the court solely for settlement purposes. Although the MPS [multi-party situation] is primarily a vehicle for managing actions, it could, if necessary, be requested to provide court oversight and approval of settlement. In such a case the criteria might cover such matters as whether:
>
> (a) the pre-requisites for a multi-party situation have been met;
> (b) the multi-party definition is appropriate and fair, taking into account, among other things, whether it is consistent with the purpose for which it is certified, whether it may be over-inclusive or under-inclusive, and whether division into sub-groups may be necessary or advisable;
> (c) persons with similar claims will receive similar treatment, taking into account any differences in treatment between present and future claimants;
> (d) notice to members of the group is adequate, taking into account the ability of persons to understand the notice and its significance to them;
> (e) the representation of members of the group is adequate, taking into account the possibility of conflicts of interest in the representation of persons whose claims differ in material respects from those of other claimants;
> (f) 'opt-out' rights are adequate to fairly protect interests of group members;
> (g) provisions for lawyers' fees are reasonable, taking into account the value and amount of services rendered and the risks assumed;
> (h) the settlement will have significant effects on parties in other actions pending;
> (I) the settlement will have significant effects on potential claims of group members for injury or loss arising out of the same or related occurrences but excluded from the settlement;
> (j) the compensation for loss and damage provided by the settlement is reasonable, taking into account the balance of costs to defendant and benefits to class members; and
> (k) any claims process under the settlement is likely to be fair and equitable in its operation.

The Victorian Law Reform Advisory Council considered guidelines drafted by the Australian Law Reform Commission to be ideal:[166]

> An excellent formulation of some of the factors that courts should consider when deciding whether to approve settlement or discontinuance of a class suit was provided by the ALRC. Section 28(3) of the ALRC's Draft Bill provides that the matters that the court should take into account include the nature and the likely cost

[165] Lord Woolf Report, *supra* n. 12, at 246, §82.

[166] VLRAC Report, *supra* n. 14, at 55.

> and duration of the proceedings; the amount offered and the likelihood of success in the proceeding; whether the settlement, discontinuance, etc. is in the interests of the group members having regard to the views of the group members; and whether satisfactory arrangements have been made for the distribution of money to be paid to the group members.

Sharpe J. in *Dabbs* also noted:[167]

> A leading American text, *Newberg on Class Actions*, (3rd ed), para. 11.43 offers the following useful list of criteria:
>
> 1. Likelihood of recovery, or likelihood of success
> 2. Amount and nature of discovery evidence
> 3. Settlement terms and conditions
> 4. Recommendation and experience of counsel
> 5. Future expense and likely duration of litigation
> 6. Recommendation of neutral parties if any
> 7. Number of objectors and nature of objections
> 8. The presence of good faith and the absence of collusion

The Commission believes that it is advisable to provide the court with guidelines for exercising its discretion in approving settlement agreements. Ideally, the guidelines would be an amalgam of the criteria set out by the Australian Law Reform Commission and those referred to by Sharpe J.

RECOMMENDATION 38

In deciding whether or not to approve a settlement agreement, the court should be required to find that the agreement is fair, reasonable, and in the best interests of those affected by it. In coming to that determination, the court should be directed to consider the following criteria:

- ***(a) the settlement terms and conditions;***
- ***(b) the nature and likely duration and cost of the proceeding;***
- ***(c) the amount offered in relation to the likelihood of success in the proceeding;***
- ***(d) the expressed opinions of class members other than the representative party;***
- ***(e) recommendations of neutral parties, if any;***
- ***(f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members; and***
- ***(g) any other matter the court considers relevant.***

[167] *Dabbs*, *supra* n. 157, §13.

5. Aggregate Assessment of Awards

A class proceeding will not always result in a global, or aggregate, award against the defendant in favour of all class members. Nevertheless, the nature of class proceedings is such that, frequently, it will be relatively straightforward for the court to calculate the entitlement of the class members without requiring class members to prove the amount of their claims individually. In that situation, it would be appropriate for the court to make an aggregate assessment of the damages payable by the defendant to the class.

The South African Law Commission noted:[168]

> Aggregate awards are appropriate where the class members can be identified and the amount of their individual claims can be easily determined without their assistance, for instance where there has been an overcharge for services rendered. … There is no need to go through the costly and time-consuming exercise of requiring the class members to prove their claims individually.
>
> Aggregate awards may also be appropriate where the size of the class is large, but approximately determinable, and the size of the individual claims is small but more or less uniform. Again in this kind of case the requirement of individual proof may not be justifiable and the court might be prepared to entrust the representative or some other person or authority with the task of making an 'average' distribution of the award.

The Commentary to section 29 of the Uniform Act suggests:[169]

> Although in some cases the injuries to class members will be so varied that individual proceedings will be required to establish the total amount of damages, this section authorizes the treatment of monetary relief as a common question. It is particularly useful when the injuries to the class members are relatively consistent.

The Australian Law Reform Commission suggested that aggregate assessment of damages is appropriate where, for instance: (a) the number of group members and the amount of their claims can be determined without need for further assessment; (b) the defendant's total liability can be established without determining each member's share; or (c) the defendant's total liability can be determined in some other way with reasonable accuracy.[170] The Commission cited the example of *Chastain v. British Columbia Hydro &*

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[168]SALC Working Paper, *supra* n. 13, at 44-45.

[169]Uniform Law Conference of Canada, *Class Proceedings Act* (1997) 5C-23.

[170]ALRC Report, *supra* n. 15, at 95.

Power Authority[171] as a case (albeit not a class action) where the damages calculation was straightforward, and included several other examples of when it might be appropriate.[172] The Australian grouped proceedings legislation provides that the court may award damages in an aggregate amount, but only where a reasonably accurate assessment of the total amount to which group members will be entitled can be made.[173]

In Victoria, the Law Reform Advisory Council also recommended that the assessment of aggregate damages ought to be allowed.[174]

The Scottish Law Commission, on the other hand, recommended that there ought not to be any express provision dealing with the aggregate assessment of monetary awards, on the two bases that it is not an essential feature of a class action procedure, and that the "opt-in" regime it recommended should result in less need for such an assessment procedure.[175]

Under the Ontario Law Reform Commission's draft bill, aggregate assessment would be allowed where the same degree of accuracy could be obtained as in an individual action of the same kind.[176] The Ontario Act, however, provides that the court may determine all or part of the defendant's liability in the aggregate where monetary relief is claimed, no questions of law or fact remain to be determined other than those relating to assessment, and all or part of the defendant's liability can reasonably be determined without proof by individual class members.

The British Columbia and Uniform Acts include provisions essentially identical to Ontario's. The U.S. Federal Rule does not speak to the availability of aggregate relief. In Québec, the court is authorized to order collective or individual recovery of claims.

We are of the view that it is highly desirable to give the court the authority, where appropriate, to make an order on the basis of an aggregate assessment of the plaintiff class's damages. This represents the most efficient and effective use of judicial resources. It will also avoid imposing unnecessary costs on class members who would otherwise be required to establish the amount of their individual claims.

We are further persuaded that the provisions in force in the Canadian common law jurisdictions are appropriate for Manitoba's class proceedings regime.

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[171]*Chastain v. British Columbia Hydro & Power Authority* (1973), 32 D.L.R. (3d) 443 (B.C.S.C.).

[172]ALRC Report, *supra* n. 15, at 96.

[173]*Federal Court of Australia Act 1976* (Cth), Part IVA, ss. 33Z(1)(f) and (3).

[174]VLRAC Report, *supra* n. 14, at 56.

[175]SLC Report, *supra* n. 4, at §§4.102-4.103.

[176]OLRC Report, *supra* n. 5, Draft Bill, c. 22(c).

RECOMMENDATION 39

The court should be authorized to make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members if:

(a) monetary relief is claimed;

(b) no questions of law or fact remain to be determined other than those relating to assessment; and

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

(a) Statistical evidence

In assessing aggregate damages, courts in other jurisdictions have taken advantage of statistical evidence. The Ontario Law Reform Commission stated:[177]

> From an examination of the use of statistical evidence in American class actions, and of existing and proposed statutory provisions respecting such evidence, the Commission has come to the conclusion that reliable statistical evidence can play a valuable role in reducing unnecessary administrative and evidentiary burdens for courts and parties in class actions.

The Commentary to section 30 of the Uniform Act notes:[178]

> Statistical evidence has been used in class action litigation to reduce the administrative and evidentiary problems encountered in the use of traditional means of proof to establish the effect of a product or practice on a large number of people. The Ontario and British Columbia Acts only allow statistical evidence to be used for the purpose of determining issues related to the amount or distribution of a monetary award. In the United States, it can also be used to establish liability. This section provides that statistical evidence can be used by the court in determining the amount or distribution of an aggregate monetary award. The party wishing to introduce statistical evidence is to give the other side 60 days' notice of that intention, details respecting its source and must introduce it through an expert. The Quebec Code does not specifically address this issue; instead it gives the court broad powers to prescribe measures to simplify proof.

A similar regime to that in use in Ontario and British Columbia was recommended

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[177]OLRC Report, *supra* n. 5, at 841.

[178]Uniform Law Conference of Canada, *Class Proceedings Act* (1997) C5-25.

by the Victoria Law Reform Advisory Council.[179] Other agencies that have considered class proceedings legislation do not appear to have considered the appropriateness of statistical evidence.

It is our opinion that there are sound reasons for adopting the provisions in other Canadian common law jurisdictions that allow for the use of statistical evidence.

RECOMMENDATION 40

The court should be permitted, for the purposes of determining issues relating to the amount or distribution of an aggregate monetary award, to admit as evidence statistical information that may not otherwise be admissible as evidence.

(b) Distribution of award

Once an aggregate damages award has been made, the court must determine the most appropriate way for it to be distributed. The Australian Law Reform Commission noted the options available to the court:[180]

> The method for distributing any aggregate assessment of monetary relief will vary according to the circumstances of the case. In some cases it will be appropriate for the respondent to distribute monetary relief directly. In other cases a fund will need to be established to administer and distribute any amount ordered to be paid to group members.

In Canada, the courts have been granted broad discretion and powers in determining how aggregate awards are to be distributed. As a recent article noted:[181]

> [The Canadian class proceedings] Acts authorize the distribution of awards by any means that the court considers appropriate. A defendant may be required to distribute directly to class members or to pay the award into court. Alternatively, any other person may be required to distribute directly to class members. The court is authorized to order that awards be distributed by abatement or credit; the court can also order that all or part of an aggregate award be applied in any manner that may reasonably be expected to benefit class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order. A court can order this type of distribution even if persons who are not class members or who may otherwise receive monetary relief

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[179]VLRAC Report, *supra* n. 14, at 56.

[180]ALRC Report, *supra* n. 15, at 97.

[181]Campion and Stewart, *supra* n. 20, at 38-39.

> as a result of the proceedings may benefit. The Quebec provisions are less specific, but they do give the courts discretion to determine the terms and conditions of payment, with either collective or individual distribution of awards available.

The same authors noted that the expansive nature of the Canadian common law jurisdictions' provisions is, to some extent, in response to the barriers that have been erected by the United States Federal Courts, arising out of the fact that U.S. Federal Rule 23 does not speak to the distribution of aggregate awards:

> One reason for the broad and rather extraordinary powers given to the court in the distribution of awards stems from some of the difficulties experienced in the United States in relation to the distribution of damage awards, specialized proof, the use of abatements or credits to distribute awards, and the ability to order a *cy-prés* distribution of an award (where, for example, some individuals who are not class members may benefit from the award). The Ontario and B.C. Acts are designed to ensure that some of the barriers to effective recovery of awards in class proceedings that have been encountered in the U.S. are removed: the court has been granted extraordinary powers not found in traditional procedures to deal with the unique problems encountered in assessing and distributing awards in class proceedings. The Canadian legislation therefore makes it easier for plaintiffs to recover damages in class proceedings and to this extent is more pro-plaintiff than pro-defendant in its approach.[182]

The provisions in the British Columbia and Uniform Acts are based on the recommendations made by the Ontario Law Reform Commission,[183] and differ from the Ontario provisions in that they allow individual class members to "opt out" of the distribution of aggregate damages and prove the amount of their own individual claim, where they object to receiving an "average" or "proportionate" share of the award.

The Victorian Law Reform Advisory Council considered the Ontario provisions to be appropriate, and recommended their adoption in that state.[184] The South African Law Commission was also enthusiastic about this flexibility in distributing damages:[185]

> If the principle of aggregate awards is accepted, then consideration should also be given to authorizing a *cy-prés* type of distribution.... In the context of class actions, a *cy-prés* distribution refers to application of the award in a way which compensates or benefits the class members where actual division and distribution of the award among the class members is impossible or impracticable. An example would be where an award assessed in respect of damages suffered as a result of pollution of

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[182]Campion and Stewart, *supra* n. 20, at 39.

[183]OLRC Report, *supra* n. 5, at 581 and 602.

[184]VLRAC Report, *supra* n. 14, at 56-57.

[185]SALC Working Paper, *supra* n. 13, at 45.

> the environment is used to clean up the environment for the benefit of those affected, or to provide a health service to remedy the ills caused by the pollution. Another example of the application of this doctrine would be where the individual claimants are regular users of a service in respect of which there has been an overcharge and the court orders compensation by way of a reduction in the charges for the service for a certain period of time.

The Commission is of the opinion that it is desirable to provide courts with the widest flexibility in distributing aggregate damages awards, so as to ensure that class members will derive the benefit of awards in the most efficient and economical way consonant with justice.

RECOMMENDATION 41

The court should be permitted to order the distribution of aggregate awards of damages by any means that it considers appropriate.

(c) Undistributed residue

Closely related to the method by which an aggregate award is distributed is the question of how to deal with any residue. Given the potential for inaccuracy in the assessment of aggregate damage awards, the possibility exists that, on occasion, a residue will remain after all claimants entitled to a portion of the award have received the amount to which they are entitled. The Commentary to section 34 of the Uniform Act discusses this issue as follows:[186]

> If part of an aggregate award remains after individual claims have been paid, the court may order that the undistributed funds be used in a manner that will benefit class members generally. This method can be used even if non-class members and class members who have received individual awards would benefit from the distribution. This is often referred to as a cy-prés distribution.
>
> Where money designated to pay individual claims is not all distributed, the court may determine whether it should be returned to the defendant, forfeited to the government or used to pay the costs of the class action. This approach is consistent with the British Columbia Act. The Ontario Act provides that undistributed funds that were designated to pay individual claims be returned to the defendant. In Quebec the court has discretion to determine the appropriate distribution of these funds.

The Australian Law Reform Commission recommended that where money is not paid out in its entirety within the set time period, the balance ought to be returned to the

[186]Uniform Law Conference of Canada, *Class Proceedings Act* (1997) C5-31.

respondent:[187]

> The grouping procedure is not intended to penalise respondents or to deter behaviour to any greater extent than provided for under the existing law. Any money ordered to be paid by the respondent should be matched, so far as possible, to an individual who has a right to receive it. If this cannot be done, there is no basis for confiscating the residue to benefit group members indirectly, or for letting it fall into Consolidated Revenue, simply because the procedure used was the grouping procedure.

That Commission recommended that the respondent should be able to apply for a refund, and that the court should be able to order it, taking into account any relevant costs and other considerations, and that money that went unclaimed should go into a fund used to finance grouped proceedings.[188]

We are persuaded that the most appropriate approach is to give the court the discretion to decide whether any residue ought to be used to benefit the class members in a *cy-prés* manner, returned to the defendant, forfeited to the government, or used to help pay the costs of the proceeding. This is the approach followed in British Columbia and adopted in the Uniform Act, and the Commission believes that it best serves the ends of class proceedings legislation.

RECOMMENDATION 42

The court should be permitted to order that all or any part of an aggregate award that has not been distributed within a time period set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members.

RECOMMENDATION 43

The court should be permitted to order that all or any part of an aggregate award that is to be divided among class or subclass members on an individual basis, but remains unclaimed or otherwise undistributed after a period of time set by the court, be applied against the cost of the class proceeding, forfeited to the government, or returned to the party against whom the order was made.

6. Replacement of Representative Plaintiff

[187]ALRC Report, *supra* n. 15, at 100.

[188]ALRC Report, *supra* n. 15, at 100.

It has been suggested that where a representative party is conducting proceedings on behalf of absent class members, the court ought to be able to replace that representative party if it is satisfied that he or she is not acting in the best interests of all the class members. The Victoria Law Reform Advisory Council stated:[189]

> The court presiding over class suits must be empowered to replace representative plaintiffs who do not adequately protect the interests of the class.

The Australian Law Reform Commission[190] and the Scottish Law Commission[191] made similar recommendations.

Under the U.S. Federal Rule and the Canadian class proceedings regimes, in order to certify a proceeding the court must be satisfied that the proposed representative plaintiff will adequately represent the class. If this criterion is not met at any point during the proceedings, the court may, on motion by a party or a class member or on its own motion, amend the certification order. Although there is no specific or express power to replace the representative party, it is implicit in the scheme of the legislation that a representative party may be replaced if necessary.

Nevertheless, we are of the opinion that in order to make the court's power as clear as possible, the class proceedings legislation should stipulate that the representative party may be replaced by the court if he or she fails to act in the best interests of the class.

RECOMMENDATION 44

The court should have the power to replace the representative party if it is satisfied that the representative party is not acting in the best interests of the class.

7. Discovery

In a typical proceeding, the parties are entitled to broad discovery of the opposing party or parties. In a class proceeding, such a broad right of discovery, if extended to every class member, would often have the potential to paralyze the proceeding and render it inefficient and ineffective. Accordingly, jurisdictions that have introduced class proceedings legislation have typically limited the discovery rights in such proceedings.

U.S. Federal Rule 23 is silent on the question of discovery rights, leaving it to the

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[189]VLRAC Report, *supra* n. 14, at 52.

[190]ALRC Report, *supra* n. 15, at 77-78.

[191]SLC Report, *supra* n. 4, at §4.95.

court to determine the extent of discovery of class members. In Ontario and British Columbia, and under the Uniform Act, the *parties* (*i.e.*, the defendant and the representative plaintiff) have the same rights of discovery against one another that they would have in any other proceeding. After discovery of the representative party, however, the defendant may move for discovery under the rules of court against any other class members. The court must consider a number of listed criteria when deciding whether to grant such discovery rights. Similarly, in Québec discovery is only permitted of the representative party, unless the court orders otherwise.

This same approach was considered and recommended by the Australian Law Reform Commission[192] and the Victorian Law Reform Advisory Council. [193] The Ontario Law Reform Commission stated:[194]

> Consistent with the position taken by courts in the United States, and with the views of commentators who have considered this issue, we do not believe that it is justifiable to impose the inconvenience and expense of discovery on absent class members when the needs of the defendant can be met by discovery of the class representative. Both before certification and prior to the trial of the common questions, it is probable that the class plaintiff will be in possession or control of the information relevant to the issues in dispute at the particular stage of the proceedings, and it is to him that the defendant should be obliged to look. If, however, discovery of the representative plaintiff proves to be inadequate, the defendant should be able to apply to the court for permission to examine or discover other class members.

We are satisfied that the discovery procedure in place in the other Canadian jurisdictions, and proposed in the Uniform Act, is appropriate and should be included in Manitoba's class proceedings legislation.

RECOMMENDATION 45

Parties to a class proceeding should have full rights of discovery under the Court of Queen's Bench Rules as against one another, but discovery of another class member should only be available with the court's approval.

RECOMMENDATION 46

In deciding whether or not to grant leave to discover a class member, the court should be directed to consider:

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[192]ALRC Report, *supra* n. 15, at 73.

[193]VLRAC Report, *supra* n. 14, at 54.

[194]OLRC Report, *supra* n. 5, at 639.

(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 defences of the party seeking leave;

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

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

(f) any other matter the court considers relevant.

CHAPTER 5

SUMMARY OF RECOMMENDATIONS

The following is a summary of the recommendations contained in this Report:

1. Manitoba should adopt a statutory class proceedings regime. (p. 36)

2. Class proceedings should be permitted to proceed only in the Court of Queen's Bench (General Division), and not in the Small Claims Division. (p. 38)

3. The recommendations in this Report should be introduced by legislation, with incidental rules flowing out of the legislation drafted by the Queen's Bench Rules Committee to come into effect simultaneously with the legislation. (p. 39)

4. Class proceedings should not be subject to Rules 20A or 78 of the Court of Queen's Bench Rules, but the Rules should in all other respects apply to class proceedings to the extent they do not conflict with the class proceedings legislation. (p. 40)

5. The legislation implementing the Commission's recommendations should be based on the existing Canadian common law statutory regimes, and in particular on the Uniform Class Proceedings Act. (p. 41)

6. Class proceedings, once filed, should not be allowed to proceed until they have been certified by the court. (p. 43)

7. Appeals from certification decisions should be available to both plaintiffs and defendants, but only with leave of a judge of the Court of Appeal. (p. 44)

8. Members of a class should be permitted, with leave of a judge of the Court of Appeal, to appeal any order if the representative party fails to do so or abandons an appeal after filing it. (p. 44)

9. Plaintiffs should be required to bring a motion for certification of a class proceeding after filing their originating process within 90 days of the close of pleadings. (p. 46)

10. Certification of class proceedings should be mandatory if the criteria set out in the legislation are satisfied. (p. 47)

11. The plaintiff should be required to establish on a certification application that his or her pleadings disclose a cause of action. (p. 49)

12. There need only be an identifiable class of two or more persons in order for a proceeding to be certified as a class proceeding. (p. 50)

13. A class proceeding should be certified if the claims of the class members raise a common issue, defined as:
    (a) a common but not necessarily identical issue of fact; or
    (b) a common but not necessarily identical issue of law that arises from common but not necessarily identical facts,

    whether or not the common issue predominates over issues affecting only individual members. (p. 52)

14. Class proceedings should be certified if they would be the preferable procedure for the fair and efficient resolution of the common issues. (p. 53)

15. The court should be directed to consider the following issues when deciding whether a class proceeding is preferable to other methods of proceeding:
    (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 the 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 practical 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. (p. 55)

16. Representative parties should be required to satisfy the court that they will be able to "fairly and adequately" represent the class. They need not, however, necessarily be members of the class themselves. (p. 57)

17. The following matters should not be considered by the court, individually or in the aggregate, in determining whether a class proceeding ought to be certified:
    (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
    (b) the relief claimed relates to separate contracts involving different class members;
    (c) different remedies are sought for different class members;
    (d) the number of class members or the identity of each class member is not

known; and

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members. (p. 59)

18. The court should be entitled, at any time following certification, to decertify a class proceeding on the basis that it no longer meets the criteria for certification. (p. 60)

19. As part of its certification order, the court should be required to describe the class in respect of which the order was made by setting out the class's identifying characteristics. (p. 61)

20. The court should be permitted to certify subclasses if it is satisfied that doing so is necessary to protect the interests of the members of identifiable subclasses with common issues that are not common to the class as a whole. (p. 63)

21. Members of a class in a proceeding that has been certified should be bound by any decision on the common issues in the class proceeding unless they notify the court of their intention not to be bound within a time period specified in the certification order. (p. 66)

22. The court should be permitted to certify classes that include non-residents of Manitoba. (p. 67)

23. The representative party should be required to give notice of the certification of the class proceedings to all members of the class, unless the court considers it appropriate to dispense with notice. The representative party should also be required to give notice to all class members when the court considers it necessary to protect the interests of any class member or party, or to ensure the fair conduct of the proceeding. (p. 70)

24. The court should have the authority to order a party to give the notice required of another party, and to make any order it considers appropriate as to the costs of any notice. (p. 70)

25. Limitation periods should be suspended as against class members on the commencement of a class proceeding, whether or not the proceeding is ultimately certified, and should resume running against a class member when:

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

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

(c) a decertification order is made;

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

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

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise. (p. 72)

26. Unsuccessful parties should not be liable to pay costs unless:
    (a) there has been vexatious, frivolous, or abusive conduct by a party;
    (b) an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or
    (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs. (p. 76)

27. Class members, other than the representative party, should not be liable for costs except with respect to the determination of their own individual claims. (p. 77)

28. Section 58 of *The Law Society Act*, C.C.S.M. c. L100, should apply to proceedings brought under the class proceedings legislation except as provided in that legislation. (p. 80)

29. An application under subsection 58(4) of *The Law Society Act* should be made to the judge who either presided over the trial of the common issues or approved the settlement agreement, as the case may be. (p. 80)

30. Fees and disbursements payable under an agreement should form a first charge on any monetary award in the proceeding. (p. 80)

31. Representative parties should be permitted to seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class. (p. 81)

32. Agreements regarding fees and disbursements should be approved by the court prior to, or simultaneously with, certification of the proceeding. The court should also have the authority, however, to amend the terms of the agreement if it is subsequently persuaded that those terms are no longer fair and reasonable in all of the circumstances. (p. 84)

33. It is not necessary that a special fund be established to which potential representative plaintiffs can apply to offset the costs of a class proceeding. (p. 86)

34. The court should have the power to make any order it considers appropriate to ensure the fair and expeditious determination of a class proceeding, including the power to stay or sever any related proceeding. (p. 88)

35. The court should have the power to decide whether and how to determine individual

issues once it has determined the common issue(s) in a class proceeding. The court should have maximum flexibility to decide how the individual issues will be determined, and to dispense with or impose any procedural steps or rules that it considers appropriate, consonant with justice to the class members and parties. (p. 90)

36. The judge who makes a certification order in a proceeding should hear all other applications in the proceeding. Where the parties agree, that judge should also be able to hear the trial of the common issues. (p. 91)

37. No settlement, discontinuance, or abandonment of a class proceeding should be permitted without the approval of the court. (p. 93)

38. In deciding whether or not to approve a settlement agreement, the court should be required to find that the agreement is fair, reasonable, and in the best interests of those affected by it. In coming to that determination, the court should be directed to consider the following criteria:
    (a) the settlement terms and conditions;
    (b) the nature and likely duration and cost of the proceeding;
    (c) the amount offered in relation to the likelihood of success in the proceeding;
    (d) the expressed opinions of class members other than the representative party;
    (e) recommendations of neutral parties, if any;
    (f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members; and
    (g) any other matter the court considers relevant. (p. 96)

39. The court should be authorized to make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members if:
    (a) monetary relief is claimed;
    (b) no questions of law or fact remain to be determined other than those relating to assessment; and
    (c) the aggregate or part of the defendant's liability can reasonably be determined without proof by individual class members. (p. 98)

40. The court should be permitted, for the purposes of determining issues relating to the amount or distribution of an aggregate monetary award, to admit as evidence statistical information that may not otherwise be admissible as evidence. (p. 99)

41. The court should be permitted to order the distribution of aggregate awards of damages by any means that it considers appropriate. (p. 101)

42. The court should be permitted to order that all or any part of an aggregate award that

has not been distributed within a time period set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members. (p. 103)

43. The court should be permitted to order that all or any part of an aggregate award that is to be divided among class or subclass members on an individual basis, but remains unclaimed or otherwise undistributed after a period of time set by the court, be applied against the cost of the class proceeding, forfeited to the government, or returned to the party against whom the order was made. (p. 103)

44. The court should have the power to replace the representative party if it is satisfied that the representative party is not acting in the best interests of the class. (p. 104)

45. Parties to a class proceeding should have full rights of discovery under the Court of Queen's Bench Rules as against one another, but discovery of another class member should only be available with the court's approval. (p. 105)

46. In deciding whether or not to grant leave to discover a class member, the court should be directed to 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 defences of the party seeking leave;
    (d) the approximate monetary value of individual claims, if any;
    (e) whether discovery would result in oppression or undue annoyance, burden, or expense for the class members sought to be discovered; and
    (f) any other matter the court considers relevant. (pp. 105-106)

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 12th day of January 1999.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

PROPOSED CLASS PROCEEDINGS ACT

APPENDIX A

PROPOSED CLASS PROCEEDINGS ACT

PART 1: Definitions

1. Definitions

PART II: Certification

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15. Participation of class members
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PART I

Definitions

1. In this Act:

"certification order" means an order certifying a proceeding as a class proceeding;

"class proceeding" means a proceeding certified as a class proceeding under Part 2;

"common issues" means

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

"court", except in section 37, means the Court of Queen's Bench;

"defendant" includes a respondent;

"plaintiff" includes an applicant.

PART II: Certification

Plaintiff's class proceeding

2. (1) One member of a class of persons who are resident in Manitoba may commence a proceeding in the court on behalf of the members of that class.

(2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.

(3) An application under subsection (2) must be made

(a) within 90 days after the close of pleadings, or

(b) with leave of the court at any other time.

(4) The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding.

Defendant's class proceeding

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make an application to a judge of the court for an order certifying the proceedings

as a class proceeding and appointing a representative plaintiff.

Class certification

4. (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if

(a) the pleadings disclose a cause of action,

(b) there is an identifiable class of 2 or more persons,

(c) the claims of the class members raise a common issue, whether or not the common issue predominates 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 plaintiff 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 class members of the proceeding, and

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

(2) 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 the following:

(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 the 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 practical or less efficient;

(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.

Certification application

5. (1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

(2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

Subclass certification

6. (1) Despite section 4, if a class includes a subclass whose members have claims 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 may, in addition to the representative plaintiff for the class, appoint a representative plaintiff for each subclass 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 that is in conflict with the interests of other subclass members.

(2) A class that comprises persons resident in Manitoba and persons not resident in Manitoba may be divided into resident and non-resident subclasses.

Certain matters not bar to certification

7. The court must not refuse to certify a proceeding as a class proceeding by reason only of one or more of the following:

(a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

(b) the relief claimed relates to separate contracts involving different class members;

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

(d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;

(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

Contents of certification order

8. (1) A certification order must

(a) describe the class in respect of which the order was made by setting out the class's identifying characteristics,

(b) appoint the representative plaintiff for the class,

(c) state the nature of the claims asserted on behalf of the class,

(d) state the relief sought by the class,

(e) set out the common issues for the class,

(f) state the manner in which and the time within which a class member may opt out of the proceeding,

(g) state the manner in which, and the time within which, a person who is not a resident of Manitoba may opt in to the proceeding, and

(h) include any other provisions the court considers appropriate.

(2) If a class includes a subclass whose members have claims 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 certification order must include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.

(3) The court may at any time amend a certification order on the application of a party or class member or on its own motion.

(4) Without limiting the generality of subsection (3), where it appears to the court that a representative plaintiff is not acting in the best interests of the class, the court may substitute another class member or any other person as the representative plaintiff.

Refusal to certify

9. If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for that purpose, the court may

(a) order the addition, deletion or substitution of parties,

(b) order the amendment of the pleadings, and

(c) make any other order that it considers appropriate.

If conditions for certification not satisfied

10. (1) Without limiting subsection 8 (3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or subsection 6 (1) are not satisfied with respect to a class proceeding.

(2) If the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties and may make any order referred to in section 9 (a) to (c) in relation to each of those proceedings.

PART III Conduct of Class Proceedings

Role of Court

Stages of class proceedings

11. (1) Unless the court otherwise orders under section 12, in a class proceeding,
    (a) common issues for a class must be determined together,
    (b) common issues for a subclass must be determined together, and
    (c) individual issues that require the participation of individual class members must be determined individually in accordance with sections 27 and 28.

    (2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Court may determine conduct of proceeding

12. The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

Court may stay any other proceeding

13. The court may at any time stay or sever any proceeding related to the class proceeding on the terms the court considers appropriate.

Motions

14. (1) The judge who makes a certification order is to hear all motions in the class proceeding before the trial of the common issues.

    (2) If a judge who has heard motions under subsection (1) becomes unavailable for any reason to hear a motion in the class proceeding, the chief justice of the court may assign another judge of the court to hear the motion.

    (3) Where the parties agree, a judge who hears motions under subsection (1) or (2) may preside at the trial of the common issues.

Participation of Class Members

Participation of class members

15. (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 if this would be useful to the class.

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

Opting out and opting in

16. (1) A 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.

(2) Subject to subsection (4), a person who is not a resident of Manitoba 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 Manitoba, a member of the class involved in the class proceeding.

(3) A person referred to in subsection (2) who opts in to a class proceeding is from that time a member of the class involved in the class proceeding for every purpose of this Act.

(4) A person may not opt in to a class proceeding under subsection (2) unless the subclass of which the person is to become a member has or will have, at the time the person becomes a member, a representative plaintiff who satisfies the requirements of section 6 (1) (a), (b) and (c).

(5) If a subclass is created as a result of persons opting in to a class proceeding under subsection (2), the representative plaintiff for that subclass must ensure that the certification order for the class proceeding is amended, if necessary, to comply with section 8(2).

Discovery

17. (1) Parties to a class proceeding have the same rights of discovery under the Queen's Bench Rules against one another and against non-class members as they would have in any other proceeding.

(2) After discovery of the representative plaintiff or, in a proceeding referred to in section 6, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.

(3) In deciding whether to grant a defendant leave to discover other class members, the court must 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 defences 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 Queen's Bench Rules as a party for failure to submit to discovery.

Examination of class members before an application

18. (1) A party may not require a class member, other than a representative plaintiff, to be examined as a witness before the hearing of any application, except with leave of the court.

(2) Subsection 17 (3) applies to a decision whether to grant leave under subsection (1) of this section.

Notices

Notice of certification

19. (1) Notice that a proceeding has been certified as a class proceeding must be given by the representative plaintiff 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 must make an order setting out when and by what means notice is to be given under this section and in doing so must 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 presence of subclasses,
(f) the places of residence of class members, and
(g) any other relevant matter.

(4) The court may order that notice be given by
(a) personal delivery,
(b) mail,
(c) posting, advertising, publishing or leafleting,
(d) individually notifying a sample group within the class,
(e) creating and maintaining an Internet site, or
(f) any other 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) Unless the court orders otherwise, notice under this section must
(a) describe the proceeding, including the names and addresses of the representative plaintiffs and the relief sought,
(b) state the manner in which and the time within which a class member may opt out of the proceeding,
(c) state the manner in which and the time within which a person who is not a resident of Manitoba may opt in to the proceeding,
(d) describe any counterclaim or third party proceeding being asserted in the proceeding, including the relief sought,
(e) summarize any agreements respecting fees and disbursements
(I) between the representative plaintiff and the representative plaintiff's solicitors, and
(ii) if the recipient of the notice is a member of a subclass, between the representative plaintiff for that subclass and that representative plaintiff's solicitors,
(f) describe the possible financial consequences of the proceedings to class members and subclass members,
(g) state that the judgment on the common issues for the class, whether favourable or not, will bind all class members who do not opt out of the proceeding,
(h) state that the judgment on the common issues for a subclass, whether favourable or not, will bind all subclass members who do not opt out of the proceeding,
(I) describe the rights, if any, of class members to participate in the proceeding,
(j) give an address to which class members may direct inquiries about the proceeding, and

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

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.

Notice of determination of common issues

20. (1) Where the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

(2) Subsections 19 (3) to (5) apply to notice given under this section.

(3) Notice under this section must
(a) state that common issues have been determined,
(b) identify the common issues that have been determined and explain the determinations made,
(c) state that members of the class or subclass may be entitled to individual relief,
(d) describe the steps that must be taken to establish an individual claim,
(e) state that failure on the part of a member of the class or subclass to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court,
(f) give an address to which members of the class or subclass may direct inquiries about the proceeding, and
(g) give any other information that the court considers appropriate.

Notice to protect interests of affected persons

21. (1) At any time in a class proceeding, the court may order any party to give notice to the persons that the court considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

(2) Subsections 19 (3) to (5) apply to notice given under this section.

Approval of notice by the court

22. A notice under this Division must be approved by the court before it is given.

Giving of notice by another party

23. The court may order a party to give the notice required to be given by another party

under this Act.

Costs of notice

24. (1) The court may make any order it considers appropriate as to the costs of any notice under this Division, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

PART IV: Orders, Awards and Related Procedures

Order on Common Issues and Individual Issues

Contents of order on common issues

25. An order made in respect of a judgment on common issues of a class or subclass must
(a) set out the common issues,
(b) name or describe the class or subclass members to the extent possible,
(c) state the nature of the claims asserted on behalf of the class or subclass, and
(d) specify the relief granted.

Judgment on common issues is binding

26. (1) A judgment on common issues of a class or subclass binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that
(a) are set out in the certification order,
(b) relate to claims described in the certification order, and
(c) relate to relief sought by the class or subclass as stated in the certification order.

(2) A judgment on common issues of a class or subclass does not bind a party to the class proceeding in any subsequent proceeding between the party and a person who opted out of the class proceedings.

Determination of individual issues

27. (1) If 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, 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 into those individual issues under the Queen's Bench Rules 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 may give any necessary directions relating to the procedures that must 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 doing so, the court may

(a) dispense with any procedural step that it considers unnecessary, 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) may 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 grant 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

granted.

(7) Unless otherwise ordered by the court making a direction under subsection (1) (c), 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. Without limiting section 27, 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 by those individual class members, section 27 applies to the determination of the defendant's liability to those class members.

Aggregate Awards

Aggregate awards of monetary relief

29. (1) The court may make an order for an aggregate monetary award in respect of all or any part of a 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.

(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 individual nature of the relief.

Statistical evidence may be used

30. (1) For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by

experts in the field of statistics.

(2) A record of statistical information purporting to be prepared by or published under the authority of an enactment of the Parliament of Canada or the legislature of any province may be admitted as evidence without proof of its authenticity.

(3) Statistical information must not be admitted as evidence under this section unless the party seeking to introduce the information

(a) has given to the party against whom the statistical evidence is to be used a copy of the information at least 60 days before that information is to be introduced as evidence,

(b) has complied with subsections (4) and (5), and

(c) introduces the evidence by an expert who is available for cross-examination on that evidence.

(4) Notice under this section must specify the source of any statistical information sought to be introduced that

(a) was prepared or published under the authority of an enactment of the Parliament of Canada or the legislature of any province,

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public, or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), notice under this section must

(a) specify the name and qualifications of each person who supervised the preparation of the statistical information sought to be introduced, and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

(6) Unless this section provides otherwise, the law and practice with respect to evidence tendered by an expert in a proceeding applies to a class proceeding.

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

Average or proportional share of aggregate awards

31. (1) If the court makes an order under section 29, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if

(a) it would be impractical or inefficient to

(I) identify the class or subclass members entitled to share in the award, or

(ii) determine the exact shares that should be allocated to individual class or subclass members, and

(b) failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.

(2) If an order is made under subsection (1), any member of the class or subclass in respect of which the order was made may, within the time specified in the order, apply to the court to be excluded from the proposed distribution and to be given the opportunity to prove that member's claim on an individual basis.

(3) In deciding whether to exclude a class or subclass member from an average distribution, the court must consider

(a) the extent to which the class or subclass member's individual claim varies from the average for the class or subclass,

(b) the number of class or subclass members seeking to be excluded from an average distribution, and

(c) whether excluding the class or subclass members referred to in paragraph (b) would unreasonably deplete the amount to be distributed on an average basis.

(4) An amount recovered by a class or subclass member who proves that member's claim on an individual basis must be deducted from the amount to be distributed on an average basis before the distribution.

Individual share of aggregate award

32. (1) When the court orders that all or a part of an aggregate monetary award under section 29 (1) be divided among individual class or subclass members on an individual basis, the court must determine whether individual claims need to be made to give effect to the order.

(2) If the court determines under subsection (1) that individual claims need to be made, the court must specify the procedures for determining the claims.

(3) In specifying the procedures under subsection (2), the court must minimize the burden on class or subclass members and, for that purpose, the court may authorize

(a) the use of standard proof of claim forms,

(b) the submission of affidavit or other documentary evidence, and

(c) the auditing of claims on a sampling or other basis.

(4) When specifying the procedures under subsection (2), the court must set a reasonable time within which individual class or subclass members may make claims under this section.

(5) A class or subclass member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

(6) Subsection 27 (6) applies to a decision whether to grant leave under subsection (5) of this section.

(7) The court may amend a judgment given under subsection 29 (1) to give effect to a claim made with leave under subsection (5) of this section if the court considers it appropriate to do so.

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 members until further order of the court, or

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

(3) In deciding whether to make an order under clause (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 must 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 made 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
(a) order that the costs of distributing an award under this Division, including the costs of any notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment, and
(b) make any further or other order it considers appropriate.

Undistributed award

34. (1) The court may order that all or any part of an award under this Division that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members.

(2) In deciding whether to make an order under subsection (1), the court must consider
(a) whether the distribution would result in unreasonable benefits to persons who are not members of the class or subclass, and
(b) any other matter the court considers relevant.

(3) The court may make an order under subsection (1) whether or not all the class or subclass members can be identified or all their shares can be exactly determined.

(4) The court may make an order under subsection (1) even if the order would benefit
(a) persons who are not class or subclass members, or
(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

(5) If any part of an award that, under subsection 32 (1), is to be divided among

individual class or subclass members remains unclaimed or otherwise undistributed after a time set by the court, the court may order that part of the award

(a) be applied against the cost of the class proceeding,
(b) be forfeited to the Government, or
(c) be returned to the party against whom the award was made.

Termination of Proceedings and Appeals

Settlement, discontinuance, abandonment and dismissal

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, and
(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 class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the 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.

(6) Before approving a settlement under subsections (1) or (2), the court must be satisfied that the agreement is fair, reasonable, and in the best interests of those affected by it. In making that determination, the court must consider, inter alia:
(a) the settlement terms and conditions,
(b) the nature and likely duration and cost of the proceeding,
(c) the amount offered in relation to the likelihood of success in the proceeding,
(d) the expressed opinions of class members other than the representative party,

(e) recommendations of neutral parties, if any, and

(f) whether satisfactory arrangements have been made for the distribution of money to be paid to the class members.

Appeals

36. (1) Any party may appeal without leave to the Court of Appeal from

(a) a judgment on common issues, or

(b) an order under Division 2 of this Part, other than an order that determines individual claims made by class or subclass members.

(2) With leave of a justice of the Court of Appeal, a class or subclass member, a representative plaintiff or a defendant may appeal to that court any order

(a) determining an individual claim made by a class or subclass member, or

(b) dismissing an individual claim for monetary relief made by a class or subclass member.

(3) With leave of a justice of the Court of Appeal, any party may appeal to the Court of Appeal from

(a) an order certifying or refusing to certify a proceeding as a class proceeding,

(b) an order decertifying a proceeding.

(4) If a representative plaintiff does not appeal or seek leave to appeal as permitted by subsection (1) or (3) within the time limit for bringing an appeal set under the Court of Appeal Rules or if a representative plaintiff abandons an appeal under subsection (1) or (3), any member of the class or subclass for which the representative plaintiff had been appointed may apply to a justice of the Court of Appeal for leave to act as the representative plaintiff for the purposes of subsection (1) or (3).

(5) An application by a class or subclass member for leave to act as the representative plaintiff under subsection (4) must be made within 30 days after the expiry of the appeal period available to the representative plaintiff or by such other date as the justice may order.

PART V: Costs, Fees and Disbursements

Costs

37. (1) Subject to this section, neither the Court of Queen's Bench nor the Court of Appeal may award costs to any party to an application for certification under subsection 2 (2) or section 3, to any party to a class proceeding or to any

party 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 purpose of delay or increasing costs or for any other improper purpose, or

(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) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

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

Agreements respecting fees and disbursements

38. (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must

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

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

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

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

(3) An application under subsection (2) may,

(a) unless the court otherwise orders, be brought without notice to the defendants, or

(b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.

(4) An application under subsection (2) must be brought prior to certification of

the proceeding as a class proceeding.

(5) Interest payable on fees under an agreement approved under subsection (2) must be calculated in the manner set out in the agreement or, if not so set out,

(a) at the prejudgment interest rate, as that term is defined in the Court of Queen's Bench Act, or

(b) at any other rate the court considers appropriate.

(6) Interest payable on 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,

(a) at the prejudgment interest rate, as that term is defined in the Court of Queen's Bench Act, or

(b) at any other rate the court considers appropriate,

on the balance of disbursements incurred as totaled at the end of each 6 month period following the date of the agreement.

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

(8) If an agreement is not approved by the court, or if the court is persuaded at any point in the proceeding that an agreement has ceased to be fair and reasonable in all the circumstances, the court may

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

(b) direct an inquiry, assessment or accounting under the Queen's Bench Rules to determine the amount owing, or

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

(9) An application under subsection 58(4) of the Law Society Act must be made to

(a) the judge who presided at the trial of the common issues, or

(b) the judge who approved the settlement agreement

as the case may be.

PART VI: General

Limitation periods

39. (1) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding

(a) is suspended in favour of a person if another proceeding was commenced and it is reasonable for the person to assume that he or she was a class member for the purposes of that other proceeding, and

(b) resumes running against the person when clauses (2) (a) to (g) applies to the person as though he or she was the member referred to in subsection (2).

(2) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and resumes running against the class member when

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

(b) a ruling by the court has the effect of excluding the class member from the class proceeding or from being considered to have ever been a class member,

(c) an amendment is made to the certification order that has the effect of excluding the member from the class proceeding,

(d) a decertification order is made under section 10,

(e) the class proceeding is dismissed without an adjudication on the merits,

(f) the class proceeding is discontinued or abandoned with the approval of the court, or

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

(3) If there is a right of appeal in respect of an event described in subsection (2) (a) to (g), 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.

Rules of Court

40. The Queen's Bench Rules, other than Rules 20A and 78, apply to class proceedings, to the extent that those rules are not in conflict with this Act.

Application of Act

41. This Act does not apply to

(a) a proceeding that may be brought in a representative capacity under another Act,

(b) a proceeding required by law to be brought in a representative capacity, and

(c) a representative proceeding commenced before this Act comes into force.

REPORT ON CLASS PROCEEDINGS

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

INTRODUCTION

Around the world in recent years, people and governments have grown concerned about "access to justice". A common finding is that the "average citizen's" access to justice is unacceptably limited in a number of ways. One of those limitations has been the difficulty encountered by individuals who may collectively have experienced significant loss, but who individually cannot justify the cost of litigation to obtain compensation.

In jurisdictions around the world the response to this issue has been, increasingly, the introduction of legislation to facilitate—indeed, to permit—the bringing of class proceedings by representative individuals. The Commission is of the opinion that the potential for enhancing access to justice for the citizens of Manitoba through the introduction of class proceedings legislation merits careful consideration.

Class proceedings legislation does not create any new legal liabilities. Rather, it creates a procedural device that allows a representative plaintiff to assert, on behalf of other plaintiffs, tortious, contractual, or other claims that the law already recognizes. Even so, class proceedings are quite different from other civil claims because, among other things: the proceedings directly affect persons not before the court (that is, all who may have a common claim); judges are more involved in managing the case, in part to protect the absent plaintiffs; and novel evidentiary and remedial rules often apply.

Modern class proceedings may currently be brought in Québec, Ontario, and British Columbia. The remaining Canadian provinces, including Manitoba, still operate under archaic rules which only permit class proceedings in very limited circumstances.

MULTI-PARTY PROCEEDINGS IN MANITOBA

The class action rule in Manitoba has remained essentially unchanged since it was first developed as a rule of the equity courts. That rule became part of the English civil procedural rules, and was received into Canadian civil procedure in common law jurisdictions. The Supreme Court of Canada held in 1982 that this "class action" rule was simply inadequate to accommodate certain types of actions. The rule's deficiencies included, amongst others, the lack of provisions for service of notice, costs, opting out, modification of the discovery rules and approval of settlements, and the uncertain application of limitation periods and the *res judicata* doctrine. In short, the historic rule was simply inadequate in the context of modern, complex claims.

The class action rule was one of the very few areas left completely untouched when Manitoba's *Queen's Bench Rules* were revised and re-enacted in 1988. The current

Manitoba rules on multi-party proceedings are a patchwork of provisions intended to deal with specific problems, and a poor substitute for a comprehensive class proceedings regime.

CLASS PROCEEDINGS LEGISLATION IN OTHER JURISDICTIONS

American courts were the first common law jurisdictions to permit modern class proceedings. Rule 23 of the United States Federal Rules of Civil Procedure was substantially broadened in the early 1950s and then again in 1966. Québec led the way in Canada in 1979 with legislation that is very similar to the United States Federal Rule. Ontario introduced *The Class Proceedings Act, 1992* on 1 January 1993, and in 1995 British Columbia passed *The Class Proceedings Act*. The Uniform Law Conference of Canada adopted the *Uniform Class Proceedings Act* in 1996. The Ontario statute, which the British Columbia and Uniform Acts closely followed, is a conscious effort to avoid the weaknesses of the United States/Québec model. None of the other Canadian provinces have adopted a comprehensive class proceedings regime. Australia has adopted class proceedings legislation at the federal level and at some state levels, and both the English and Scottish courts are considering revising their class or grouped proceedings rules.

SOME EXAMPLES OF CLASS PROCEEDINGS

Class proceedings in tort cases include claims arising from single incident mass accidents where people who are gathered together (for example, as travelers, spectators, workers, or neighbours) suffer losses from the same occurrence. Tort-based claims for bodily injury arising from consumer products (for example, tobacco and asbestos) or, more commonly, medical products (for example, intra-uterine devices, breast implants, contaminated blood, jaw implants, silver mercury fillings, and heart pacemakers) have also been filed as class proceedings. Other tort-based class proceedings include claims of group defamation, nuisance, various statutory torts, damage claims for breach of *Charter* rights, claims arising from illegal strikes, negligent house construction, and negligent misstatement.

Contractual class claims have involved the prototypical consumer claims for defective products (for example, defective toilets, house siding, plastic blinds, and heaters), which usually involve relatively small amounts of money and are not feasible to pursue on an individual basis. Other contractual claims involve misrepresentations (for example, in the provision of services), wage and wrongful dismissal claims, and disputes over franchise agreements.

Securities cases arising out of a breach of fiduciary obligations, a failure to disclose, or negligent or misleading representations are very common in the United States because of the obvious plaintiff class: shareholders. Securities class proceedings claims in Canada, while not unknown, are not common, although this may change following the release of a recent report by the Toronto Stock Exchange.

Class proceedings against governments are relatively common, including, for example, the contaminated blood cases. The largest proportion of class actions in the United States involve actions against governments arising from breaches of civil rights and claims for equitable remedies on the grounds that the government had wrongfully acted or refused to act and had thereby infringed the civil rights of the class as a whole. Governments have also been the beneficiaries of class actions.

RATIONALES FOR PERMITTING CLASS PROCEEDINGS

Not the least important rationale for the introduction of class proceedings legislation is the need to provide a means of redress to people whose injuries are insufficient, except in the aggregate, to make pursuing compensation in the judicial system economically feasible. As well, the judicial system is increasingly being called upon to do more and more with fewer and fewer resources, and class proceedings can help ensure that those resources are used as efficiently as possible. Class proceedings legislation will also result in wrongdoers being held accountable for wrongs that might not be pursued by individual victims, thereby enhancing the fairness of society as a whole.

The fact that Manitobans are now liable to have their rights affected by class proceedings brought in other jurisdictions, and possibly to be prejudiced as a result, is yet another compelling reason for the establishment in Manitoba of a modern class proceedings regime.

Finally, fears that introduction of such a regime may result in an explosion of spurious and extortionate litigation by entrepreneurial lawyers are, in the Commission's opinion, unfounded.

Manitoba's existing "class proceedings" procedures are insufficient to the tasks required of a modern class proceedings system, having been designed to solve other types of problems. For this reason, and for the specific reasons mentioned above, the Commission is of the opinion that Manitoba should take steps to provide its citizens with the protection of a modern class proceedings regime.

DEFINING A CLASS PROCEEDINGS REGIME

The Commission reviewed and discussed not only the existing Canadian and United States class proceedings legislation, but also the recommendations of a number of committees and commissions that have studied the issue of class proceedings legislation in recent years. On the basis of that review, the Commission has made 46 recommendations with respect to the establishment of a class proceedings regime in Manitoba. The primary recommendation, from which all others flow, is that the class proceedings regime should be modeled on the regime set out in the *Uniform Class Proceedings Act*. The Commission also

recommends that the Court of Queen's Bench hear all class proceedings, and that the new procedure be brought in by way of legislation rather than simply changes in the *Court of Queen's Bench Rules*.

The issues discussed in the Report, and regarding which the Commission has made specific recommendations, include: requiring all class proceedings to be certified by the court before they are allowed to proceed; the nature of the certification requirements; description of the class or sub-class to be represented; requiring members of the class to opt out of the proceeding if they do not wish to participate; providing notice of the proceeding to class members; the tolling of limitation periods; costs and legal fees; the involvement of the court in controlling the process; dealing with issues that are not common to all class members; whether the judge hearing the certification application should also hear the trial; court approval of the termination of proceedings; the aggregate assessment of awards; the replacement of a representative plaintiff; and rules regarding discovery.

For the most part, the Commission's recommendations track those of the Uniform Law Conference, but there are instances in which its recommendations differ in order to tailor the legislation to Manitoba's unique circumstances.

The Commission has also included in its Report a draft *Class Proceeding Act*.

RAPPORT SUR LES RECOURS COLLECTIFS

RÉSUMÉ

RÉSUMÉ

INTRODUCTION

Depuis les dernières années et partout dans le monde, les citoyens et les gouvernements se préoccupent de plus en plus de la notion d'« accès à la justice ». On constate souvent que, pour le « citoyen moyen », l'accès à la justice est limité de bien des façons et cela est inacceptable. Cet accès est notamment limité pour les personnes qui, collectivement, ont subi une lourde perte mais qui, individuellement, ne peuvent assumer les frais de litige pour obtenir un dédommagement.

Un peu partout, les autorités ont de plus en plus répondu à cette situation en adoptant une législation afin de faciliter, voire d'autoriser, les recours collectifs à l'initiative de personnes représentant le groupe. Selon la Commission, l'amélioration possible de l'accès à la justice pour les citoyens du Manitoba grâce à l'adoption d'une loi sur les recours collectifs mérite qu'on s'y intéresse sérieusement.

Une loi sur les recours collectifs ne donne pas lieu à de nouvelles obligations juridiques. Elle met plutôt en place un mécanisme qui permet à un représentant des demandeurs de faire valoir ses droits, au nom d'autres demandeurs, et de faire établir la responsabilité délictuelle, contractuelle ou autre du défendeur, cette responsabilité étant déjà prévue par la loi. De toute façon, les recours collectifs diffèrent beaucoup des autres actions civiles, notamment parce que : la procédure touche directement des personnes qui ne sont pas présentes au tribunal (c'est-à-dire toutes celles qui ont une réclamation commune); les juges suivent le dossier de plus près, entre autre pour protéger les demandeurs qui sont absents; et, souvent, de nouvelles règles de preuve et mesures de redressement sont appliquées.

Il est actuellement possible d'intenter des recours collectifs au Québec, en Ontario et en Colombie-Britannique. Les autres provinces canadiennes, y compris le Manitoba, suivent encore des règles archaïques qui ne permettent des recours collectifs que dans des cas très limités.

LITIGES METTANT EN CAUSE PLUSIEURS PARTIES AU MANITOBA

Au Manitoba, la règle sur les recours collectifs n'a pour ainsi dire pas changé depuis son établissement du temps des tribunaux d'équité. Elle faisait partie des règles de procédure civile anglaises et a été introduite dans les instances civiles canadiennes régies par la common law. En 1982, la Cour suprême du Canada a établi que cette règle était tout simplement inadéquate pour certains types d'actions. Notamment, la règle ne prévoyait rien dans les domaines suivants : signification d'avis, coûts, désistement, modification des règles concernant l'interrogatoire préalable et approbation des règlements. De même, elle n'entraînait pas l'application systématique des délais de prescription et de la doctrine *res*

judicata. En bref, cette règle du temps jadis ne s'appliquait plus aux demandes de réparation complexes d'aujourd'hui.

La règle sur les recours collectifs a compté parmi les quelques rares éléments qui n'ont connu aucune modification au moment de la révision et de la réadoption des *Règles de la Cour du Banc de la Reine* du Manitoba en 1988. Les règles manitobaines actuelles sur les litiges mettant en cause plusieurs parties sont un assemblage de dispositions éparses prévues pour traiter des problèmes précis et elles ne sauraient nullement se substituer à un régime bien conçu pour les recours collectifs.

LES LOIS SUR LES RECOURS COLLECTIFS DANS D'AUTRES RESSORTS

Les tribunaux américains ont été les premières instances de common law à autoriser les recours collectifs modernes. Au début des années 50, puis de nouveau en 1966, on a grandement étendu la portée de la règle 23 des règles de procédure civile fédérales aux États-Unis. Au Canada, c'est la province du Québec qui, en 1979, a adopté la première une législation très semblable à celle des États-Unis, suivie le 1er janvier 1993 par l'Ontario avec sa *Loi de 1992 sur les recours collectifs*, et en 1995 par la Colombie-Britannique, qui a proclamé sa *Class Proceedings Act*. En 1996, la Conférence pour l'harmonisation des lois au Canada a adopté la *Loi uniforme sur les recours collectifs*. La loi ontarienne, dont on s'est beaucoup inspiré pour la loi de la Colombie-Britannique et pour la loi uniforme, est le résultat d'un effort délibéré visant à éviter les lacunes du modèle américain et québécois. Aucune des autres provinces canadiennes ne dispose d'un régime complet dans ce domaine. L'Australie s'est dotée d'une législation au niveau fédéral et dans certains de ses états, et tant en Angleterre qu'en Écosse, les tribunaux envisagent de revoir leurs règles de procédure à cet égard.

QUELQUES EXEMPLES DE RECOURS COLLECTIF

En matière délictuelle, les recours collectifs surviennent notamment à la suite d'accidents causés par un incident unique en une seule occasion, où un regroupement de personnes (par ex. des touristes, des spectateurs, des travailleurs ou les habitants d'un quartier) sont touchées et subissent des pertes au cours d'un même événement. Des recours collectifs ont également été entamés lors d'actions civiles pour dommages corporels causés par des produits de consommation (par ex. le tabac ou l'amiante) ou, comme c'est plus souvent le cas, par des produits médicaux (par ex. les dispositifs intra-utérins, les prothèses mammaires ou maxillaires, le sang contaminé, les amalgames d'argent au mercure et les stimulateurs cardiaques). Toujours en matière délictuelle, les recours collectifs peuvent également porter sur la diffamation de groupe, la nuisance, divers délits prévus par la loi ou des dommages attribuables à la violation de droits énoncés dans la *Charte*. Ils peuvent également découler de grèves illégales, de la construction négligente de maisons ou de déclarations négligentes et inexactes.

Les recours collectifs de nature contractuelle sont typiquement des réclamations de

consommateurs pour produits défectueux (par ex. des toilettes, des parements extérieurs de maison, des stores en plastique et des appareils de chauffage défectueux). Ces réclamations portent généralement sur des sommes relativement petites et ne se prêtent pas à des actions individuelles. D'autres recours collectifs de cette nature sont entamés à la suite d'information trompeuse (par ex. pour la prestation de services), de congédiement injustifié, de désaccord au sujet de contrats de franchise ou pour le recouvrement de créances salariales.

Aux États-Unis, les actions qui concernent des valeurs et qui sont introduites à la suite du non-respect d'obligations fiduciaires, de la non-communication de renseignements ou de déclarations trompeuses ou faites avec négligence sont très communes en raison du statut évident des demandeurs : les actionnaires. Au Canada, bien qu'elles ne soient pas méconnues, elles sont peu fréquentes mais cette situation pourrait bien changer après la publication récente d'un rapport par la Bourse de Toronto.

Les recours collectifs contre les gouvernements sont relativement fréquents; mentionnons, par exemple, les actions intentées au sujet du sang contaminé. Aux États-Unis, la majorité des recours collectifs sont dirigés contre les gouvernements à la suite de la violation de droits de la personne et pour obtenir un redressement équitable lorsqu'on invoque que le gouvernement a agi à tort ou refusé d'agir et, de ce fait, a violé les droits de tout un groupe de personnes. Les gouvernements ont également été les bénéficiaires de certains recours collectifs.

ARGUMENTS POUR AUTORISER LES RECOURS COLLECTIFS

Un des arguments les plus importants en faveur de l'adoption d'une loi sur les recours collectifs est le suivant : la nécessité de fournir un moyen de redressement aux personnes dont les préjudices sont insuffisants, sauf collectivement, pour envisager une action en justice qui soit réalisable économiquement. Par ailleurs, le système judiciaire est de plus en plus sollicité et dispose de moins en moins de ressources. Aussi, des recours collectifs permettraient que ces ressources soient utilisées le plus efficacement possible. Grâce à une loi sur les recours collectifs, les auteurs de délits seront tenus responsables de leurs actions, dans les cas où les victimes sont peut-être dissuadées d'intenter des actions individuelles, ce qui ne fera que contribuer à plus d'équité au sein de la société.

Le fait que des recours collectifs intentés dans d'autres ressorts peuvent maintenant avoir des effets sur les droits des Manitobains, voire y porter atteinte, constitue en soi une autre raison convaincante pour l'adoption d'un nouveau régime de recours collectifs au Manitoba.

Enfin, aux yeux de la Commission, il est tout à fait injustifié de craindre que l'adoption d'un tel régime n'entraîne une explosion de litiges fallacieux et exorbitants de la part de juristes entreprenants.

Les procédures qui existent actuellement au Manitoba en matière d'actions mettant en cause plusieurs parties ne répondent pas aux exigences d'un système moderne de recours collectifs, car elles ont été conçues pour régler d'autres types de problèmes. Pour cette raison, et pour celles qui sont mentionnées précédemment, la Commission est d'avis que le Manitoba devrait prendre des mesures pour protéger ses citoyens à l'aide d'un régime moderne de recours collectifs.

DÉFINITION DU RÉGIME PROPOSÉ

La Commission a étudié et analysé non seulement la législation actuelle au Canada et aux États-Unis mais aussi les recommandations d'un certain nombre de comités et de commissions qui se sont interrogés ces dernières années sur la question d'une législation concernant les recours collectifs. À la lumière de ces réflexions, la Commission a présenté 46 recommandations sur la mise en place d'un système prévoyant des recours collectifs au Manitoba. Aux termes de la recommandation principale, à partir de laquelle découlent toutes les autres, le régime devrait s'inspirer du modèle énoncé dans la *Loi uniforme sur les recours collectifs*. La Commission recommande également que tous les recours soient entendus à la Cour du Banc de la Reine et qu'une loi établisse la nouvelle procédure plutôt que de simples modifications aux *Règles de la Cour du Banc de la Reine.*

Les questions abordées dans le Rapport et pour lesquelles la Commission a formulé des recommandations précises sont notamment les suivantes : certification obligatoire de tous les recours collectifs par le tribunal avant le début de l'instance; description des conditions de certification; description du groupe ou du sous-groupe représenté; possibilités pour les membres du groupe de se retirer s'ils ne souhaitent pas participer; avis d'instance donné aux membres du groupe; application des délais de prescription; dépens, honoraires et débours; contrôle du processus par le tribunal; questions qui ne sont pas communes à tous les membres du groupe; le juge qui entend la demande de certification peut-il présider au procès; autorisation du tribunal pour clore l'instance; estimation globale du dédommagement; remplacement d'un demandeur représentant le groupe; règles concernant l'interrogatoire préalable.

Pour la plupart, les recommandations de la Commission suivent celles de la Conférence pour l'harmonisation des lois au Canada, mais, dans certains cas, elles s'en éloignent de façon à s'adapter aux circonstances particulières du Manitoba.

Le Rapport de la Commission s'accompagne également d'une ébauche de *Loi sur les recours collectifs*.