A HISTORY OF CLASS ACTIONS: MODERN LESSONS FROM DEEP ROOTS

Michael A Eizenga and Emrys Davis

Abstract: The authors trace the development of the class action from its roots nearly 1,000 years ago to the liberally available class action device that exists today. The immediate precursor of the modern class action is the representative action, which was made available in the common law courts following the fusion of Law and Equity in 1873. The representative action remained restricted in application with the result that eventually legislatures introduced class procedures. However, the authors argue that although the use of the class action device has greatly expanded in the modern era, this growth has not always been progressive. Rather, its growth has been realized in "fits and starts," as at various times, courts, legislatures, and enforcement agencies have contributed to the definition of the scope and application of the class action device. Class actions are important procedural tools that often enable individuals to achieve justice, however, the ongoing interplay between the courts, legislatures, and regulatory agencies also has the potential to be a restraining influence, to tame abuses, and finally, to define the scope of class actions in the most efficient and effective way for all involved.

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A. INTRODUCTION

The class action is linked so strongly with the unique characteristics of the modern era — mass consumption and mass production,[1] large-scale disasters,[2] corporate mismanagement — that it is easy to believe that it is a product of this era. Yet the roots of the modern class action stretch back nearly 1,000 years and its development has been ongoing for several centuries.

A review of the history of the class action is more than interesting: it is instructive. Trends emerge in its development that inform modern class action practice. Analysis of these trends indicates a new period in class action history in which all branches of government take part in its continued evolution. In the authors' view, this is a welcome development.

B. EARLY HISTORY AND MODERN DEVELOPMENT

1) Norman England

Like much of Anglo-Canadian law, the roots of the modern class action stretch back to the period following the Norman conquest of England.[3]

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1 *Western Canadian Shopping Centres Inc v Dutton*, [2001] 2 SCR 534 at para 26 [*Dutton*].

2 *Carom v Bre-X Minerals Ltd* (2000), 51 OR (3d) 236 at para 1 (CA) [*Bre-X*].

3 For a comprehensive review of the early roots and the subsequent development of the modern class action through the centuries, see Stephen C Yeazell, *From Medieval Group Litigation to the Modern Class Action* (London: Yale University Press, 1987) [Yeazell, "Medieval Group Litigation"].

Under feudalism, serfs gave service or rents in exchange for protection, governance, or religious intercession from the lord. A failure by either serf or lord to uphold their obligations could result in lawsuits involving numerous litigants. It is in such early disputes that some of the hallmarks of the modern class action appear. For instance, in 1199, a parish refused to pay burial fees to the local rector. The rector sued four parishioners as representatives of the entire parish. The judgment in his favour required all parishioners, not just the four representatives, to pay him the burial fees.[4] Similarly, in the early fourteenth century, the Lord of the Channel Islands demanded payment of his tenants' rents in French currency rather than the local currency of the Islands. The currency disparity caused rents to treble overnight. A handful of the islanders challenged the measure in court on their behalf and on behalf of all the other tenants. The judges sent by the King to adjudicate this dispute ordered a single complainant to come to London and "argue the case for all" so that the "determination of the King's Counsel in that one case would govern the judgment in all similar complaints."[5] Unfortunately, for the tenants, their representative lost the case and they had to pay their rents in French currency.

Admittedly, during this period, group social structures — parishes, villages, tenancies, and the like — were the norm and a community's standing to litigate was not questioned, as it would be centuries later. As Professor Yeazell notes, "[i]t would have made as little sense to a medieval lawyer to ask about the litigative standing of communities as it would to ask a modern lawyer why individuals can litigate."[6] Consequently, these early cases might be more appropriately characterized as examples of an individual representing a group with existing legal standing (i.e., group litigation[7]) rather than examples of a legal construct that allows similarly situated individuals to temporarily become a single litigative entity (i.e., a class action). And yet, the early cases, such as the Channel Islands case, contain the very characteristics that define the modern class action: one representative arguing the case on behalf of similarly situated individuals with the decision binding on all, whether present or not. Thus while

4 Stephen C Yeazell, "The Past and Future of Defendant and Settlement Classes in Collective Litigation" (1997) 39 Ariz L Rev 687 at 688 [Yeazell, "The Past and Future"].

5 Raymond B Marcin, "Searching for the Origin of the Class Action" (1973–74) 23 Cath U L Rev 515 at 522.

6 Yeazell, "The Past and Future," above note 4 at 689.

7 As Yeazell does, above note 3.

the medieval cases are at odds with their modern counterparts conceptually, the outcome was very similar in practice.

2) The Court of Chancery and the Early Modern Era

The easy acceptance of group standing waned at the end of the Middle Ages due to the rise of incorporation, among other factors.[8] As legal minds agreed that incorporation granted legal standing, it followed that unincorporated groups must lack such standing. Yet the communities that generated group litigation in the medieval period persisted and feudal obligations lingered into the early modern era. The common law courts proved inappropriate for litigation involving large groups because their procedural rules were more likely to spawn a plethora of individual suits.[9] Yet in this context of declining recognition of group litigative standing and continuing need for adjudication of suits involving multiple litigants, the English Court of Chancery maintained a rule of compulsory joinder. It decreed that:

> all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree which shall bind all.[10]

Although intended to protect Chancery from a multiplicity of suits and to prevent the injustice of inconsistent decisions, the rule also precluded litigants from any relief if even one party was unable to or refused to participate in the suit. The ongoing and growing need for adjudication of group litigation where the rule of compulsory joinder resulted in injustice forced Chancery to relax its rule and allow one person to bring a suit on behalf of "all persons materially interested, either legally or beneficially in the subject matter of the suit."[11] *Brown v Vermuden* (1676) is commonly cited as the first case in which Chancery applied the relaxed rule and in so doing decided the first class action of the modern era.[12] Brown was the Vicar of Worselworth and, like his predecessor from

8 Yeazell, "The Past and Future," above note 4 at 690.

9 John A Kazanjian, "Class Actions in Canada" (1973) 11 Osgoode Hall LJ 397 at 401 [Kazanjian].

10 Kazanjian, *ibid* at 400; Ontario Ministry of the Attorney General, Ontario Law Reform Commission, *Report on Class Actions*, vol 1 (Toronto: Queen's Printer, 1982) at 5 [Ontario Law Reform Commission].

11 Ontario Law Reform Commission, *ibid* at 6.

12 Kazanjian, above note 9 at 402.

1199, he wanted to enforce payments from his parishioners, in this case miners who were supposed to render their tithes in lead ore pursuant to an earlier judgment of the court. Vermuden, a miner, argued that, not having been a party to the earlier action, he was not bound by its decision. The Lord Chancellor rejected his argument holding that, "[i]f the Defendant should not be bound, Suits of this Nature, as in the case of Inclosures, Suit against the Inhabitants for Suit to a Mill, and the like, would be infinite and impossible to be ended."[13] Vermuden paid the tithe and although, in effect, it was a defendants' class,[14] the principle was set: it was appropriate to bind absent parties when many individuals were under the same obligations (such as tithes) or had the same rights (such as to pastures or mills) as the representative before the court.

Over the next century-and-a-half, Chancery adjudicated similar representative actions arising from quickly disappearing feudal obligations. At the same time, Chancery encountered a new and growing collective for which the representative action proved useful: businessmen drawn together in collective enterprises prior to the advent of the limited liability corporation.[15] By the mid-nineteenth century, Chancery had developed many if not all of the elements of the modern class action through its jurisprudence.[16] It regularly permitted representative suits on behalf of a group of similarly situated individuals where compulsory joinder was impractical. It examined the common interests of the group members to ensure that a binding decision would not prejudice absent parties. It even implemented subclasses or multiple classes where appropriate.[17]

3) The Fusion of Law and Equity

Until 1873, representative actions existed only in the Court of Chancery. As a court of equity, Chancery only provided certain relief such as an accounting, injunctive relief, or specific performance. The common law courts could award compensatory damages but they did not recognize representative suits. This changed when the UK Parliament passed

13 *Ibid*.

14 Arguably, a defendants' class proceeding (here apparently without the ability to opt out) could be a more onerous legal construct in that it may directly impose a burden (and not just a benefit) on an absent party.

15 Kazanjian, above note 9 at 401. For a more detailed discussion of Chancery's development of the representative action during this period see Kazanjian, above note 9 at 404–13.

16 *Ibid* at 408–9.

17 *Ibid* at 411.

the *Supreme Court of Judicature Act, 1873*[18] fusing the courts of law and equity. Rule 10 of the *Rules of Procedure* scheduled to the *Supreme Court of Judicature Act, 1873*, enshrined the representative procedure that Chancery had developed over the last century-and-a-half. It provided that:

> Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued or may be authorized by the Court to defend in such action on behalf of or for the benefit of all parties so interested.[19]

Expressly rejecting the rule of compulsory joinder and opening the representative action to the common law courts, Parliament significantly expanded the scope of the representative action.

Less than a decade later, the representative action appeared in Ontario with the passage of *The Ontario Judicature Act, 1881*.[20] Order XII, Rule 10 of the *Rules of Court*, which were attached as a schedule to the *Act*, was identical to the English Rule 10.

In the United States, although the representative action appeared earlier than in Ontario, its origins in equity narrowed its application to equity's causes of action and remedies far longer than in the UK or Canada.[21] In 1820, Story J reviewed the English authorities and adopted the representative action in the common law in *West v Randall*.[22] Then in 1833, Equity Rule 48 became the first procedural rule governing representative actions in the federal courts.[23] It provided for representative actions as a matter of convenience in cases with numerous parties but it did not purport to bind absent parties. However, ten years later, the US Supreme Court held that absent parties could be bound under Equity Rule 48 and in 1912, the reformulated new rule, Equity Rule 38, expressly provided that absent parties could be bound by decisions under it. It read:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to

18 36 & 37 Vict, c 66 (UK).

19 Ontario Law Reform Commission, above note 10 at 6.

20 44 Vict, c 5.

21 Ontario Law Reform Commission, above note 10 at 8.

22 29 F Cas 718 (No 17,424) (CCRI 1802). See William Landers & Wayne B Vance, "Federal and State Class Actions: Developments and Opportunities" (1975) 46 Miss LJ 39 at 41–42.

23 Deborah Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, (Santa Monica: Rand, 2001) at 10–11 [Hensler].

> bring them all before the court, one or more may sue or defend for the whole.[24]

Equity Rule 38 was short-lived but its successor, Rule 23, adopted in 1938 as part of the United States Federal Rules of Civil Procedure,[25] finally brought American procedure in line with its English and Canadian counterparts by extending the application of representative actions to legal as well as equitable remedies.[26] It also classified representative or class actions, as they were increasingly called, into three categories. While an attempt to indicate the types of cases that were appropriate for representative treatment, the categories quickly became unworkable distractions as classification overwhelmed the goal of fairly adjudicating the rights of the parties.[27] Proper classification was crucial because it determined how a decision would bind absent parties. "True" class actions involved rights enjoyed jointly and their results bound absent parties.[28] "Hybrid" class actions involved rights to specific property that were several rather than joint.[29] In these cases, absent individuals could be bound in some respects and not in others.[30] Finally, "spurious" class actions were not related to specific property and involved rights held severally.[31] Absent individuals were not bound unless they chose to be.[32] The deficiencies of the classification system would, in part, lead to further revisions in 1966.[33] These revisions are discussed more fully below.

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24 Hensler, *ibid* at 11.

25 308 US 653 (1938).

26 Ontario Law Reform Commission, above note 10 at 8.

27 *Ibid* at 8–9.

28 *Ibid* at 8; Hensler, above note 23 at 11.

29 Ontario Law Reform Commission, *ibid* at 8.

30 Hensler, above note 23 at 11–12. See, for example, *Independence Shares Corp v Deckert*, 108 F (2d) 51 (CCA 3d, 1939), rev'g 27 F Supp 763 (ED Pa 1939); rev'd by *Deckert v Independence Shares Corp*, 311 US 282 (1940). In that case, different levels of courts went back and forth over whether a class action claiming misrepresentation in a circular was spurious or hybrid.

31 Ontario Law Reform Commission, above note 10 at 8. See for example *Oppenheimer v FJ Young Co*, 144 F (2d) 387 (CCA 2d, 1944), rev'g 3 FRD 220 (SD NY 1943) cited by Zechariah Chafee, *Some Problems of Equity* (Ann Arbor: University of Michigan Law School, 1950) at 269–70 as an example of a spurious class action, although certification was denied; and *National Hairdressers' & Cosmetologists' Association v Philad Co*, 41 F Supp 701 (D Del, 1941).

32 Hensler, above note 23 at 11.

33 Chafee outlines his criticisms of the classification system at Chafee, above note 31 at 250–73.

C. RETRENCHMENT AND JUDICIAL RELUCTANCE

1) Early Judicial Conservatism in the United Kingdom

The scope of the representative action had steadily expanded through the eighteenth and nineteenth centuries, at first exclusively by judicial fiat and much later by small but significant legislative change. During this time, the courts had adopted a progressive and flexible approach to accommodate society's changing needs. The decisions of the House of Lords following the introduction of Rule 10 continued the courts' progressive and flexible approach to class actions. The first decision, *Duke of Bedford v Ellis*,[34] dealt with the entitlement of a group of fruit and vegetable growers to preferential rights at Covent Garden Market. The majority of the Lords approved of the representative action as brought by the growers despite factors weighing in favour of individual suits. Its decision endorsed Chancery's flexible approach to class actions and confirmed that it should continue in the interpretation of the new Rule 10.[35] On this basis, Lord Macnaghten set the following conditions for a class action:

> Given a common interests and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.[36]

The Lords echoed Lord Macnaghten's flexible application of Rule 10 in obiter in *Taff Vale Railway Co v Amalgamated Society of Railway Servants*:[37]

> The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires.

Despite judicial recognition of the need for flexible and expansive interpretation of Rule 10, less than a decade after these decisions, the English Court of Appeal in *Markt & Co Ltd v Knight Steamship Co Ltd*[38] radically reversed the progressive trend and narrowed the application of class actions in Canada and the United Kingdom for decades.

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34 [1901] AC 1 (HL) [*Duke of Bedford*].
35 Ontario Law Reform Commission, above note 10 at 11.
36 *Duke of Bedford*, above note 34 at 8.
37 [1901] AC 426 at 443 (HL).
38 [1910] 2 KB 1021 (CA) [*Markt*].

In *Markt*, owners of shipped goods brought a class action against a ship owner after the Russian Navy sank the ship carrying their cargo during the Russo-Japanese War. While the cause of action rested on one common occurrence, the sinking of the ship, there were forty-three separate bills of lading. The separate contracts were significant for the majority of the court who refused to allow the action to proceed as a representative action. Lord Justice Fletcher Moulton held that an "identity of form of a contract or similarity in the circumstances"[39] was insufficient to meet the requirements of a class proceeding. Significantly, he also held that:

> Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.[40]

This decision became the source of a deep reluctance in the judiciary to permit class actions where the claim was for damages.[41] In effect, Fletcher Moulton LJ reversed Parliament's statutory expansion of the class action to legal remedies, such as damages, in its adoption of Chancery's representative action in the passage of Rule 10.

In addition during this period, the rise of the limited liability company sharply reduced the need for the class action.[42] Disappearing feudal rights and obligations had left commercial relationships as the primary arena for class actions as unincorporated associations of businessmen had contributed to the growth of the class action during the nineteenth century.[43] The limited liability company that fused business owners into one legal entity through their shareholdings meant that representative actions in respect of unincorporated business groups were no longer necessary. Combined with the decision in *Markt*, the result was a pause in the development of class actions in Canada and the United Kingdom.

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39 *Markt*, *ibid* at 1040.

40 *Ibid*.

41 Kazanjian, above note 9 at 433–34. See, for example, Wilson J's decision in *Walker et al v Billingsley et al*, [1952] 4 DLR 490 (BCSC) where he reviews the English and Canadian authorities on this point beginning with *Markt* but including *Can Carriage Co v Lea* (1905), 11 OLR 171 [aff'd 37 SCR 672] and *AE Osler & Co v Solman*, [1926] 4 DLR 345 (Ont CA). However, some Canadian courts did allow representative actions for damages during this period: *Smart v Livett*, [1951] 2 DLR 47 (Sask CA) and *Bowen v Macmillan* (1921–22), 21 OWN 23.

42 *Dutton*, above note 1 at para 24.

43 Kazanjian, above note 9 at 401.

2) Slow Development in Canada

Canadian class action jurisprudence saw slow development in the years following *Markt*. In Ontario, the statutory regime changed only slightly. Rule 10 became Rule 75 of the Ontario *Rules of Practice*,[44] which by 1980 read:

> Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.

In short, the rule had remained nearly unchanged since 1881.

At the same time, the judicial development of class action procedure in Canada during this period was glacial. For instance, Canadian courts took nearly sixty years to directly address Fletcher Moulton LJ's decision in *Markt* and allow a class action for damages to proceed.[45] Even then, Jessup JA of the Ontario Court of Appeal reasoned that damages were only appropriate if the defendant would not be prejudiced procedurally:

> Thus, where the members of a class have damages that must be separately assessed, it would be unjust to permit them to be claimed in a class action because the defendant would be deprived of individual discoveries, and, in the event of success, would have the recourse for costs only against the named plaintiff although his costs were increased by multiple separate claims. However, in the present case it is clear from both the respondent's argument and the factum, although not from the pleading, that the only damages alleged by the plaintiff to have been sustained by the class he represents, including damage for conspiracy, is the gross premium above market price received by the controlling shareholders on the sale of their shares to Stanton Pipes Limited and that the individual entitlement of members of the class is simply to a *pro rata* share of such gross premium.[46]

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44 RRO 1980, Reg 540.

45 Although Canadian courts had allowed class actions for damages in the past (see *Smart v Livett*, [1951] 2 DLR 47 (Sask CA) and *Bowen v Macmillan* (1921–22), 21 OWN 23), the Ontario Court of Appeal's decision in *Farnham* directly addressed Fletcher-Moulton LJ's comment on damages. Justice of Jessup of the Court of Appeal noted that subsequent authorities and commentators parroted Fletcher-Moulton LJ's comment as law with little thought or analysis. Accordingly, Jessup JA took a more nuanced view of *Markt* in light of other English authorities such as *Duke of Bedford* and *Taff Vale*.

46 *Farnham v Fingold*, [1973] 2 OR 132 at 136–37 (CA) [*Farnham*].

Rule 75 remained so threadbare that it provided little guidance to judges. The result was a conservative and at times confusing approach to class actions that was not well received by commentators:

> The law respecting class actions and, in particular, the interpretation of Rule 75 and its counterparts elsewhere, has been characterized by uncertainty and, more importantly, has been distinguished by a reliance on formalistic and non-functional categorizations to differentiate actions appropriately brought as class actions from those that are not. The result has been a body of case law that can fairly be regarded as conservative, and more seriously described as illogical.[47]

Although the Supreme Court of Canada had the opportunity to address Rule 75's inadequacies and renew the English courts' pre-*Markt* flexible and progressive approach to class actions in *Naken v General Motors of Canada Ltd*,[48] it chose to leave change to the legislature. In *Naken*, the plaintiffs sued GM for damages on behalf of themselves and a class of Ontario purchasers of 1972 Firenze cars. GM had marketed the cars as durable, tough, and reliable but the cars had not performed as represented. The Supreme Court of Canada found that Rule 75 was "totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty of this one."[49] Echoing Fletcher Moulton LJ's comment that separate contracts and similar circumstances were insufficient to ground a class action, Estey J held that:

> I would not read Rule 75 so narrowly as to require all members of the plaintiff group to have the same property interest in the same vehicle or to have a share of a vehicle. The term "interest" in my view, is not to be so narrowly read. On the other hand, it is equally clear from the terms of Rule 75 itself and the context in which it appears in the Rules of Practice that it is not enough that the group share a "similar interest" in the sense that they have varying contractual arrangements with the appellant which give rise to different but similar claims in contract relating to the same model of automobile. No doubt the claims are similar and they might even be the same in the classification of contract claims but it does not necessarily follow that all such claims under similar but not identical contracts will have "the same interest" in a contract right or the subject

47 Larry M. Fox, "Naken v. General Motors of Canada Ltd.: Class Actions Deferred" (1984) 6 SCLR 335 at 336.

48 [1983] 1 SCR 72 [*Naken*].

49 *Ibid* at 105.

> of a contract arising between the appellant and the respondents in the sense of Rule 75. For example, some members of the class may have seen some but not all of the appellant's advertisements. Some may have made enquiries of the appellant or its representatives. Others may have seen all the public releases in question and made no enquiries of anyone. Indeed it is difficult to extend the rule beyond that conventional class action where the contest concerns a discernible fund or asset, and only two things remain to be determined, firstly the right in the plaintiffs to the asset in whole or in part, and secondly, the right of the individual members of the plaintiff class to a part of the class' total entitlement.[50]

3) American Uncertainty

Canada and the United Kingdom were not the only jurisdictions struggling to define the proper scope of the class action during the mid-twentieth century and at times reigning in its potential. In its comments on the proposed new Rule 23, the US Advisory Committee on Civil Rules noted that:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but liability and defence to liability would be present affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried . . .[51]

Such comments are in stark contrast to recent pronouncements in Canada that "mass accidents" are the protypical class action.[52] Although the American committee did not display the reluctance seen in the United Kingdom and Canada, the comments of the Advisory Committee certainly demonstrate an uncertainty during this period about the proper application of class actions, notwithstanding the wholesale revision of American class actions rules underway at the time.[53]

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50 *Ibid* at 103–4.

51 Advisory Committee on Civil Rules, "Proposed Amendment to Rules of Civil Procedure for the United States District Court" (1966) 39 FRD 69 at 103.

52 See, for example, Macpherson JA's comments in *Bre-X*, above note 2 at paras 1–5.

53 Within twenty years this perspective had changed significantly. See Professor CA Wright's comments cited in Eizenga, below note 95 at § 2.27.

D. THE MODERN CLASS ACTION: STARTLING GROWTH AND UNCERTAIN REACTION

1) The 1966 Revisions to Rule 23

As noted above, Rule 23 as adopted in the United States in 1938 proved inadequate. In 1966, Rule 23 was amended and the previous categories of "true," "spurious," and "hybrid" class actions discarded.[54] In their place, the revised Rule 23 introduced the concept of certification and set out requirements that the plaintiffs must meet to have the class action certified by the court. Rule 23(a) provided that a person could sue or be sued in a representative capacity if:

a) the class was so numerous that joinder was impractical [numerosity];
b) there are questions of law and fact common to the class [commonality];
c) the claims or defences of the representative are typical of the claims or defences of the class [typicality]; and
d) the representative will fairly and adequately protect the interests of the class [adequacy of representation].

The action must also satisfy Rule 23(b), which sets out three situational categories appropriate for class actions. The third category, Rule 23(b)(3), permits damages as a remedy and consequently has had the greatest impact and has been the most controversial. It requires that the common issues "predominate" over individual issues and that the class action is "superior" to other available methods of adjudication.

Anticipated change to Rule 23 and its ultimate revision prompted a wave of class action litigation in the United States that was not universally welcomed. By the early 1970s, elements in the judiciary and the defence bar were successfully pushing back against the rising class action tide.[55] Abuses and excesses from Rule 23's early years contributed to the poor image of the class action at this time. Federal courts were denying certification in greater numbers[56] and the US Supreme Court decided a trilogy of cases that restricted the availability of class actions. The first

54 383 US 1029 (1966).
55 See Arthur R Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'" (1979) 92 Harv L Rev 664.
56 *Ibid* at 679.

two, *Snyder v Harris*[57] and *Zahn v International Paper Co.*[58] combined to preclude federal court jurisdiction over a class action unless each class member's claim exceeded $10,000. Previously, class members had aggregated their claims to pass the $10,000 minimum monetary requirement for federal court jurisdiction. Since *Snyder* and *Zahn* precluded aggregation, large numbers of cases were kept out of the federal courts, as few class actions feature individual damages greater than $10,000. Moreover, the third decision, *Eisen v Carlisle & Jacquelin*[59] mandated that plaintiffs' counsel had to bear the cost of providing individual notice to all prospective class members[60] who could be identified with reasonable effort. The huge cost of the notice program was expected to discourage class actions as only the largest law firms could bear the upfront cost given the risk that they might not recover it at the end of the case.[61]

2) Recent American Developments: CAFA

Despite the barriers erected to class actions by the some of the early decisions, class actions remained a significant feature of the American litigation landscape throughout the 1980s and 1990s. As Professor Miller notes, legislative and judicial expansion of causes of action in the securities, antitrust, and civil rights areas were likely more responsible for the growing number of class actions than the procedural changes to Rule 23.[62] Nevertheless, the growing frequency of class actions and the potential for large damage awards ultimately provoked a comprehensive lobbying response from the American business community.[63] Ironically, after the US Supreme Court had thrown up barriers to the federal courts in *Snyder* and *Zahn*, opponents of class actions now lobbied for greater federal court jurisdiction over class actions, because the federal courts were regarded as generally less friendly to plaintiff classes. The lobbying

57 394 US 332 (1969) [*Snyder*].
58 414 US 291 (1973) [*Zahn*].
59 417 US 156 (1974) [*Eisen*].
60 But only 23(b)(3) class members.
61 Hensler, above note 23 at 20.
62 Miller, above note 55 at 670–76.
63 Edward F Sherman, "Decline & Fall: As the Golden Age of Consumer Class Actions Ends, the Question Now is Whether They Have Any Future" (June 2007) 93 ABA Journal 50(7); Allan Kanner & M Ryan Casey, "Consumer Class Actions After CAFA" (2008) 56 Drake L Rev 303 at 315 [Kanner & Casey]. The authors cite figures indicating that 100 major American businesses and trade associations sent over 475 lobbyists to Capitol Hill to promote their class action agenda between 2000 and 2002 alone.

effort culminated in the passage of the *Class Action Fairness Act of 2005*[64] (*CAFA*), which Congress passed on 17 February 2005.[65] President Bush signed it into law the next day. *CAFA* changed the class action landscape so significantly that the viability of large consumer class actions in the post-*CAFA* era remains an open question.[66]

CAFA dramatically expanded the jurisdiction of the federal court over multistate class actions. Prior to *CAFA*, the majority of class actions litigated in the United States proceeded in the state courts as consumer protection laws and tort laws vary by state.[67] The federal court had limited jurisdiction over class actions. First, the action required what was referred to as complete diversity: no named plaintiff could reside in the same state as any named defendant. [68] Second, each class member required a claim over $75,000.[69] In contrast, under *CAFA*, as long as one named plaintiff is from a different state than one defendant (referred to as minimal diversity) and the aggregate value of the claim is $5 million or more, the federal court has original jurisdiction and the defendants have a right to remove any action filed in state court to federal court.[70] Consequently, it is now easier under *CAFA* for a defendant to move a proceeding commenced in state courts to the federal court.[71]

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64 28 USC Sec 1332(d), 1453, and 1711–715 [*CAFA*].

65 For an excellent summary of *CAFA* see Elizabeth J Cabraser, Fabrice Vincen, & Paulina do Amaral, "The Class Action Fairness Act of 2005: The Federalization of U.S. Class Action Litigation" (2006) 43 Can Bus LJ 398 [Cabraser, "Federalization"] & William V Sasso & Jacqueline A Horvat, "Class Action Fairness Act of 2005: A Canadian Perspective" (2005) 2 Can Class Action Rev 63 [Sasso & Horvat].

66 Sherman, above note 63, Kanner & Cassey, above note 63, Nicole Ochi, "Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies after CAFA & MMTJA" (2008) 41 Loy LA L Rev 965 [Ochi].

67 Cabraser, "Federalization," above note 65 at 398.

68 Sasso & Horvat, above note 65 at 66; Nan S Ellis, "The Class Action Fairness Act of 2005: The Story behind the Statute" (2009) 35.2 Journal of Legislation 76 at 100 [Ellis].

69 This amount had increased from $10,000 as established in *Snyder*, above note 57, and *Zahn*, above note 58.

70 Cabraser, "Federalization," above note 65 at 400–1; Sasso & Horvat, above note 65 at 80, Ellis, above note 68 at 100; Emery G Lee III & Thomas E Willging, "The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals" (2008) 156 U Pa L Rev 1723 at 1734 [Lee & Willging].

71 Ellis, *ibid* at 104; Lee & Willging, *ibid* at 1738–739.

CAFA also protected class members from improvident settlements.[72] In Congress' view "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed," such as when "counsel are awarded large fees, while leaving class member with coupons or other awards of little value."[73] Consequently, among other measures, *CAFA* prohibited lawyers from calculating their fees on the basis of the gross amount of coupons awarded to the class. Instead, they must refer to the number of coupons actually redeemed.[74] *CAFA* also imposed more onerous notice requirements for settlements.[75]

Although a procedural statute, *CAFA*'s supporters in the American business community certainly viewed it as having a substantive impact as the federal court system is generally perceived to be less sympathetic to plaintiffs.[76] In contrast, easy certification and large damage awards from juries have garnered state courts in general, and the courts of certain counties in particular (for example, Madison County, Illinois[77]), a reputation for being plaintiff-friendly. The American Tort Reform Association labeled such jurisdictions "judicial hellholes" and decried plaintiffs' counsel who "forum shop" and seek out such jurisdictions.[78] Moreover, their detractors maintained that state courts provided few class benefits, high attorneys' fees, and rubber-stamped settlements[79]

72 Some note that the growth in class actions in the 1980s and 1990s was at least partly due to recognition by defendants that quick settlements with the class meant certainty and the end of all claims: Stephen B Burbank, "The Class Action Fairness Act of 2005 in Historical Context: A Preliminary Review" (2008) 156 U Pa L Rev 1439 at 1497–498. Such incentives raise concerns of collusion between plaintiff's counsel and the defendants and improvident settlements particularly in "clientless litigation" where the individual monetary claims are too small to draw much interest from class members.

73 Lee & Willging, above note 70 at 1739; *CAFA*, above note 64 at § 2(a)(3)(A).

74 Ellis, above note 68 at 105.

75 Sasso & Horvat, above note 65 at 73–76.

76 Elizabeth J Cabraser, "The Class Action Counterreformation" (2005) 57 Stan L Rev 1475 at 1476 [Cabraser, "Counterreformation"] where Cabraser cites the view of an analyst for the tobacco industry that *CAFA* will funnel multistate class actions into the overburdened and unsympathetic federal court system to the advantage of the business community. See also John F Harris & Jim VandeHei, "Senate Nears Revision of Class Actions," *Washington Post* (10 February 2005) A4.

77 Where class actions lawsuits increased 5,000 percent between 1998 and 2005: see Ellis, above note 68 at n 115.

78 Lee & Willging, above note 70 at 1725; American Tort Reform Association, "Judicial Hellholes, 2009–2010" online: American Tort Reform Association www.atra.org/reports/hellholes/report.pdf.

79 Cabraser, "Counterreformation," above note 76 at 1516.

that burdened American society with unnecessary litigation.[80] However, suggestions that state courts are more likely to certify classes than their federal counterparts may be overstated. Some commentators point out that the underlying empirical evidence is contradictory at best and cite studies that indicate that state and federal judges both certify approximately one in four class proceedings.[81]

Response to *CAFA* has been mixed. While some have predicted the end of the consumer class action post-*CAFA*, others suggest that *CAFA* is not the death knell that some thought.[82] Some even predict that it will make it easier to certify cases in the federal court system.[83] Preliminary analysis suggests *CAFA* has increased the number of class actions commenced in the federal court system and the number removed to the federal system from the state courts.[84] However, it is too early to tell if this is a "mass exodus"[85] from the state to federal courts that will overwhelm the already heavy-laden federal court system.[86] In any event, *CAFA* has not ended forum shopping. Instead, it has shifted the focus from vertical forum shopping (that is, federal versus state courts) to horizontal forum shopping (that is, selecting between federal court circuits). In *CAFA*'s first year, filings in the Third, Ninth, and Eleventh circuits rose approximate-

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80 Ellis, above note 68 argues that *CAFA* is a comprehensive legislative response to a powerful narrative: that class plaintiffs are greedy and irresponsible; that plaintiff's counsel are opportunistic, manipulative, and earn huge fees at the expense of their clients; that defendants are hard-working victims; and that American consumers bear the ultimate cost by paying more for goods and services. He notes that some have suggested that this litigation burden reduces American competitiveness internationally and puts certain services, such as healthcare, beyond the reach of ordinary Americans. Indeed, the culture of litigation and its costs appears to have been on President Bush's mind when he signed *CAFA* into law. At the time, he declared that *CAFA* "will ease the needless burden of litigation on every American worker, business, and family" and that *CAFA* was a "critical step toward ending the lawsuit culture in our country." Ellis, above note 68 at 99.

81 Sasso & Horvat, above note 65 at 78; Ellis, above note 68 at 108; Ochi, above note 66 at 980–81. All cite Thomas E Willging & Shannon R Wheatman, "An Empirical Examination of Attorney's Choice of Forum in Class Action Litigation," online: Federal Judicial Centre 2005 www.fcj.gov/public/pdf.nsf/lookup/clact05.pdf/$file/clact05.pdf.

82 Ochi, above note 66 at 1035–37.

83 Kanner & Casey, above note 63 at 325–31.

84 Lee & Willging, above note 70 at 1762.

85 Cabraser, "Federalization," above note 65 at 399.

86 Cabraser, "Federalization," *ibid* at 401 and 418. The authors note that *CAFA* will shift the class action burden from 9,200 state judges to 678 federal judges.

ly 500 percent from the previous year. Other circuits saw increases of 200 percent and some less than 50 percent.[87]

4) Long Awaited Legislative Change in Canada

In Canada, comprehensive revision to Rule 75 and class action procedure lagged American reform by several decades. While Quebec passed class action legislation in 1978,[88] its civil law system meant that its 1978 reforms were not as significant for the remaining nine common law provinces. Instead, Ontario's reforms in 1992 proved more influential both because Ontario shared its common law system with eight other provinces and because of the size of its population and business community. The Ontario Law Reform Commission had begun the reform process with its *Report on Class Actions* published in 1982. A comparative analysis of English, American, and Canadian class action law and experience, the Commission, among other things, recommended a provincial *Class Proceedings Act* (*CPA*).[89] It also set out the three purposes of class actions that the Supreme Court of Canada would adopt nearly twenty years later:[90] judicial economy,[91] access to justice,[92] and behaviour modification.[93] Although the Commission's report did not produce an immediate response from the legislature, in 1989, the Attorney General's Advisory Committee on Class Action Reform issued a report,[94] which relied heavily on the Commission's report. In addition, the Committee's proposed bill borrowed heavily from the Commission's[95] and was ultimately the basis for the *Class Proceedings Act, 1992*.[96]

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87 Lee & Willging, above note 70 at 1760–761. The authors note that the Second, Third, and Ninth Circuits are considered more likely to certify class actions and so more likely to see a higher increase in original filings as compared to the other circuits.

88 *Code of Civil Procedure*, RSQ c C-25, ss 99–1026.

89 Ontario Law Reform Commission, above note 10 at 198.

90 *Dutton*, above note 1 at paras 27–29.

91 *Ibid* at 118.

92 *Ibid* at 139.

93 *Ibid* at 145–46.

94 Ontario Minister of the Attorney General, Policy Development Division, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Queen's Printer, February 1990).

95 See Michael A Eizenga et al, *Class Actions Law and Practice*, 2d ed, loose-leaf (Markham: LexisNexis) at §1.10 [Eizenga].

96 SO 1992, c 6 [*CPA*].

Like the American Rule 23, the *CPA* mandated a certification process providing that courts should certify an action as a class proceeding where:

(a) the pleadings or the notice of application discloses a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
(c) the claims or defences of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant 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 for the class, an interest in conflict with the interests of other class members.

A decade later in a trilogy of decisions that have become familiar to every Canadian class action lawyer, the Supreme Court of Canada commented on the growing role of class actions in Canadian society and their important purpose. Adopting the purposes set out by the Ontario Law Reform Commission twenty years earlier, McLachlin J stated that:

> Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times).
>
> Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.

> Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation.[97]

The Supreme Court of Canada also set out four criteria to enable judges lacking a provincial statute such as the *CPA* to certify a class action: (1) the class is capable of a clear definition; (2) there are issues of law and fact that are common to all class members; (3) success for one class member would necessarily mean success for all members; and (4) the proposed class representative would adequately represent the class.[98]

In the companion decisions of *Rumley v British Columbia*[99] and *Hollick v Toronto (City)*,[100] the Court discussed the commonality and preferable procedure requirements and commented that courts should interpret these criteria and the Ontario *CPA* generously to give full effect to the benefits of class proceedings. In all, the trilogy evidences a radical shift from the Court's prior reluctance in *Naken* to its endorsement of a flexible and expansive approach to class action procedure even in the absence of a statutory framework.[101]

Since the passage of the Ontario *CPA* and the Supreme Court of Canada's decisions in the trilogy, all provinces except for Prince Edward Island have passed a class proceedings statute. [102] Even the Federal Court Rules now permit class proceedings in that court, although limited to those matters within its narrow statutory jurisdiction.[103] Canadian judges and practitioners have grown more familiar with class actions amidst what some have described as a tsunami of class actions sweeping the nation.[104]

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97 *Dutton*, above note 1 at paras 27–29.
98 *Ibid* at paras 38–41.
99 [2001] 3 SCR 184 [*Rumley*].
100 [2001] 3 SCR 158 [*Hollick*].
101 Note that at the time of the SCC decision in *Dutton*, Alberta did not have a class proceedings enabling statute.
102 Eizenga, above note 95 at §1.13.
103 *Rules Amending the Federal Court Rules*, 1998 SOR 2002–417, s 17.
104 Peter J Pliszka, "Northern Exposure: The Law of Class Actions in Canada — An Overview" (Paper delivered at the Product Liability Advisory Council Fall

E. MODERN PRINCIPLES FROM THE HISTORICAL EXPERIENCE

History is instructive. In the authors' view, three important points from the historical experience are particularly relevant to the modern class action regime.

1) Sunrise Litigation in the Regulated Society

First, the class action has been first-response litigation. Where statute or common law provided a remedy but the legislature had not granted standing to a group or otherwise provided the means for individuals to achieve this remedy, the class action enabled unincorporated groups to achieve justice.[105] However, upon the appearance of an alternative legal construct — such as the limited liability company — that more efficiently responded to the requirements of the group, the class action waned in importance. In this sense, class actions have sometimes been "sunrise" suits delivering justice until their numerosity or changing societal needs prompt a more comprehensive legislative or regulatory response.

The Ontario court's denial of certification in *Fischer v IG Investment*[106] is a recent example of this phenomenon. *Fischer* was a class proceeding launched by aggrieved investors following allegations of market timing in the mutual fund industry. The Ontario Securities Commission had conducted a lengthy investigation and obtained a significant restitutionary payment for investors from the defendants. The court concluded that a class action was not the preferable procedure because the OSC had already achieved the goals of the class proceeding.[107]

The idea that alternative proceedings may be preferable to a class action is not new. Indeed, in *Hollick*, McLachlin CJ noted that

> Ontario's environmental legislation[108] provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation

2005 Conference, San Francisco, 26–28 October 2005), online: http://www.fasken.com/files/Publication/5c33eaea-ae47-4e15-8297-c8826501c03e/Presentation/PublicationAttachment/a995e0a5-243e-4786-8fbe-e57d06966967/NORTHERNEXPOSURE.PDF [Pliszka].

105 Kazanjian, above note 9 at 436.

106 2010 ONSC 296 [*Fischer*].

107 *Ibid* at paras 246–54.

108 *Environmental Bill of Rights*, 1993 s 61(1) and *Environmental Protection Act*, s 14(1).

> certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification[109]

Like Perell J in *Fischer*, McLachlin CJ recognized that alternatives exist to class proceedings. Where statutes or regulations provide for such alternatives, courts should consider whether these alternatives better achieve the purposes of a class proceeding: access to justice, behaviour modification, and judicial economy. If they do, it may be that a class proceeding is not the preferable procedure. In these circumstances, it may be that the regulatory response crafted by the legislature replaces what could otherwise be a costly and lengthy class proceeding.

Ultimately, on appeal in *Fischer*, the Ontario Divisional Court overturned the lower court's decision and certified the action.[110] Access to justice was front and centre. That there was some basis in fact that the OSC settlement had not provided *full* restitution for class members was critical to the Divisional Court's analysis.[111] One wonders if this concern would be lessened in cases where payments to individual class members are unlikely even following a damages award. In many cases, individual damages may be so small or so costly to allocate on an individual basis that cy près awards will be ordered and class members will not receive direct compensation. It may be more difficult to establish some basis in fact that fines or restitutionary payments imposed by regulators did not provide full restitution when it is apparent that the class proceeding itself would not directly compensate class members either. In these circumstances, behaviour modification is typically the primary purpose to justify the class proceeding. However, when regulators have already acted to impose significant fines or restitutionary payments, one wonders if the goal of behaviour modification has not already been better served, thus rendering the class proceeding unnecessary.

The Divisional Court left open the possibility that restitutionary settlements with regulators that provide "substantially full recovery" to

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109 *Hollick*, above note 100 at para 35. The chief justice noted that, "while the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behavior modification."

110 2011 ONSC 292 (Div Ct).

111 The Divisional Court also noted that the OSC settlement reserved the rights of individuals to bring other proceedings, and that the lower court had effectively imposed the OSC settlement on individual class members without the rigorous scrutiny that would be applied in approving a settlement in a typical class proceeding.

plaintiffs may be preferable to a class proceeding. What "substantially full recovery" means is uncertain given that even class proceedings themselves rarely resolve with full recovery for class members. Thus, in the right case, there may be ways to structure regulatory settlements and to provide evidence of their reasonableness that will be acceptable as a basis for a court to conclude that a class proceeding is not the preferable procedure. Although this remains to be seen, at the very least, courts should not reject the possibility out of hand. There is a sufficient public interest in wrongdoers cooperating with regulators to acknowledge wrongdoing and make restitutionary payments that these settlements should be seriously considered by courts deciding issues of certification.

A significant decrease in class actions due to the activity of regulators and enforcement agencies is unlikely in the foreseeable future. Lack of political will, limited budgets, and higher burdens of proof[112] will often preclude enforcement agencies from achieving compensation for victims of all regulatory offences. Consequently, statutes[113] and courts[114] recognize that private enforcement of regulatory offences, often through class actions, is a valuable part of a comprehensive enforcement regime.

In light of the foregoing, class actions will likely continue to play a meaningful role to discourage unlawful behavior and achieve compensation for those harmed by it. The Supreme Court's guidance in *Hollick*, the initial result in *Fischer*, and the implications of *Fischer* appeal decision, however, demonstrate the potential for significant interplay between pri-

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112 Regulatory offences often require a criminal burden of proof, whereas, in class actions, a lower civil standard or sometimes a hybrid civil-criminal standard applies. In any event, the burden will usually be higher for an enforcement agency as compared to the class.

113 For instance, s 36 of the *Competition Act*, RS 1985, c C-34 provides for private enforcement of certain unlawful activity. Section 130 of the *Ontario Securities Act*, RSO 1990, c S.5 (*OSA*) (and comparable provisions in other provinces) facilitates primary market securities class actions by allowing investors to bring actions based upon misrepresentations without requiring that each class member relied on the misrepresentation. Similarly, s 138 of the *OSA* facilitates secondary market class actions though with certain tradeoffs, including a requirement that the plaintiff obtain leave to commence proceedings. The *Consumer Protection Act, 2002*, c 30, Sched A, s 8(1) explicitly notes that a consumer may commence a class proceeding or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term in the agreement that purports to prevent the consumer from becoming a member of a class proceeding.

114 See the Supreme Court of Canada's discussion of the then *Combines Investigation Act*, RSC 1970, c C-23 in *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641.

vate prosecution (such as class actions) and public prosecution (such as enforcement agencies) of regulatory offences.

2) Dialogue between Courts and Legislatures

Second, the development of the class action from its deep roots in Norman England, through the Court of Chancery and its growth in the modern era, has not always been progressive. Instead, it has grown in fits and starts. At times, class actions have fallen from prominence due to changing concepts of group legal standing, judicial reluctance to expand their application to remedies traditionally available only to individuals, or the creation of new legal entities.

However, whereas in the early years the development of class actions was the domain of the courts, the legislature occupies the leading role in the modern era. Legislative change led the development of the American class action regime with the 1966 revisions to Rule 23. *CAFA* reaffirms Congress' leading role in the United States. The legislature's role is even more apparent in Canada where the initiatives of the Quebec and Ontario legislatures transformed the Supreme Court of Canada's reluctance with class actions in *Naken* into robust acceptance in the trilogy. Legislatures remain active in the class action field: most recently, Quebec amended its class action legislation in 2003.[115]

Many factors contributed to the legislature taking the leading role. Overall, the legislature's influence and involvement have grown enormously since the 1700s and in particular since the end of the Second World War with the rise of the regulated society. However, the particular focus on class action reform indicates the growing importance and significance of class actions in the modern era. Mass consumption and mass production are no doubt significant factors, but the scale of the modern class action and the media attention that it garners are also influential. Class actions affect important constituencies: business (and in particular, big business), the legal profession (which produces a disproportionate number of politicians), and individuals (large numbers of ordinary American and Canadian consumers). The scale of recovery in class actions, both for the class and for the lawyers, attracts a level of media attention unique in civil litigation. Class actions may also raise public interest issues (as recognized by the creation of the Class Proceedings

115 For instance, Article 1002 of the *Civil Code* no longer requires affidavit material in support of certification motions. Some have described the amendments as plaintiff-friendly: Pliszka, above note 104 at 9.

Fund to fund and facilitate such class actions). Where such public interest issues are raised, legislatures are unlikely to leave the field entirely to the courts. In this context, it is not surprising that legislatures now take a leading role in class action development. More importantly, it seems likely, based on the above factors that its role is not likely to diminish.

Accordingly, courts may expect continued legislative involvement in the development of class action procedure. Like the "dialogue" between the courts and the legislature in the constitutional context,[116] the legislature's role can move the class action boundaries in either direction. In Quebec, the changes were thought to be designed as plaintiff-friendly. On the other hand, *CAFA* demonstrates this dialogue between courts and legislatures in the American context. At least in part, *CAFA* is Congress' response to the perception that state courts were too quick to certify class actions and sometimes too plaintiff-friendly.

3) Adjudicating Fairness Concerns

Third, more than debates about individual and group standing, fairness between the parties has been the overriding concern of courts during their development of class action procedure over the centuries. Fairness underlined the development of the common issues analysis to ensure that absent parties were not prejudiced by an order that bound them without their participation. It was also apparent in Jessup JA's concern in *Farnham* that a class action for damages was only possible if it did not prejudice the defendants.

Judicial development of class action procedure is increasingly confined to procedures not comprehensively addressed in legislation. The most prominent examples are judicial approval of notice programs, attorney fees, and settlements. It is in these areas that judges maintain significant discretion and where fairness considerations must be at the forefront of their analysis.

As some judges have commented, adjudicating fairness concerns is particularly difficult on settlement or fee approvals due to the absence of the regular adversarial process.[117] Whereas their predecessors evaluated

116 See Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall LJ 75, and the Supreme Court of Canada's discussion of this concept in *Vriend v Alberta*, [1998] 1 SCR 493 at paras 137–39.

117 Discussed by the members of the "Judicial Panel: a View from the Bench" at The National Symposium on Class Actions held April 29 & 30, 2010. See also comments in *McCarthy v Canadian Red Cross Society*, [2001] OJ No 2474 at

fairness based on the submissions of two adversaries, in modern approval hearings, neither side opposes approval. Instead, plaintiffs' counsel makes submissions on the reasonableness of the notice program, fees, or settlement and defence counsel remains quietly optimistic that the judge will grant approval. Non-settling defendants do not have standing to oppose the settlement unless it prejudices them. The judge must evaluate fairness issues without the benefit of the usual opposing submissions. Consequently, the courts have progressively developed their own set of tests and mechanisms to evaluate settlements and guide court approvals.[118]

It has also imposed disclosure obligations on counsel regularly reserved for *ex parte* proceedings.[119]

Another solution to absence of the adversarial system is to artificially create it (bring another party into the proceeding to oppose or at least scrutinize the settlement). For instance, *CAFA* requires notice of proposed settlements to appropriate federal and state regulators, usually the respective attorneys general.[120] This gives the attorneys general an opportunity to review the settlement and seek leave to intervene in ap-

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para 21 (Sup Ct), where he imposed a disclosure standard on counsel regularly reserved for *ex parte* proceedings.

118 See, for example, Cullity J's summary of the principles to be applied in *Nunes v Air Transat AT Inc*, [2005] OJ No 2527 at para 7 (SCJ) and the decisions of Sharpe J in *Dabbs v Sun Life Assurance Company of Canada*, [1998] OJ No 1598 at para 13 (Gen Div); and (1998), 40 OR (3d) at 439–44 aff'd (1998), 41 OR (3d) 97 (CA), leave to appeal denied [1998] SCCA No 372.

119 *McCarthy v Canadian Red Cross Society*, [2001] OJ No 2474 at para 21 (Sup Ct):

> By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the court. These absent class members are dependent on the court to protect their interests. In order to do so, the court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the court to all relevant information that would impact on the court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

120 Sasso & Horvat, above note 65 at 76.

propriate cases. However, an attorney general's office is likely in no better position to evaluate the fairness of the settlement than a judge. Instead, it is possible that its focus would fall on the most sensational and politically important cases. Attorney's fees, sometimes perceived to be too high in relation to the compensation achieved for the class, may draw particular attention. However, intervention to address political rather than legal concerns is not needed. In the authors' view, if the government disapproves of settlements for political reasons then it should respond with generally applicable legislation and not an evaluation of individual settlements on a case-by-case basis.

In any event, case-by-case intervention is already available. In Ontario, a non-party can seek leave to intervene in the settlement approval hearings.[121] Although the threshold is high, courts will grant intervenor status where one side of the argument will not be presented to the court absent the intervention.[122] Thus, Canadian courts have granted intervenor status in the context of settlement or fee approvals in proper circumstances.[123]

Similarly, regulatory agencies in the United States have sought intervenor status in appropriate cases to challenge settlements perceived as potentially harmful to some class members.[124]

In the ongoing development of tests and mechanisms to evaluate settlements, it may be that interventions will become a more frequently invoked device. But relying on interested third parties to seek intervenor status is risky. There will be times when no one seeks to intervene, yet the judge has concerns about the proposed settlement. Such cases may include situations where many class members have opted out of

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121 Rules 13.01 and 13.02 of the *Rules of Civil Procedure*, RRO 1990, Reg 194.

122 *Dabbs v Sun Life Assurance Co of Canada*, 1997 CanLII 12274 at para 7 (Ont Sup Ct) [*Dabbs*].

123 *Killough v Canadian Red Cross Society*, 2001 BCSC 1060 at para 41.

124 See the list of amicus briefs filed by the Federal Trade Commission, online: www.ftc.gov/ogc/briefs.htm. For instance, in *Chavez v Netflix, Inc*, (5 January 2006), San Francisco No CGC-04-434884 (Super Ct San Francisco County), the FTC opposed settlement because the only value in the settlement was linked to negative option billing. Netflix proposed to provide one month of free service to class members, but it would start charging after one month if class members did not cancel in time. The FTC argued that Netflix was using the settlement to gain business. It also argued that some class members would be worse off for participating in the compensation package because they would fail to cancel the free service in time and end up paying significant sums to Netflix.

the settlement but are not represented by counsel.[125] Submissions from a third party to explain or give context for the high number of opt-outs may be helpful and appropriate. In these rare cases, judges should be able to request the assistance of an amicus to review the settlement and represent the interests of parties not before the court.

Of course the immediate issue then is payment of the amicus. Without a regular client, the court would be asking the amicus to work for free. One option would be to award the amicus' fees from the settlement proceeds. But this incentivizes the amicus simply to support settlement approval. A better alternative is to use the Class Proceedings Fund to pay the amicus' fees. If settlement is approved, the Fund could be reimbursed using the proceeds of the settlement. This would keep the amicus' incentives in the right place and not unfairly burden the settling parties with payment in advance of settlement. Note, however, that this option would require the involvement of the legislature.

F. CONCLUSION

A review of the history of class actions and its modern trends reveals a procedure in which legislatures, courts, and increasingly regulatory agencies affect its scope and application. In the authors' view, this modern state of class action development is welcome. Class actions are important procedural tools that often enable individuals to achieve justice. They need to be, and historically have been, interpreted flexibly and expansively to meet this goal. However, class actions are not without challenges. The potential for their abuse by all stakeholders — plaintiffs, defendants, and counsel — is ever-present. The authors hope for "diversity of development," as courts, legislatures, and enforcement agencies contribute to the development of class actions principles and procedures in years to come will help to tame the potential for abuse and define the scope of class actions in the most efficient and effective way for all involved.

125 See, for example, Winkler J's decision in *Dabbs*, above note 120 where he denied intervenor status on a motion for settlement approval partly because all parties were already represented before the court, including several class members who had opted out of the settlement.