

CLASS ACTION DEFENCE QUARTERLY

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ALBERTA OPTS FOR CHANGE



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Introduction

Over the past 20 years, Alberta has led all Canadian provinces in economic growth.¹ Moreover, Alberta is the locus for the Canadian energy industry, has a substantial population base of consumers, and is home to the third highest number of corporate head offices in the country.² Despite these economic indicators, Alberta has lagged behind other provinces when it comes to the evolution of class action litigation. Rarely are Alberta class proceedings brought on behalf of a national or global class involving securities law, competition law, or mass torts. Instead, Alberta class proceedings have generally centered on local issues affecting only Alberta residents. Examples include: *Windsor v. Canada Pacific Railway Ltd.* (a class certified on behalf of Alberta residents alleging diminution in property values caused by the presence of trichloroethylene in the groundwater);³ and *Elder Advocates v. Alberta* (a class certified on behalf of Alberta residents in long-term care facilities against the provincial government seeking compensation for health care costs paid as “accommodation fees”).⁴

There are indications that Alberta is about to catch up to other Canadian jurisdictions when it comes to the evolution of class action litigation. The Alberta Legislature has recently introduced *Bill 20: Class Proceedings Amendment Act, 2010* and is presently debating the Bill at second reading.⁵ Bill 20 proposes several key amendments to the *Alberta Class Proceedings Act*⁶ which, if enacted, will convert Alberta from an “opt-in” to an “opt-out” class actions regime (the “Amendments”). If they are enacted, the Amendments will significantly alter the class proceeding landscape in Alberta by permitting Alberta courts to certify national and global opt-out classes. This change will in turn increase the desirability for Plaintiffs’ counsel to file multi-jurisdictional claims in the province.

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Corporate Canada, and by extension the defence bar, might view these potential changes to Alberta's class actions regime with trepidation. However, there may be some positive attributes to Alberta becoming an opt-out jurisdiction. If one accepts that class actions are here to stay, and Alberta-based corporations are to be faced with defending these cases, it is worthwhile to consider whether it is in their interest that the outcomes of such cases be determined in Alberta.

In the past, claims brought on behalf of Alberta residents and against Alberta-based defendants (in cases of national or even international scope) were being heard in other provinces. This arguably led to diminished access to justice for Alberta litigants (both plaintiffs and defendants) who had to attend out-of-province hearings to litigate or have their settlements administered when Alberta may have been the better forum based on jurisdictional connection and judicial expertise in relevant industry sectors.

The Background

The origins of Alberta resident-only classes lie in the original design of the Alberta CPA. By way of brief background, the Alberta CPA was enacted in 2004. By this time, class action legislation existed in all Canadian provinces except New Brunswick and Nova Scotia. The Alberta CPA was introduced after consideration of an Alberta Law Reform Institute report that set out recommendations for the proposed class proceedings legislation.⁷ As presently structured, the Alberta CPA has a number of features that distinguish it from its counterparts in other provinces, such as a "loser-pay" costs provision, under which either the plaintiffs or the defendants are held accountable for costs.⁸ This alone might be expected to have a chilling effect on class action activity. However, in practice, Alberta courts have made "no costs" awards to plaintiffs as long as certain criteria are met,⁹ and there is no shortage of Alberta class actions addressing purely local matters in which the costs exposure issue is very much alive.

The feature of the Alberta CPA that more likely explains the trend towards local and Alberta resident-only proceedings is the "opt-in" requirement for non-residents. The Alberta CPA sets out in s. 17(1) that class members not resident in Alberta must opt-in to a class in order to be bound by the result of the litigation. Unlike the costs provision, there is no readily apparent way for either litigants or the courts to circumvent the

opt-in regime. It is for this reason that opt-in regimes tend to be best suited to small, regional classes. For equally obvious reasons opt-out regimes tend to be better suited to large, national or global classes which can benefit plaintiffs (in the formation of their class) and defendants (in certainty of a binding result).

Though British Columbia is also an opt-in jurisdiction,¹⁰ the B.C. CPA was enacted in 1995 (almost a decade earlier than the Alberta CPA) and it included from the beginning a “no costs” regime (as opposed to the loser-pays regime in Alberta). Alberta’s class action history is arguably more similar to that of Saskatchewan which enacted class proceedings legislation in 2002,¹¹ and chose an opt-in as opposed to an opt-out regime. However, Saskatchewan has recently decided to amend its class actions legislation in order to become an opt-out regime. By introducing the Amendments, Alberta now appears to be ready to move in a similar direction.

Opt-in Versus Opt-out Regimes

The ALRI Report, mentioned above, made certain recommendations for legislative reform of the existing class action procedure (or “representative actions”, as they are known under the Rules of Court).¹² On the issue of opt-out versus opt-in regimes, the ALRI Report recommended that Alberta adopt an opt-in regime. In making this recommendation, the ALRI Report concluded that:

*[f]or constitutional reasons, we support the idea that non-residents should be required to opt in to the proceedings. We note, however, that if one of our goals were to put Alberta into a position to compete effectively with Ontario as a forum for national class litigation, the provision would have to require all Canadians to opt out.*¹³

The reasoning behind this conclusion becomes clear upon examining the advantages and disadvantages of each regime.

Advantages and Disadvantages of Opt-Out Regimes

Opt-out regimes generally create larger classes that are not confined by provincial boundaries. The primary advantage of such multi-jurisdictional classes is that they enhance access to justice by automatically including all persons who are disadvantaged and would be unable to take the positive step of including themselves in litigation.¹⁴ Increasing access to justice is one of the predominate purposes on which class action legislation

is based. The advantage to plaintiffs (or perhaps more accurately, plaintiffs’ counsel) is that a larger class can mean larger legal fees, whether the proceedings end by settlement or at a trial of the common issues. Not as obvious, but just as important, is the fact that opt-out regimes provide defendants with some level of certainty with respect to the extent of their exposure (*i.e.* which potential claims have been included) and the finality following final judgment either at trial or a judicially sanctioned settlement.

A frequently identified concern with opt-out regimes is that they purportedly permit courts to bind residents outside of their jurisdiction. In addition, the issue of notice is problematic, and courts have consistently taken issue with the level of notice provided to non-resident class members. For example, in *Canada Post Corp v. Lépine*,¹⁵ the Supreme Court of Canada considered whether a class action settlement order made in Ontario was enforceable against residents of Quebec. The Court held that the notice procedure is “indispensable” as it advises class members about how their rights are affected under the order.¹⁶ Ultimately, the Court concluded the Ontario settlement was not binding on Quebec residents as the notice did not properly explain the impact of the settlement order on Quebec members.

Advantages and Disadvantages of Opt-In Regimes

The advantage of opt-in regimes is they avoid thorny issues concerning jurisdiction over non-resident class members. In opt-in regimes, courts do not take jurisdiction over non-residents; rather, non-residents themselves submit to the court’s jurisdiction by opting in to the proceeding. The distinct difficulty with opt-in regimes is that they tend to produce smaller classes which in turn result in reduced access to justice for non-resident class members who fail to opt-in either for lack of proper notice or simply out of personal inertia.¹⁷ Just as importantly, under opt-in regimes defendants cannot obtain the comfort of knowing that the claims against them have been finally resolved. The Ontario Court of Appeal addressed this issue in *Currie v. McDonald’s Restaurants of Canada Ltd.*,¹⁸ a case which involved the enforcement in Ontario of a settlement order from an Illinois class action. The Court found there were strong policy reasons favouring the recognition of cross-border proceedings. The Court further held that “[a]n order

requiring members of the plaintiff class to opt-in would, as a practical matter, effectively negate meaningful class action relief.”¹⁹ In other words, by limiting the class to only those who choose to bring a claim together, the purported purpose of increasing access to justice is lost. Moreover, defendants do not necessarily benefit from opt-in regimes, since they remain exposed to multiple proceedings by litigants in other jurisdictions who chose not to opt in to the proceeding.

By making the initial decision to incorporate an opt-in regime into the Alberta CPA, the provincial legislators appear to have accepted the ALRI Report’s recommendation and decided that a regime characterized by small classes and unencumbered by inherent issues of jurisdiction was preferable to the alternative. The jurisdictional issues which troubled Alberta’s legislators, and which seemingly compelled them to favour the opt-in approach, have advanced in the ensuing half decade, particularly in the national and global class debate that has recently taken place in Ontario.

National and Global Class Actions: Where are we now?

In 1993, Ontario became one of the first provinces to enact class action legislation.²⁰ Although the Ontario CPA does not specifically address the issue of opt-out, multi-jurisdictional class actions, Ontario courts have consistently certified these types of classes.²¹ Ontario courts have generally made such rulings based on jurisdictional principles: where there is a real and substantial connection to the claim and where the assertion of jurisdiction is consistent with the principles of order and fairness.

The debate as to whether national and global classes can be certified on jurisdictional grounds has evolved in several recent decisions, including: *McCann v. CP Ships*,²² *Silver v. Imax*,²³ *Pysznyj v. Orsu Metals*²⁴ and *McKenna v. Gammon Gold Inc.*²⁵ In *CP Ships*, the plaintiffs sought to certify a global class seeking damages for the alleged overstatement of net income in financial statements and other disclosures.²⁶ Justice Rady of the Ontario Superior Court of Justice refused to certify a global class and instead limited the class definition to those persons and entities resident in Canada who acquired securities over the TSX. Moreover, the Court questioned the connection between an Ontario action and a foreign class member, asking: “[w]here is the real and substantive connection between, for example, the

Ontario Court and a French citizen residing in France who purchased securities over the TSE?”²⁷ The Court concluded it would be “judicial hubris” to find Ontario had jurisdiction in those circumstances and the certification of a global class was therefore denied.²⁸

Shortly thereafter, Justice van Rensburg of the Ontario Superior Court of Justice took the opposite view in *Imax*.²⁹ The plaintiffs in *Imax* sought certification of a global class consisting of persons who acquired securities of Imax on the TSX and the NASDAQ and who suffered loss as a result of the devaluation of their shares due to alleged misrepresentations. The plaintiffs also sought leave to pursue a statutory claim under the secondary market provisions of the Ontario *Securities Act* against the defendants. On the global class issue, van Rensburg J. provided lengthy reasons which concluded that the Court had jurisdiction over non-resident class members. The Court applied the real and substantial connection test and found that such a connection existed between the claims made and Ontario. In considering whether the principles of order and fairness were met, the Court recognized the complexity of different class members being subject to different laws, but found it did not weigh against certification. The Court further emphasized the importance of a thorough notice program to ensure non-resident class members are made aware of their rights.³⁰ Following the release of the *Imax* decision, Rady J. agreed with the reasoning set out by van Rensburg J. and certified a global class for the purposes of settlement in *Orsu Metals*³¹ on the facts of that case. The Court held: “The question of whether this court’s judgment would be enforced in another jurisdiction is a question for that other court”.³²

Finally, and most recently, in *Gammon Gold* a proposed class action was based on allegations that the defendants made misrepresentations in connection with the sale of securities.³³ A key issue was whether it would be appropriate to certify a global class action on behalf of all purchasers of Gammon Gold securities wherever situated during the class period. In applying the real and substantial connection test, the Court certified a class of Canadian residents and non-residents who acquired shares through underwriters in Canada and under the prospectus, but excluded those persons who purchased securities from the underwriters or their agents outside Canada.³⁴ The plaintiff sought leave to appeal the decision to refuse certification for secondary market purchasers and a global class. In the leave to appeal

decision, the Court considered whether the motion judge erred in excluding certain class members. The plaintiff's arguments were founded in other cases which certified global classes, but the Court distinguished cases such as *Western Canada Shopping Centres Inc. v. Dutton*,³⁵ *Ramdath v. George Brown College of Applied Arts and Technology*,³⁶ *Imax, Orsu Metals and C.P. Ships*, concluding that the seemingly conflicting decisions to certify global classes do not represent a departure in principle, but rather turned on differing facts.³⁷ The Court's distinctions were centred on whether a plaintiff would reasonably expect their claims to be settled in Ontario, based on the connections between the transaction or contract to Ontario.³⁸

At this time, Ontario courts would appear to have resolved these issues. According to Ontario courts, when determining whether to certify a national or global class, the court must first establish that it has jurisdiction over the substance of the claim and will not focus on class residence issues — *i.e.* does the claim meet the real and substantial connection test and the principles of order and fairness. Moreover, it appears that higher courts have implicitly agreed that national and global class action orders will be recognized in Canada. The Ontario Court of Appeal's decision in *Currie*³⁹ reinforces the notion that a court has the authority to certify an international class if the criteria for taking jurisdiction are met. The Court found three pre-conditions for recognition of a class action judgment encompassing an international class: (1) the existence of a real and substantial connection linking the cause of action to the foreign jurisdiction; (2) adequate representation of the rights of non-resident class members; and (3) procedural fairness to non-resident class members, including adequate notice.⁴⁰ Moreover, the Supreme Court of Canada's recent decision in *Lépine* is consistent with these principles.⁴¹ In *Lépine*, the Court emphasized that as long as the court of first instance had jurisdiction over the claim and adequate notice was provided to "satisfy the requirement that individual rights be safeguarded", courts could recognize and enforce extra-territorial orders arising in class proceedings.⁴² However, the Court also cautioned that legislators should "pay more attention to the framework for national class actions and the problems they present".⁴³ The proposed Amendments to the Alberta CPA can be interpreted as an answer to the call for legislative reform made in *Lépine*.

Legislative Solutions

If enacted, the Amendments to the Alberta CPA will explicitly permit courts to certify multi-jurisdictional class proceedings with opt-out provisions for both resident and non-resident members. In proposing the Amendments, Alberta legislators have followed the recommendations of the Alberta Courts and the Uniform Law Conference of Canada as set out in its amended *Class Proceeding Act* released in 2006.⁴⁴ The notable amendments to the ULCC Act include s. 4(1), which provides a test for courts to determine whether a class action in another jurisdiction may be the most suitable forum. In this way, courts can avoid overlapping multi-jurisdictional class actions that continue to frustrate all parties to the proceedings. Another important amendment was to s. 16, which permits class members to opt out of the proceeding. Previously, the ULCC Act contained an opt-in clause for non-resident class members. The Uniform Law Conference of Canada explained the grounds for this amendment as: (a) strong policy considerations; (b) the diminished risk of an opt-out mechanism being found unconstitutional; and (c) no real reason for treating members of a multi-jurisdictional class differently from an intra-provincial class.⁴⁵ In 2008, Saskatchewan amended its legislation to include multi-jurisdictional class actions provisions similar to those set out in the amended ULCC Act. It also converted from an opt-in regime to an opt-out regime through an amendment.⁴⁶

The proposed Amendments to the Alberta CPA are similar to those made in the ULCC Act and the Saskatchewan CPA. The Amendments propose to repeal s. 17(1) of the Alberta CPA, formerly the opt-in provision, and replace it with an opt-out provision whereby each person, regardless of whether they reside in Alberta, who meets the certified class criteria, is a class member unless they opt-out of the class proceeding.

Moreover, the Amendments propose to amend s. 5 of the Alberta CPA to include criteria to assist the court in determining whether Alberta or another province is the most appropriate jurisdiction for a class action to proceed. This means that if a national or global class proceeding has been commenced in another province that is the same or similar to the proceeding being considered for certification before an Alberta court, the Alberta court must determine where it would be preferable for some or all of the claims or common

issues to be resolved in the class proceeding commenced in another province.⁴⁷ The criteria that the court will have to consider include: (a) the alleged basis of liability, including the applicable laws; (b) the stage each of the proceedings has reached; (c) the plan for the proposed multi-jurisdictional class proceeding; (d) the location of the class members and representative plaintiffs in the various proceedings; (e) the location of evidence and witnesses; and (f) the advantages and disadvantages of litigation being conducted in more than one jurisdiction.⁴⁸

Conclusion

At first blush, the concepts advanced in the Amendments, such as access to justice, appear to serve only the interests of individual plaintiffs and their counsel who take on corporate defendants through class proceedings. However, the principle of access to justice cuts both ways. An Alberta-based corporate defendant will also stand to benefit from a claim being commenced in Alberta due to: less management time costs; fewer displacement issues; less legal fees; and access to Alberta courts that may have more experience in determining certain industry sector issues which may lie at the core of class actions involving Alberta corporations. For example, if a claim arose against an Alberta-based energy corporation alleging misconduct associated with reserve reporting, the expertise of counsel, industry experts, and the courts on energy industry-related issues and practices (all located in Alberta) would arguably be of benefit to them. What is certain is that if the Amendments are adopted then the opt-out regime will be here to stay in Alberta. This change to Alberta's class actions regime may not turn out to have the negative implications anticipated by some defendants.

¹ Alberta Finance and Enterprise, "Alberta Economic Quick Facts" (September 2010), online: Alberta Canada <http://www.albertacanada.com/documents/SP-EH_AlbertaEconomicQuickFacts.pdf>.

² Statistics, Canada, *Head Offices in Canada* (Socio-economic guide), online: Statistics Canada <www41.statcan.gc.ca/2006/2239/ceb2239_004-eng.htm>.

³ [2006] A.J. No. 584, 402 A.R. 162 (Q.B.), *aff'd* [2007] A.J. No. 1047, 417 A.R. 200 (C.A.).

⁴ [2008] A.J. No. 909, 453 A.R. 1 (Q.B.), *var'd* [2009] A.J. No. 1336, 469 A.R. 270 (C.A.), leave to appeal to S.C.C. granted, 2010 CarswellAlta 973 (S.C.C. May 20, 2010).

⁵ Bill 20, *Class Proceedings Amendment Act, 2010*, 3rd Sess., 27th Leg., Alberta, 2010 [Bill 20]. Also see Alberta, Legislative Assembly, *Hansard*, No. 36 (1 November 2010) at 1032 (Wayne

Drysdale) [Bill 20, First Reading]; and Alberta, Legislative Assembly, *Hansard*, No. 37 (2 November 2010) at 1065-66 (Wayne Drysdale).

⁶ SA 2003, c. C-16.5 [Alberta CPA].

⁷ Alberta Law Reform Institute, *Class Actions*, Final Report No. 85 (Edmonton: Alberta Law Reform Institute, December 2000) [ALRI Report].

⁸ Alberta CPA, *supra* note 6. See s. 37 which allows courts to award costs as provided under the *Alberta Rules of Court*, Alta. Reg. 390/1968 [Rules of Court].

⁹ See *Ayrton v. PRL Financial (Alta.) Ltd.*, [2006] A.J. No. 296, 384 A.R. 1, (C.A.).

¹⁰ *Class Proceedings Act*, RSBC 1996, c. 50, s. 16(2) [B.C. CPA].

¹¹ *Class Actions Act*, S.S. 2001, c. C-12.01 [Saskatchewan CPA].

¹² ALRI Report, *supra* note 7 at 100. The ALRI Report recommended that potential class members not resident in Alberta should be required to opt-in to class actions.

¹³ ALRI Report, *supra* note 7 at 99.

¹⁴ *Ibid.* at 95.

¹⁵ *Canada Post Corp v. Lépine*, [2009] S.C.J. No. 16, [2009] 1 S.C.R. 549 [Lépine].

¹⁶ *Ibid.* at para. 42.

¹⁷ ALRI Report, *supra* note 7 at 93.

¹⁸ *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 506, 74 O.R. (3d) 321 (C.A.) [Currie].

¹⁹ *Ibid.* at para. 29.

²⁰ *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [Ontario CPA].

²¹ See *Nantais v. Telectronics Proprietary (Canada) Ltd.*, [1995] O.J. No. 2592, 25 O.R. (3d) 331 (Gen. Div.), leave to appeal refused, [1995] O.J. No. 3069 (Div. Ct.); *Carom v. Bre-X Minerals Ltd.*, [1999] O.J. No. 281, 43 O.R. (3d) 441 (Gen. Div.); *Robertson v. Thomson Corp.*, [1999] O.J. No. 280, 43 O.R. (3d) 161 (Gen. Div.); *Webb v. K-Mart Canada Ltd.*, [1999] O.J. No. 3285, 45 O.R. (3d) 425 (S.C.J.); and *Wilson v. Servier Canada Inc.*, [2002] O.J. No. 2032, 59 O.R. (3d) 656 (S.C.J.).

²² *McCann v. CP Ships Ltd.*, [2009] O.J. No. 5182 (S.C.J.) [CP Ships].

²³ *Silver v. Imax Corp.*, [2009] O.J. No. 5573, 66 B.L.R. (4th) 222 (S.C.J.) [Imax].

²⁴ *Pysznyj v. Orsu Metals Corp.*, [2010] O.J. No. 1994 (S.C.J.) [Orsu Metals].

²⁵ *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) [Gammon Gold], leave to appeal allowed in part, [2010] O.J. No. 3183 (S.C.J.).

²⁶ *CP Ships*, *supra* note 22.

²⁷ *Ibid.* at para. 83.

²⁸ *Ibid.*

²⁹ *Imax*, *supra* note 23.

³⁰ *Ibid.* at paras. 108-165.

³¹ *Orsu Metals*, *supra* note 24.

³² *Ibid.* at para. 17.

³³ *Gammon Gold*, *supra* note 25.

³⁴ *Ibid.* at paras. 115-116.

³⁵ *Western Canadian Shopping Centres Inc. v. Dutton*, [2000] S.C.J. No. 63, [2001] 2 S.C.R. 534.

³⁶ *Ramdath v. George Brown College of Applied Arts and Technology*, [2010] O.J. No. 1411 (S.C.J.).

³⁷ *Gammon Gold*, *supra* note 25.

³⁸ *Ibid.* at para. 108.

³⁹ *Currie*, *supra* note 18.

⁴⁰ *Ibid.* at para. 30.

⁴¹ *Lépine*, *supra* note 15.

⁴² *Ibid.* at paras. 42-46.

⁴³ *Ibid.* at para. 57.

⁴⁴ Uniform Law Conference of Canada, *Class Proceedings Act (Consolidation, 2006)*, online: <<http://www.ulcc.ca>> [ULCC Act].

⁴⁵ *Ibid.* at p. 12.

⁴⁶ Saskatchewan CPA, *supra* note 11.

⁴⁷ Bill 20, *supra* note 5 at s. 5.

⁴⁸ *Ibid.*

CLASS ACTIONS IN ONTARIO: TWENTY YEARS OF A GROWTH INDUSTRY — PART I



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On December 17, 1990, then Attorney-General Howard Hampton introduced Bill 28, *An Act respecting Class Proceedings*, in the Legislative Assembly of Ontario. Twenty years later, the significance of that event for the courts and litigators of Ontario would be difficult to overstate. Actions under the *Class Proceedings Act, 1992* [CPA],¹ which was proclaimed in force on January 1, 1993, have turned class actions practice into a growth industry, creating opportunities for entrepreneurial plaintiff-side litigators and a lucrative line of defence work for the litigation departments of corporate law firms. They have also introduced novel elements into trial practice in Ontario, including an entirely new procedure relating to certification, aggregated damages awards, application of the *cy pres* doctrine, and, most recently and controversially, a (wavering) judicial affirmation of the restitutionary “waiver of tort” principle. Finally — shifting our perspective beyond Ontario’s borders — the frequency of cases in which multiple class actions relating to the same cause of action have been brought in multiple Canadian jurisdictions is straining traditional conflict of laws principles.

The foregoing summary may not be perfect or complete, but it is likely that almost any judge or counsel active in Ontario class actions would come up with a substantially similar list if asked. In short, it is uncontroversial that in retrospect the stand-out effects of the CPA are its striking impacts on the courts, on civil procedure, and on the business of law. The purpose of this article is to consider whether, in developing as it has, the class actions regime has lived up to expectations. Our conclusion is that, having largely rectified the access to justice concern that legitimately

motivated it, the CPA has been expanded in a number of new and generally unforeseen directions, some of which are not (we will argue) in the best interests of litigants or the Ontario courts. In this first instalment, we will look at the origins of class action reform in Ontario, particularly the climate that surrounded the passage of the CPA, concluding with a brief outline of developments over the subsequent two decades. A more detailed discussion of those developments, which have arguably expanded the province’s class action regime beyond what was originally intended, will be the focus of the second article in this two-part series.

Origins of class action reform in Ontario

Turning the calendar back to that December day in 1990, it is hard not to see the CPA as a product of its time. While the origins of class actions reform can be traced to an Ontario Law Reform Commission study begun in 1976,² the subject was propelled into the limelight of legal reform efforts only after the Supreme Court of Canada’s 1983 ruling in *General Motors of Canada Ltd. v. Naken*, the Firenza owners’ case.³ Delivering the Court’s unanimous ruling in *Naken*, Justice Estey ruled out any attempt to re-purpose Ontario’s existing Rule 75 (which stated that “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”) as a quasi-class proceeding provision.⁴

Naken was the picture-perfect case for class actions: thousands of “ordinary folks” who had suffered significant harm from an unreliable product manufactured by a multinational corporate defendant for which few felt much sympathy. It was therefore a matter of widespread and well-founded concern that the Ontario rule, virtually unchanged since 1881, was incapable of dealing with the matter. “We’re 25 years behind the times”, Liberal MPP Bob Chiarelli lamented at the Third Reading of Bill 28, referring to well-established class actions legislation in Quebec and the United States.⁵ In addition to *Naken*, the Ottawa-area MPP reminded the House of the remarks of former Attorney-General Ian Scott, who in introducing the legislation in June of 1990 (before it died on the order paper as a result of Premier David Peterson’s ill-fated decision to call an election), had cited the Mississauga train derailment and the Dalkon Shield case as additional, and undeniably compelling, situations of a

type with respect to which the CPA would finally create a framework for redress.⁶

Underlying the entire 1990-92 debate was a generalized concern about access to justice. While we might not think to connect the two today, the CPA was enacted in the midst of the heated public and political controversy stemming from the Supreme Court of Canada's ruling in *R. v. Askov*.⁷ In that case, the Court stayed criminal charges against the defendants because of unconstitutional delays in Ontario's chronically backed-up court system, setting a standard that soon led to the dismissal of many criminal prosecutions in Ontario and elsewhere. Also in the public eye, and mentioned in the debate, were delays in completing the much-needed Brampton courthouse.⁸ Such events created a sense of political urgency around almost any initiative that could be construed as improving access to justice.⁹ Indeed, the debate on the CPA is likely one of the few in the history of Ontario in which the Opposition's principal complaint was that the Government was not moving fast enough to enact its own legislation.

This raises a final point about the context of the 1990-92 debate, namely that it was essentially a debate without an Opposition. The New Democratic Party government of Premier Bob Rae had only just taken office. Bill 28 was essentially a re-introduction of the previous Liberal bill that had been in turn a product of a legislative process undertaken by Progressive Conservative Attorney-General Roy McMurtry in the 1970s and 80s. All three parties were eager to see the results of their efforts become law.¹⁰ MPP Robert Callahan did express policy concerns over the abolition of the rule against champerty (in order to allow for contingency fees, an essential element in a class actions regime) and about the possibility of "opening up the floodgates totally" but, having done so, he immediately took comfort in a reassuring 1970s-era "Unsafe At Any Speed" example — in this case not the badly designed Firenza but the exploding Pinto (which he misidentified as the Firebird)¹¹ — and in stories of gridlock at Toronto's University Avenue courthouse.¹²

The key point is that, given public concern about access to justice and the feeling that the time had long since come for Ontario to provide for a means of legal redress to plaintiffs in situations like *Naken*, Ontario legislators were largely willing to confine their debate on Bill 28 to its ability to contribute to a resolution of

those specific issues. More extreme and potentially controversial possibilities were either left aside or discounted on faith, as in this passage from Mr. Callahan's long address to the House:

*We see in the United States — and I suppose this was at the very root cause in some respects of the concerns about the insurance settlements in this country — that the settlements there are significantly higher than they are anyplace else. The reason for it is contingency fees. Lawyers are able to take, I think, a third of the settlement, and of course that induces lawyers to do a number of things: to start out with a \$3 million lawsuit, where maybe \$100,000 or \$200,000 might apply, because a third of it is going to go to them. I don't want to be perceived as saying that members of the legal profession would do that — that's obviously not something they would do — but if you open the door you may have someone in the legal profession who is unscrupulous enough to do that.*¹³

In April 1992, as the CPA moved through Third Reading, the Law Society of Upper Canada held a seminar in Toronto entitled "Ontario's New Class Proceedings Act: Are You Prepared?" The same general perspective was maintained by a number of the invited speakers. For example, Justice Robert S. Montgomery set his keynote address on the judicial response to the CPA against the background of court backlogs, the Mississauga derailment, the Air India disaster and *Naken*, before proceeding to praise the Act for "poignantly" balancing the rights of individual plaintiffs *against one another*¹⁴ — not (tellingly) against *defendants'* rights and interests, which one might expect to exert at least some weight on the scales of justice but which were conspicuous by their absence from many early public discussions of the CPA.

Contemporary responses to class proceedings

We have seen that the political climate of 1990-92 made class actions legislation such an imperative that the opposition parties were at least as eager as the Government to see it passed. The public debates of the period show that the CPA was regarded as the solution to pressing access-to-justice problems and as a long overdue mechanism for dealing with mass product liability claims. That, it seems, was all that Ontario's politicians needed to know. However, there was no shortage of evidence at the time to suggest that class actions would or could raise a range of concerns that were arguably not raised by *Naken*, including the concern that the legislation would open the floodgates to opportunistic lawsuits of doubtful merit.

Among that evidence was the 1982 Ontario Law Reform Commission *Report on Class Actions*, which anticipated a number of issues, even as it tended to downplay or dismiss them. Having expressed strong doubts that “there is a large number of unscrupulous lawyers in Ontario who would knowingly bring meritless actions against innocent defendants”,¹⁵ the OLRC replied to specific criticisms, e.g. by noting that even though counsel fees might consume a significant share of any recovery, that share was still better than the 100 per cent share that they would (theoretically) consume under the old system in which plaintiffs were forced to proceed independently.¹⁶ It also emphasized the goal of behaviour modification, which in its view could justify non-compensatory “unjust enrichment” awards (although “waiver of tort”, as a means of achieving this, was not specifically foreseen).¹⁷

The criticisms addressed in the OLRC Report were primarily derived from the long history of class actions in the United States. At the time of the legislative debates over Bill 28, academic criticism of the U.S. experience was plentiful. A 1991 analysis of securities class actions in the *Stanford Law Review*, for example, noted rather typically that:

*Plaintiffs’ lawyers’ descriptions of their methods of locating potential securities class actions also support the inference that suits were filed whenever there was a sudden decrease in the stock price that produced a market loss sufficient to support the necessary fee.*¹⁸

From an economic point of view, the efficiency of U.S. class actions had also been examined and criticized, e.g. by Columbia University professor John C. Coffee, Jr., who wrote in a 1987 *University of Chicago Law Review* article that the class proceedings regime was inimical in many ways to the operation of the free market, most notably because of agency costs arising from the typically passive role of plaintiffs who will often have too little at stake to justify any monitoring of counsel. Representative plaintiffs might have a somewhat greater incentive to do so, Coffee noted, but perhaps not in cases where their function has been “trivialized” through the use of a “professional plaintiff” who has appeared in literally hundreds of other actions.¹⁹ A number of Canadian observers predicted that Ontario’s experience under the new CPA would mirror the U.S. experience.²⁰

These articles are raised not as proof of their authors’ contentions but as evidence of the extent of the literature on existing class actions experience that might have been consulted in the 1990-92 period. Neither the House, nor — with one prominent exception — the participants in the Law Society’s “Are You Prepared?” conference in 1992 seem to have had these issues at the front of their minds, even though the OLRC report had recognized nearly all of them. The exception was Ian Binnie, Q.C., then of the Toronto office of McCarthy Tétrault, who was given the opportunity to represent “the Defendant’s Perspective” at the conference. In response to comments by the Attorney-General citing support for the legislation from (among others) the Canadian Manufacturers’ Association, the Retail Council of Canada and the Canadian Federation of Independent Business, the future Supreme Court of Canada justice remarked:

*To the extent these organizations can be said to speak on behalf of defendants, their clamour for early passage of the Class Proceedings Act seems to us as eccentric as Butterball turkeys calling for an early Christmas.*²¹

Accurately reading the zeitgeist, Mr. Binnie went on to add that the CPA, like Christmas, was inevitable and that its purpose “is clearly to facilitate the bringing of class actions against defendants that would not otherwise be brought.”²² The “spirit of the age” was no less an inspiration to Canada’s courts, he noted, citing Justice Cory’s opinion in *R. v. Wholesale Travel* that “such names as Thalidomide, Bhopal, Chernobyl and the Exxon Valdez can leave no doubt” of the consequence of ignoring regulatory measures — with the implication that the courts are a rampart in society’s defence against such disasters.²³

Unlike many other commentators of the period, Mr. Binnie went on to analyze the likely effect of the new regime on defendants. In particular, he picked up on the important theme that the OLRC Report had referred to as “behaviour modification” but which can also be seen as viewing class proceedings as an instrument of regulation. With its exemption from the rule against champerty and the “Class Proceedings Fund” established under the *Law Society Act*,²⁴ as well as the likelihood (since realized) of disgorgement and other non-compensatory awards, it was inevitable, as Mr. Binnie put it, that:

In many respects the Representative Plaintiff will act as a kind of private Attorney General to perform a quasi-regulatory function in

*relation to overcharging utilities, polluting 'smokestack' industries and careless product manufacturers.*²⁵

Aggregated damages and *cy pres* distributions that “benefit persons who are not even class members” would, in Mr. Binnie’s opinion, “operate against the grain of our traditional concept of damages” while fitting in with “public law concepts of regulated industries”.²⁶

Referring to the tendency already noted for commentators at the time to focus exclusively on *Naken*-like cases, rather than on the more extreme type of class action scenario that was already familiar from the U.S. experience, Mr. Binnie added, with respect to the “Representative Plaintiff”:

*While on occasion she is the legitimate spokesperson for the substantially damaged members of the Rusty Ford Owner’s class, she is also the outraged defender of six million purchasers of pan-baked bread who suffered a cumulative overcharge of 9 dollars each in Hackett v. General Host, 455 F.2d 618 (1972).*²⁷

To avoid the judicial reticence that had slowed the development of Quebec class actions under that province’s legislation, Ontario legislation was, Mr. Binnie argued, “clearly designed to encourage rather than to merely permit litigants to make use of the class action procedures.”²⁸ Arguably, however, the adoption of more plaintiff-friendly certification standards than those in place in Quebec was ill-advised, as Quebec law was evolving quickly, within that province’s existing framework, to a more favourable view of class actions.²⁹

Exceeding expectations: Was the legislation too successful?

The enthusiasm of all three parties for effective class action legislation delivered the message that Ontario’s legislature intended courts to use the *CPA* purposefully, as a means of vindicating the rights of plaintiffs (conceived of almost exclusively as consumers) against defendants (big corporations) that had for too long been largely immune from lawsuits over consumer-product flaws that produced cumulatively large but individually small losses. If the legislators’ goal was to solve what in economists’ terms is a classic “co-ordination problem”, the *CPA* has for the most part achieved it — a 2011 equivalent of the *Firenza* would be off the road almost as soon as it was off the assembly line. However, as we will argue in Part II of this retrospective on the *CPA*, the Act was flexible enough to allow for expansion significantly beyond the limited range of egregious

consumer-product cases on which Ontario’s legislators focused their attention. Spurred on by the creative arguments of plaintiffs’ counsel, Ontario class proceedings have become a profitable “growth industry” in which entrepreneurs (class action counsel) compete to find and assert control over “raw material” (potential claims), which because of short supply can sometimes be of dubious quality. If success is measured by settlements, class action legislation has more than met its expectations, although on closer examination it appears that settlements sometimes fail to produce much of a return for wronged plaintiffs — the intended beneficiaries of the *CPA*. On top of this, the language of the *CPA* has encouraged courts to interpret traditional common law principles ever more liberally in order to give effect to the legislators’ intention to allow more Ontarians (and even non-Ontarians) their day in court — a development that may have significant consequences for the law as a whole.

In Part II, we will look at a number of these issues in the context of nearly two decades of experience with Ontario’s *CPA*. The following are among the points to be considered:

- Over the past decade, creative use of the aggregate damages, *cy pres* and “waiver of tort” doctrines in class action situations has increasingly made the class actions system an avenger of victimless crimes. In other words, the *CPA* regime may be turning into a parallel regulatory system in which plaintiffs’ counsel play the part of informal attorneys-general undertaking private prosecutions. As noted above, the *CPA* was always intended to include a “behaviour modification” function, but things have arguably gone too far when that function is exercised in contexts where no one has suffered any loss, and damages are paid largely to non-party charities or causes. If regulation is required, why should it not be done the old-fashioned way — by government regulators? Mr. Binnie’s concern about the creation of “private attorneys-general” does not seem far-fetched from the perspective of 2010.³⁰
- Alternatively, if class litigation is an effective way of regulating corporate behaviour, we might ask whether a different approach — for example, a system in which government

lawyers act as plaintiffs, and disgorged profits are paid into a public fund — might be worth considering (at least in those “waiver of tort” situations in which no actual harm is alleged). Some European countries limit standing as plaintiffs in class proceedings to consumer organizations or a government-appointed consumer ombudsman, a practice that might serve the purpose of regulating corporate behaviour while creating fewer incentives for excessive litigation.³¹

- Ontario’s class actions regime could be excused for being less than flawless if it achieved its fundamental goal of ensuring that genuinely wronged plaintiffs would not be left in the hopeless position of *Naken’s* Firenza owners. However, there is reason to believe that, in some cases, plaintiffs are not benefitting significantly from the settlements obtained by their counsel. Moreover, the courts are not in a good position to monitor how much of a settlement actually makes it into the pockets of class members, and in some cases settlements take forms (e.g. coupons) that, some argue, are of little practical value to many plaintiffs. It could be argued, of course, that any recovery is better than none — indeed the OLRC report made just that point³² — but low recovery levels for plaintiffs would undeniably affect any evaluation of the costs and benefits of class actions.
- The rarity of trial court rulings is responsible for the unsettled state of class action law, e.g. with respect to the existence and nature of the waiver of tort doctrine — a crucial question in class action practice that has been awaiting resolution for several years. The result is a “vicious circle” in which risk-averse corporate defendants, unable to evaluate the strength of their legal position with sufficient confidence to proceed to trial, settle at an early stage, leaving the legal questions underlying the lawsuit no closer to resolution. This naturally encourages further class actions on similar grounds, with an equally elevated likelihood of settlement. Moreover, it seems fair to observe that, while in principle there is nothing wrong with pre-trial settlements, the “optics” of a system that

devotes so much court and practitioner time to carriage motions, and relatively little to the resolution of plaintiffs’ and defendants’ disputes (or to monitoring the administration of awards and settlements), could exacerbate the public’s already rather cynical attitude toward lawyers and the court system.³³

- Multijurisdictional class actions continue to be a procedural quagmire for the courts of Ontario and other provinces, as the tug of war between Saskatchewan and Ontario courts in the “Vioxx” class actions illustrates. In the first ruling in the matter (on a carriage motion) an Ontario judge rejected a Saskatchewan-based plaintiffs’ counsel group in favour of an Ontario one.³⁴ However, the Saskatchewan group had also commenced a class proceeding in its home province, which (having lost out in Ontario) it managed to have certified shortly before the Ontario certification hearing was to take place.³⁵ At that Ontario hearing, Justice Cullity pointedly declined to stay the Ontario action, noting that the Saskatchewan court had essentially ignored, and “implicitly disagreed with”,³⁶ the Ontario court’s determination (at the carriage motion) that the Ontario-based counsel were better placed to advance the interests of the proposed plaintiff class. Indeed, it appeared that the Saskatchewan court had placed greater emphasis on the relative merit of Saskatchewan and Ontario as jurisdictions — with respect to efficiency and costs issues for plaintiffs — than on the experience of the proposed counsel teams.³⁷ Where the courts of two provinces approach a difficult question of jurisdiction with conflicting understandings of the key principles that are at play, customary deference and comity may not suffice to preclude a multiplicity of proceedings. Faced with just such a conundrum, Cullity J. justified the certification of the Ontario action with the observation that “[c]omity is ... a two-way street”,³⁸ while recognizing that certification produced the “unfortunate”³⁹ consequence of duplicative class action proceedings.

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¹ S.O. 1992, c. 6.
² The resulting OLRC study was published under the title *Report on Class Actions* in 1982.
³ *General Motors of Canada Ltd. v. Naken*, [1983] S.C.J. No. 9, [1983] 1 S.C.R. 72.
⁴ *Ibid.*
⁵ Hansard, April 27, 1992 at 1540.
⁶ Attorney-General Scott's remarks appear in Hansard, June 12, 1990 at 1350. The Union Carbide disaster in Bhopal, India, was similarly cited by Mr. Chiarelli's colleague Robert Callahan of Brampton. (Hansard, April 29, 1992, at 1600).
⁷ *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199.
⁸ Hon. Robert Callahan, as recorded in Hansard, April 29, 1992 at 1550.
⁹ *E.g.*, as Mr. Callahan urged, "I applaud this act. I applaud Bill 29 [containing related amendments to the *Law Society Act*, R.S.O. 1990, c. L.8] which is also going to give people access to the courts. I applaud that, but it's only a baby step. You've only started to walk. You've got to do more." (*Ibid.*)
¹⁰ As Justice Montgomery observed, "This is the first time in my memory that three attorneys-general of different political persuasions have agreed on anything. This must indeed be a special bill." Justice Robert S. Montgomery, Keynote address to the Law Society of Upper Canada's conference entitled "Ontario's New Class Proceedings Act: Are You Prepared?", April 14, 1992, at I-7 of the conference materials.
¹¹ "One that jumps to mind is, I think, the Firebird, where if you ran into the back of it it would explode. If that's not right, I apologize to Firebird owners, but it was something like that." (Hansard, April 29, 1992, at 1540)
¹² Hansard, April 29, 1992, at 1550.
¹³ *Ibid.* at 1540.
¹⁴ Justice Montgomery, *supra* note 100, at I-15.
¹⁵ OLRC *Report on Class Actions*, *supra* note 2, at 147.
¹⁶ *Ibid.* at 134-35.
¹⁷ *Ibid.* at 145.
¹⁸ Janet Cooper Alexander, "Do The Merits Matter? A Study of Settlements in Securities Class Actions", *Stanford Law Review*, vol. 43, no. 3 (Feb. 1991), pp. 497-598, at 513. The author proceeded to show that every company in the high-tech sector that had done IPOs in the relevant period and subsequently suffered a substantial financial reverse was sued. Even though it would be highly unlikely that every such loss was the result of actionable wrongdoing, the settlements in each case were generally similar, supporting the author's conclusion that settlements were largely unrelated to the degree of alleged wrongdoing (or even the existence of wrongdoing).

¹⁹ John C. Coffee, Jr., "The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action", *University of Chicago Law Review*, vol. 54, no. 3 (Summer 1987), pp. 877-937 at 883-86.
²⁰ See, e.g., Paul M. Iacono, "Class Actions and Products Liability in Ontario: What Will Happen?", 13 *C.I.L.R.* 99 (1991-92) and S. J. Simpson, "Class Action Reform: A New Accountability", [1991] *Adv. Soc. J.* 19.
²¹ Ian Binnie, Q.C., "The Class Proceedings Act: A Defendant's Perspective", in *Ontario's New Class Proceedings Act: Are You Prepared?* (Toronto: The Law Society of Upper Canada, 1992), at F-2.
²² *Ibid.*
²³ *Ibid.*, at F-30, citing Cory J. in *R. v. Wholesale Travel Ltd.*, [1991] S.C.J. No. 79, 84 D.L.R. (4th) 161 (S.C.C.).
²⁴ *Law Society Act*, R.S.O. 1990, c. L.8, ss. 59.1-59.5.
²⁵ Binnie, *supra* note 21 at F-3.
²⁶ *Ibid.* at F-6.
²⁷ *Ibid.*, at F-5. The actual number of purchasers cited in the proposed plaintiff's claim was 1.5 million, who were in turn alleged to represent 6 million bread consumers (*Hackett*, para. 2).
²⁸ *Ibid.* at F-29.
²⁹ *Ibid.* at F-28.
³⁰ Binnie, *supra* note 21, at F-3.
³¹ See, for example, the Finnish Ministry of Justice's April 12, 2007 announcement "Class action in consumer protection cases possible as of October 2007", available at <<http://tinyurl.com/finlandclass>> (accessed October 22, 2010). Austria, Italy, the Netherlands and Spain are among the countries that largely or entirely restrict standing in class actions to consumer associations. See the online *Antitrust Encyclopedia's* article "What about class actions? What is the trend?", available at <<http://tinyurl.com/euroclass>> (accessed October 22, 2010).
³² OLRC *Report on Class Actions*, *supra* note 2, at 138.
³³ This has arguably happened in the United States as the result of extravagant jury awards in tort cases, including class actions. A U.S. study conducted by the Rand Corporation think tank, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000), indicates that even among U.S. plaintiff class action counsel, public cynicism about class action counsel fees constitutes "a worrisome source of public disrepute . . ." (98). The study is available on the Rand Corporation website, <www.rand.org>.
³⁴ *Settlington et al. v. Merck Frosst Canada Ltd. et al.*, [2006] O.J. No. 376 (S.C.J.), per Justice Winkler.
³⁵ *Wuttunee v. Merck Frosst Canada Ltd.*, [2008] S.J. No. 324, 312 Sask. R. 265 (Q.B.), per Justice Klebuc.
³⁶ *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996, 295 D.L.R. (4th) 32 (Ont. S.C.J.), para. 16.
³⁷ *Ibid.* para. 26.
³⁸ *Ibid.* para. 21.
³⁹ *Ibid.* para. 41.

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