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CLASS ACTIONS IN ONTARIO AND QUEBEC

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Judicial development of class actions procedures in the common law provinces has now been precluded by the decision of the Supreme Court of Canada in Naken v. General Motors of Canada Ltd. The Ontario Law Reform Commission, however, in a three-volume report, has recommended legislative enactment in Ontario of a detailed and complex class action statute. These developments occur at a time when experience in Quebec, and increasingly in the United States, suggests that there are fundamental problems with the concept of class litigation which even the most sophisticated legislation and generous financing cannot overcome. The author concludes that the proposals of the Ontario Law Reform Commission are unlikely to resolve these problems, and that the case for class actions has yet to be made.

La décision de la Cour suprême du Canada dans l'affaire Naken c. General Motors of Canada Ltd. a mis fin au développement par voie judiciaire de l'action collective dans les provinces de common law. En même temps, cependant, la commission de réforme du droit de l'Ontario a recommandé, dans un rapport de trois volumes, la création par voie législative d'une procédure très détaillée et complexe pour faciliter de telles actions. Ces développements ont lieu à un moment où l'expérience québécoise et, de façon croissante, celle des États-Unis suggèrent que la notion même d'action collective est remise en question et qu'aucune législation, même assortie d'un financement généreux, ne saurait éliminer les difficultés. L'auteur conclut que les recommandations de la commission de réforme du droit de l'Ontario ne résoudront pas ces problèmes, et que la cause des actions collectives est loin d'être gagnée.

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Introduction

The Supreme Court of Canada, in *Naken v. General Motors of Canada Ltd.*,¹ has now rejected judicial invention of a class action mechanism more complex and facilitative than that of the present Ontario Rule 75.² The decision will deter judicial initiatives in the other common law provinces as well.³ Class action development, if it is to take place, will therefore be largely legislative in origin, and attention has now shifted to the detailed legislative proposals of the Ontario Law Reform Commission, whose recently published three-volume report is of national importance.⁴ In Quebec, however, detailed class action legislation enacted in 1978 and described by the Ontario Law Reform Commission Report as "the most progressive class action legislation in Canada, if not in the Commonwealth at the present time",⁵ has proven disappointing to its proponents, and recent and substantial amendments do not appear to have effected a cure.⁶ These developments occur at a time when "countertendencies" to the use of class actions have emerged abroad,⁷ while the judgment of the Supreme Court in *Naken* adverts to problems beyond the textual inadequacies of Rule 75.

This article describes and assesses recent Ontario and Quebec developments and seeks to place the debate over party incentives and class management in the larger context of adjudicative proceedings and the judicial function. It concludes that the class action is both an ineffective means of social reform and a presently unjustified, if not essentially unjustifiable, departure from existing principles of procedure and adjudication. The conclusion follows from a close examination of the nature of class actions themselves and is not based on more usual and consequentialist criticisms, which are seen as generally misconceived, though occasionally

¹ [1983] 1 S.C.R. 72, (1983), 144 D.L.R. (3d) 385.

² The Rule provides: "Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized to defend on behalf of, or for the benefit of, all." For history and interpretation of the Rule, see Ontario Law Reform Commission, Report on Class Actions (1982), pp. 5-49, with references; Colin Gillespie, The Scope of the Class Action in Canada (1981), 11 Man. L.J. 215.

³ All Canadian common law provinces have a class action rule similar to Ontario's Rule 75. For references see Ontario Law Reform Commission, *op. cit.*, footnote 2, p. 44.

⁴ *Op. cit.*, footnote 2. The report is accompanied at pp. 851-854 by a statement of the "Chairman's Reservations" as to the conclusions reached, as to which see *infra*, text accompanying footnotes 36-41.

⁵ *Ibid.*, p. 398.

⁶ L.Q./S.Q. 1982, c. 37, arts. 20-25, and see the discussion *infra*, text accompanying footnotes 70-86.

⁷ See Abram Chayes, Public Law Litigation and the Burger Court (1982), 96 Harv. L. Rev. 4, at pp. 7, 26-45; Mauro Cappelletti and Bryant Garth, Finding an Appropriate Compromise: a Comparative Study of Individualistic Models and Groups Rights in Civil Procedure (1983), 2 C.J.Q. 111, at pp. 113, 119; and the discussion *infra*, text accompanying footnotes 87, 88, 97.

accurate. As a study exclusively of class action procedures, the article draws no further conclusions as to the appropriate measure of judicial involvement in society, though the class action debate is very much a part of this larger question. Realization of the inherently problematical character of class litigation may, however, contribute to this larger debate, and permit a more realistic assessment of a range of remedial devices and of the need for them.

I. Ontario Developments

In *Naken* suit was brought by four individual plaintiffs on behalf of a class of some 4,600 purchasers of a model of automobile produced and marketed by the defendant. \$1,000 was claimed on behalf of each member of the class, representing the alleged depreciation in resale value of each vehicle attendant upon defects in production. Liability was said to be founded on defendant's breach of express warranties of fitness contained in its advertising. The case reached the Supreme Court after the Ontario Court of Appeal had allowed it to proceed only on behalf of a class limited to those purchasers who had actually seen and relied upon the defendant's advertisements.⁸ The Supreme Court, speaking unanimously through Estey J., foresaw the proposed action as proceeding in at least three stages: (1) a High Court trial to determine whether any or all members of the class had (assuming reliance and damage on their part) a valid cause of action against the defendant; (2) reference to the Master of the Supreme Court to establish reliance on the part of each individual claimant and the extent of their damages up to a limit of \$1,000; and (3) final proceedings before the trial judge for computation (based on the Master's Report) and entry of judgment.⁹ Such proceedings would have been, however, in the opinion of the court, entirely incompatible with the brevity of Rule 75,¹⁰ which makes

⁸ (1978), 92 D.L.R. (3d) 100, 21 O.R. (2d) 780. This limitation of the class flows from the present state of the law of products liability in Ontario, as to which see Ontario Law Reform Commission, Report on Products Liability (1979). Counsel for the class representative abandoned in the Court of Appeal an argument that all purchasers of the vehicles benefited from implied warranties of fitness: see 92 D.L.R. (3d) 100, at p. 103, 21 O.R. (2d) 780, at p. 784. In Quebec law the Supreme Court has endorsed the view that manufacturers' warranties run with the product to all subsequent purchasers, justifying recovery on their part for economic loss: see *General Motors Products of Canada Ltd. v. Kravitz*, [1979] S.C.R. 790, (1979), 93 D.L.R. (3d) 481, and comments, from civil and common law perspectives, in (1980), 25 McGill L.J. 295-406. Rejection of the *Naken* class action on the part of the Supreme Court cannot thus be ascribed to any antipathy on the part of the Court to extension of manufacturers' liability. The Court was not, however, seized with an appeal by the plaintiffs in *Naken*, and thus decided on the appropriateness of the class proceedings in the light only of existing substantive law. Hence proof of reliance, as well as proof of damage, was taken as essential to each class member's recovery, with fatal results. The judgment suggests clearly, however, that the same result would have been reached had individual claimants been required to prove only the extent of their damage; see the discussion *infra*.

⁹ *Supra*, footnote 1, at pp. 96-97 (S.C.R.), 403-404 (D.L.R.).

¹⁰ *Supra*, footnote 2.

no provision, in the enumeration of Estey J.,¹¹ for any of the following: hearings and adjudication outside of the High Court itself; opting out of the class action by unwilling members; awarding of costs against unsuccessful class members; discovery, production or other pre-hearing stages in connection with proceedings before the Master; and the effect of the statute of limitations where an action has been improperly commenced under Rule 75. The court also questioned the efficiency of such a representative action over individual trials, given the need to offer substantial proof in support of each individual claim,¹² and drew attention to the potentially harsh effect of *res judicata* on claims of class members in excess of \$1,000 (notably for personal injuries).¹³ The court concluded that Rule 75 in its present form could not have been intended to create, full blown, such a new, distinct and uncharted method of proceeding. The conclusion, it is felt, is entirely warranted.

The decision of the Supreme Court thus leaves the common law largely intact, with the representative or class action limited to declaratory or injunctive relief, while actions based on separate contracts or requiring individual assessments of damages must be separately pursued.¹⁴ In the latter cases the particularities of each claim prevent plaintiffs, in the language of Rule 75, having "the same interest", and thus benefiting from a single judicial decision. In insisting on separate treatment of claims, the judiciary maintains both its traditional concentration on the fact-finding process and its belief in the inherent distinguishability of patterns of fact. This judicial posture, whatever adjectives one may wish to attach to it, is of central importance in the class action debate.

The Report of the Ontario Law Reform Commission gives three reasons for introducing a more extensive class action procedure into Ontario law. The first is judicial efficiency, through the grouping of claims which would otherwise be litigated individually. It is recognized that this argument is convincing only with respect to individually recoverable claims, i.e., claims which would be normally litigated absent class action proceedings.¹⁵ The second reason is improved access to the courts, given the high cost of litigation (even in small claims proceedings), ignorance of law and legal institutions, or disenchantment with them, and fear of reprisals.¹⁶ This argument assumes both the desirability of improved

¹¹ *Supra*, footnote 1, at pp. 97-104 (S.C.R.), 404-409 (D.L.R.).

¹² *Ibid.*, at pp. 99-100 (S.C.R.), 405-406 (D.L.R.).

¹³ *Ibid.*, at pp. 100-101 (S.C.R.), 406-407 (D.L.R.).

¹⁴ For amplification and refinements, see references cited *supra*, footnote 2, and, for early 16th and 17th century equitable origins of declaratory and injunctive relief in group litigation, Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action* (1977), 77 Col. L. Rev. 866.

¹⁵ *Op. cit.*, footnote 2, pp. 118-119.

¹⁶ *Ibid.*, pp. 119-129.

access to courts (as does most contemporary literature)¹⁷ and the need to circumvent, through the particular device of the class action, the problems mentioned. The third reason is behaviour modification, which the Commission views as a 'by-product', although an important one, of class actions otherwise justifiable.¹⁸ The class action would thus provide an incentive for increased compliance with the law and prevent unjust enrichment, through forcing defendants to bear or distribute a larger share of the true costs of their activities. This argument, a procedural variant of those frequently advanced in favour of strict liability in tort, espouses the view that civil proceedings may properly fulfill a role beyond that of simple dispute resolution. The Commission suggests that the resulting behaviour modification is only that which flows from removal of economic or other barriers to litigation.¹⁹

The conclusion of the Commission in favour of a new and expanded class action procedure is qualified, however, by its view that some class actions would be "inappropriate", in that they "would have a harmful impact on society".²⁰ The procedure recommended by the Commission is therefore highly complex, since detailed measures of implementation are accompanied by equally detailed measures of control. As in the United States and Quebec, judicial authorization of the class action would be required at a preliminary stage,²¹ and specified conditions for authorization would have to be met,²² again similar to those prevailing in the United States and Quebec. These include good faith, a reasonable possibility of success on the merits, a numerous class with questions of fact or law common to it, the superiority of the class action to other methods of resolution,²³ and adequacy of representation. Assuming the above conditions were met, a class action could still be refused (this provision has no evident parallel in other legislation) if the court came to the conclusion, on proof by the *defendant*, that "the adverse effects of the proceedings upon

¹⁷ See, however, a recent major study prepared for the Quebec *Office de la protection du consommateur*, recognizing limitations of the traditional judicial system and indicating new interest in informal or private dispute-resolution procedures, in Quebec and abroad: Jean-Guy Belley, Patrice Garant, Nicole L'Heureux, Fabienne Coulombe, Jean-Paul Proulx, Christine Robillard, *Les consommateurs et la justice au Québec* (1983), pp. 323, 327, 410. On such procedures see generally M. Cappelletti (ed.), *Access to Justice*, vol. 1, *A World Survey* (M. Cappelletti and B. Garth eds., 1978), pp. 85-107.

¹⁸ *Op. cit.*, footnote 2, pp. 140-146.

¹⁹ *Ibid.*, p. 144.

²⁰ *Ibid.*, p. 212.

²¹ For proposed legislation implementing these and the other recommendations, see the draft Act respecting Class Actions, *ibid.*, pp. 861-878. The judicial authorization requirement is contained in s. 3.

²² *Ibid.*, s. 3.

²³ In view of the conclusions of the Supreme Court, the claims in *Naken* would have been inappropriate for a class action on this ground, the class action dissolving into thousands of individual trials on issues of purchase, reliance and damages. See *supra*,

the class, the courts or the public would outweigh the benefits".²⁴ Affidavit evidence would have to be filed by both the class representative and the defendant for purposes of the application for certification, and there would be examination on the affidavits.²⁵ The court would be given wide but unspecified powers of class management ("all appropriate orders").²⁶ Notice of the action could be given to class members by a wide variety of means, but would not be mandatory, and the court would be directed to consider a variety of circumstances in deciding on the need and manner of notice.²⁷ Class members would have no right to opt out of a class action, but could be excluded by permission of the court, again after consideration of a variety of circumstances.²⁸ The court would be given a wide discretion in effecting monetary relief, and could allow individual distribution (which might be averaged in cases where it would be difficult to determine exact shares) of an aggregate assessment of damages,²⁹ *cy-près* distribution "in a manner that may reasonably be expected to benefit some or all members of the class",³⁰ or individual proceedings for assessment of damages before the court or elsewhere according to the "simplest, least expensive and most expeditious method".³¹ The effect of *res judicata* would be limited to "questions common to the class that are defined in the order certifying the action as a class action and that relate to the claim described and the relief specified in the order".³² Extensive rights of appeal would be given to both sides, both from orders at the stage of certification and from judgments.³³ A 'no-way' costs rule would generally prevail (each side bearing his or her own costs), while the class representative and the class lawyer would be authorized to make an agreement for payment of fees and disbursements, as determined by the court, only in the event of success.³⁴

The Commission is of the view that the detail of its proposed legislation, and the control of the court, would eliminate what it considered the most frequently alleged problems of class actions, notably "flooding" of the courts, "legalized blackmail" (the use of class actions to force unjust-

footnote 12 and the accompanying text. This conclusion may be seen as the procedural manifestation of a lack of questions common to the class. The superiority of the class action is thus directly related to the willingness of a court to find that common questions exist, as to which see *infra*, footnote 138 and the accompanying text.

²⁴ Act respecting Class Actions, *supra*, footnote 21, s. 6.

²⁵ *Ibid.*, s. 8.

²⁶ *Ibid.*, s. 15.

²⁷ *Ibid.*, ss. 16(2), 18(2).

²⁸ *Ibid.*, s. 20.

²⁹ *Ibid.*, ss. 22-26.

³⁰ *Ibid.*, s. 27.

³¹ *Ibid.*, s. 31.

³² *Ibid.*, s. 34(2).

³³ *Ibid.*, ss. 37-41.

³⁴ *Ibid.*, ss. 41-47.

tifiable settlements upon defendants), and prosecution of "unmanageable" actions.³⁵ The Chairman of the Commission, however, Dr. Derek Mendes da Costa, Q.C., expressed reservations as to the conclusions of the Commission. He was generally concerned at being "unduly guided by the American experience" in assessing the Ontario position³⁶ and dissented from any recommendation which would impose an "activist" role on the court in class management.³⁷ More specifically, he objected to imposing any burden of proof on the defendant to show the unsuitable character of a class action,³⁸ to permitting class members to opt out of the class only with permission of the court,³⁹ to allowing *cy-près* distribution of the residue of a damage award,⁴⁰ and to costs rules which would immunize plaintiffs from payment of any costs.⁴¹ The Government of Ontario is thus faced with a major class action proposal and a number of possible variants of it, should implementation be decided upon.

II. The Quebec Experience

Enacted in 1978 and described by government spokesmen at the time as a significant measure of social reform,⁴² Quebec's class action legislation borrowed heavily from the federal United States class action rule.⁴³ It also innovated in an apparently significant fashion through the provision of public funding for class actions.

As in the United States, a Quebec class action may proceed only with judicial authorization, and a number of conditions for authorization are set out in the Code of Civil Procedure.⁴⁴ These are: the existence of "identical,

³⁵ *Op. cit.*, footnote 2, p. 211.

³⁶ *Ibid.*, p. 851.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*, pp. 851-852.

⁴⁰ *Ibid.*, p. 852. *Cy-près* distribution was rejected as unconstitutional by the U.S. Second Circuit Court of Appeal in *Eisen v. Carlisle & Jacquelin*, 479 F. 2d 1005 (2nd. Cir., 1973), vacated and remanded on other grounds 417 U.S. 156 (1974).

⁴¹ *Op. cit.*, footnote 2, pp. 852-854.

⁴² See *Débats de l'Assemblée nationale*, 31^{ème} session, 31^{ème} législature, vol. 20, at pp. 2064, 2066. The *Loi sur le recours collectif/Act respecting the Class Action*, L.Q./S.Q. 1978, c. 8, was enacted on June 8, 1978 and its main provisions came into focus on January 19, 1979. See *Gazette officielle du Québec*, 1979, p. 459.

⁴³ Rule 23 (enacted 1966) of the Federal Rules of Civil Procedure for the United States District Courts. For its influence in Quebec see Hubert Reid, *Le recours collectif au Québec* (1978), 27 U.N.B.L.J. 18, at p. 21.

⁴⁴ C.C.P., arts. 1002, 1003. See generally Mario Bouchard, *L'autorisation d'exercer le recours collectif* (1980), 21 C. de D. 855; Denis Ferland, *La Cour suprême et les conditions d'autorisation de l'exercice du recours collectif*, (1003 C.P.) (1981), 41 R. du B. 485; Pierre Verge, *La recevabilité de l'action de l'intérêt public* (1983), 24 C. de D. 177.

similar or related" questions of law or fact; that "the facts alleged appear to justify the conclusions sought"; that other methods of proceedings are difficult or impractical;⁴⁵ and that the class representative will adequately represent its members. These conditions are similar to those known in the United States and those proposed by the Ontario Law Reform Commission. Throughout class action proceedings in Quebec the court is given broad powers of management to accelerate and simplify proceedings,⁴⁶ and may determine the most appropriate manner of effecting mandatory⁴⁷ notice of the action to members.⁴⁸ Members of the class may opt out of proceedings as of right⁴⁹ and thereby escape the effect of *res judicata* attaching to the final judgment. Where the action is successful, the court may order a wide variety of monetary relief, again similar to that proposed for Ontario, including appropriate payments to members of the class following an aggregate assessment of damages,⁵⁰ *cy-près* distribution where individual distribution is impracticable or onerous,⁵¹ individual assessment of damages followed by corresponding awards,⁵² or other reparative measures.⁵³ The original legislation of 1978 conferred rights of appeal on both sides from orders made at the stage of authorization, as well as from final judgment.⁵⁴ Non-profit corporations and employee associations were also given limited rights to act as class representatives.⁵⁵

While the traditional Quebec 'two-way' or 'loser pays' costs rule was maintained,⁵⁶ costs disincentives to class actions were sought to be overcome through their public funding, using the mechanism of the *Fonds d'aide aux recours collectifs*, an administrative agency responsible for assessing and funding class action initiatives.⁵⁷ Appeals by applicants from

⁴⁵ Other methods of proceeding in Quebec include the so-called "representative action" in which persons having a "common interest in a dispute" may, by written mandate, authorize one of their members to act on their behalf: Art. 59, C.C.P. This procedure is available for small classes willing to opt in and assume responsibility for costs, though the procedure has not been sufficiently used for any clear definition of a "common interest in a dispute" to emerge.

⁴⁶ C.C.P., art. 1045.

⁴⁷ C.C.P., arts. 1005, 1006.

⁴⁸ C.C.P., art. 1046.

⁴⁹ C.C.P., art. 1007.

⁵⁰ C.C.P., arts. 1031-1033.

⁵¹ C.C.P., art. 1034.

⁵² C.C.P., arts. 1037-1040.

⁵³ C.C.P., art. 1032.

⁵⁴ C.C.P., arts. 1010 (as enacted by L.Q./S.Q. 1978, c. 8, art. 3), 1041. For subsequent amendment see *infra*, footnote 73 and accompanying text.

⁵⁵ C.C.P., arts. 1048 (as enacted by L.Q./S.Q. 1978, c. 8, art. 3).

⁵⁶ C.C.P., art. 477.

⁵⁷ See the Loi sur le recours collectif/An Act respecting the Class Action, L.R.Q./R.S.Q., c. R-2.1, arts. 5-45, as amended by L.Q./S.Q. 1982, c. 37, art. 25. The budget of

decisions of the *Fonds* lie to the Provincial Court.⁵⁸ In adding public financial support to the existing possibility of financing litigation through contingent fees,⁵⁹ it was hoped to overcome both the financial burden of pre-judgment class management and the downside risk of costs liability under the traditional costs rule.

During the five years since enactment of the legislation, however, the average annual number of class action petitions has been only slightly more than twenty,⁶⁰ in a court, the Quebec Superior Court, which annually receives approximately 55,000 new civil cases.⁶¹ This rate of class action litigation (.04% of the total) is vastly inferior to original expectations (1%)⁶² and to that which has prevailed in the past at the federal level in the United States (2.7% at its highest points in 1973 and 1976).⁶³ Even given the fuller range of private causes of action found in United States civil rights, anti-trust and securities legislation (principal sources of United States federal class actions), this variance is of interest.⁶⁴ In one of the most

the *Fonds* in 1982 was approximately \$350,000, of which approximately \$110,000 was used for administrative expenses. The *Fonds* has three full-time employees (lawyer, administrative assistant, secretary) and three part-time administrators render decisions. The danger of long-term under-funding of such a fund was pointed out to the Attorney-General of Ontario in a submission by the Canadian Bar Association (Ontario) and the Public Interest Research Centre, Report on Class Actions, (November, 1983), p. 35.

⁵⁸ *Ibid.*, art. 35.

⁵⁹ See the Tarif de certains honoraires extra-judiciaires des avocats/Tariff of certain extrajudicial fees of advocates, R.R.Q., c. B-1, s. 14, art. 3, permitting contingent fees to a maximum of 30% of the amount obtained and collected.

⁶⁰ See *Fonds d'aide aux recours collectifs*, Rapport annuel 1982-83, pp. 26-27, for Quebec class action statistics as of March 31, 1983. The author is grateful to Me Yves Lauzon, of the *Fonds*, for more current and complete statistics. As of November 15, 1983, 109 class actions petitions had been presented to the Superior Court.

⁶¹ Gouvernement du Québec, Ministère de la justice, Rapport annuel, 1979-80, p. 44, 1980-81, p. 46; *Ibid.*, Direction générale des Services judiciaires, Rapport d'activités 1982-83, pp. 46-47.

⁶² André Sirois, Un fonds d'aide de 100,000 dollars (1979), 1 (No. 2) Justice 22.

⁶³ Administrative Office of the United States Courts, 1980 Annual Report of the Director, Table 31, p. 78.

⁶⁴ See the data of the Ontario Law Reform Commission relating to areas of U.S. class actions in its report, *op. cit.*, footnote 2, pp. 172-178. Class actions in the three areas indicated have annually accounted for 50% to 70% of the total U.S. federal class actions. The comparability of statistics for Quebec and U.S. federal courts may be affected by the differences in jurisdictions between the two sets of courts. While U.S. federal Courts are limited generally to matters of federal or constitutional law or cases between citizens of different states, the Quebec Superior Court is a court of general, inherent jurisdiction in matters of provincial and federal law. Both jurisdictions, however, are very broad, and there appears to be some inherent validity in comparing respective volumes of class action litigation, given whatever broad jurisdictions exist. Differences may then be attributed, in part at least, to differences in class action design. There is a lack of empirical evidence concerning the rate of class action litigation in U.S. state courts. State legislation relating to class actions is diverse. See the report of the Ontario Law Reform Commission, *op. cit.*, footnote 2, pp. 64-70, 178-180.

publicized instances of alleged mass damage, moreover, that of the installation of urea formaldehyde foam insulation, no class action could be commenced because of the difficulty of finding common elements in the complaints.⁶⁵

Nor has the low volume of class action litigation in Quebec been compensated for by a high rate of plaintiff success. Again more than five years after enactment of the legislation, only eight judgments have been rendered at first instance, seven in favour of plaintiffs.⁶⁶ Of these seven favourable decisions, however, four were by consent or default,⁶⁷ and only one of the remaining three involved a class of significant size.⁶⁸ A total of six cases have been settled. The entire statistical table indicates high levels of abandonment, delay (in part because of appeals) and dismissal. Twenty-one cases have been abandoned or adjourned *sine die*, thirty-six have been prolonged through appeal proceedings (following orders made at the stage of authorization), a further eleven await authorization proceedings, while twenty-six have been definitively refused authorization. Only eighteen

⁶⁵ In Quebec the product was produced by six different manufacturers in fourteen different varieties and contracts were concluded by approximately 200 installation enterprises, whose installation methods were not uniform. Property and physical damage varied considerably; see *Barreau* 82, April, p. 12. Trial of six (joined) urea formaldehyde foam test cases began in Montreal in September, 1983 and the trial is expected to last from four to six months. *Le Devoir*, Montreal, Sept. 7, 1983, p. 2. Problems of urea formaldehyde foam insulation were cited by the Ontario Law Reform Commission in its report, *op. cit.*, footnote 2, p. 96, as potentially suitable for class action proceedings, as was the case brought by Mrs. Naken on behalf of purchasers of defective automobiles. The latter case has now been rejected by the Supreme Court as unsuitable for class action proceedings under present Ontario Rules, and the judgment of the court suggests a similar result even given more detailed legislation; *supra*, footnotes 12, 23 and the accompanying text. In the two other examples given by the Ontario Law Reform Commission of the possible utility of class action proceedings, those of the Mississauga train derailment and the collapse of Re-Mor Investment Company, test cases are now either under way or contemplated. Ontario Law Reform Commission, *op. cit.*, footnote 2, pp. 90-100.

⁶⁶ These and all subsequent statistics in this paragraph are drawn from statistics contained in the annual report of the *Fonds d'aide aux recours collectifs*, *supra*, footnote 60, as supplemented by current figures of the *Fonds*, to November 15, 1983.

⁶⁷ The unreported cases of *Nault c. Jarmak* (C.S. Mtl. 500-06-000013-801); *Charbonneau c. Aero Mexico* (C.S. Mtl. 500-06-000023-818); *Feinberg c. L'Une et l'Autre Inc.* (C.S. Mtl. 500-06-000001-806); *Boisvert c. La Compagnie Forar* (C.S. Mtl. 500-06-000009-791).

⁶⁸ *Plouffe c. Câblevision National Ltée*, [1982] C.S. 257, in which some 40,000 cable television subscribers were awarded forty-cent credits for two day interruptions of service due to labour difficulties. Damages were agreed upon by the parties. In *Cloutier c. Ville de Bromont* (C.S. Bedford 455-06-00000180) a group of approximately 70 property owners were awarded a return of municipal taxes, while in *Côté c. Boutique 254 Inc.* (C.S. Québec 200-06-000003-809) a group of approximately 25 persons were awarded back wages owed by their employer. This case is being appealed. The latter two cases might have been undertaken as 'representative actions' (*supra* footnote 45), had the class members been willing to formally mandate one of their number as the class representative and to assume responsibility for costs.

cases have so far emerged from authorization and appeal proceedings to the stage of an action on the merits (and, as indicated, there has been judgment in only eight of these). Some part of this uninspiring picture can be attributed to chronic court delays, though these do not appear to be excessive by Canadian standards. Elapsed average time from authorization to judgment in the four contested cases in which judgment has been given has been twenty-nine months.⁶⁹

In 1982, disappointed with the results of the original legislation and acting upon the advice of consumer groups and the *Fonds d'aide aux recours collectifs*,⁷⁰ the Quebec government enacted a series of reforms designed to further facilitate class action proceedings. Cooperatives were added to the list of organizations entitled to act as class representatives, and there was repeal of an earlier requirement that at least one member of the represented class had to have been a member of the organization at the time the cause of action arose.⁷¹ It is now possible for a non-profit corporation (such as a consumer protection association) or a cooperative to sue on behalf of an entire class the members of which have joined the corporation or cooperative after the litigious event in order to be represented in the suit. This provision has not yet been acted upon, and only 6% of all applications for authorization have been made by corporations, cooperatives or associations.⁷²

In order to reduce delay through appeal proceedings, immediate appeals as of right by defendants from orders authorizing class actions were also eliminated, though petitioners retained their immediate right of appeal

⁶⁹ The four cases of *Plouffe*, *Cloutre*, *Coté*, *ibid.*, and *Dalpe c. Ville de Bromont* (C.S. Bedford 455-06-000001-81) in which a municipal tax complaint of municipal mobile home owners was rejected. Quebec court delays are most severe in the judicial district of Montreal, but class actions begun in Montreal account for only slightly more than half of the total number of class actions begun in the province. *Fonds d'aide aux recours collectifs*, *supra*, footnote 60. In 1982 the average delay in civil matters for the entire province, including the district of Montreal, was 17.7 months from setting down for trial to trial: Direction générale des Services judiciaires, *supra*, footnote 61, p. 309. The statistics given in the text above indicate that relatively few cases have reached the usual stage of delay, that following the setting down for trial.

⁷⁰ See *Barreau* 82, avril, p. 12; *The Globe and Mail*, Toronto, January 31, 1981, p. 3. The *Fonds* also publicizes the class action mechanism and available funding through brochures, radio and television, and press conferences: see *Fonds d'aide aux recours collectifs*, *supra*, footnote 60, pp. 28-29.

⁷¹ L.Q./S.Q. 1982, c. 37, art. 23, amending art. 1048, C.C.P.

⁷² *Fonds d'aide aux recours collectifs*, *supra*, footnote 60, at p. 9. For reasons suggested in Part III of this article, it is highly unlikely that class actions instituted by corporate persons will be more successful than those instituted by physical persons members of the class. Courts are presently unwilling to extrapolate from the experience of one class member conclusions valid for an entire class. They will be even less likely to render judgment in favour of an absent class when the precise experience of a class representative is not before the court. For the ineffective character of actions brought by consumer protection associations in France, see *Le Monde Dimanche*, Oct. 30, 1983, p. 1.

from refusal orders.⁷³ This overt discrimination⁷⁴ between parties will have some effect in expediting class action proceedings, though defendants to date have been responsible for only ten appeals from a total of twenty-eight orders authorizing class actions.⁷⁵ The bulk of appeals have been undertaken by petitioners, responsible for twenty-six appeals from forty refusal orders at first instance.⁷⁶ Appeal by petitioners from orders of the *Fonds* refusing financial assistance remains possible.⁷⁷

Though the *Fonds d'aide aux recours collectifs* has been funding over 80% of the applications it receives,⁷⁸ problems of costs were perceived as a major barrier to class actions, and the 1982 legislation also effected changes in costs rules. Though the 'two way' or 'loser pays' costs rule has been retained in principle, the effect of the changes is to lower the amount of recoverable costs and to provide greater protection to class representatives from costs risks. Class action costs will be calculated in the future according to the tariff of costs applicable to civil causes involving amounts of from \$1,000 to \$3,000, and there has been repeal, for class actions, of a controversial supplementary counsel fee of 1% of the amount in question exceeding \$100,000 in cases involving more than \$100,000.⁷⁹ The possibility of unsuccessful class representatives being liable for costs awards in the tens or even hundreds of thousands of dollars in multi-million dollar suits has thus been eliminated.⁸⁰ As well, the powers of the *Fonds* to

⁷³ L.Q./S.Q. 1982, c. 37, art. 22, amending art. 1010, C.C.P.

⁷⁴ In normal proceedings in Quebec either party may appeal from an interlocutory order if leave is obtained (art. 511, C.C.P.) and if the interlocutory order falls within the conditions of art. 29, C.C.P. in either deciding the issues of the case, ordering the doing of anything which cannot be remedied by the final judgment, or causing unnecessary delay. These provisions will frequently result in a plaintiff whose action has been dismissed on a preliminary motion being allowed to appeal, and a defendant whose motion to dismiss has been refused not being allowed to appeal. Class action parties are removed, however, from this normal regime of interlocutory appeals and the class representative given a right of appeal, not subject to leave, while the class defendant is simply "without appeal" (art. 1010, C.C.P.). Were the normal regime of interlocutory appeals to prevail, it is quite possible class action defendants would be granted permission to appeal orders authorizing class actions, since the final judgment cannot remedy, by dismissal of the case, having to defend a class action for which authorization should not have been given. Orders authorizing the granting of a writ of evocation are thus subject to appeal, with leave of the court. (Art. 850, C.C.P.).

⁷⁵ *Fonds d'aide aux recours collectifs*, *supra*, footnote 60.

⁷⁶ *Ibid.*

⁷⁷ *Supra*, footnote 58.

⁷⁸ *Fonds d'aide aux recours collectifs*, *supra*, footnote 60.

⁷⁹ L.Q./S.Q. 1982, c. 37, art. 24, enacting art. 1050.1, C.C.P.

⁸⁰ In *Association pour la protection automobile c. Canadian Honda Motor Ltd.*, published in Hubert Reid & Denis Ferland, *Code de procédure civile annoté du Québec*, vol. 3, the Superior Court decided in 1981 that the 1% fee was inapplicable to proceedings at the stage of authorization, rejecting a claim by defence counsel for costs in the amount of \$675,650 (costs of \$650 for proceedings in an action in the amount of \$100,000 plus 1% of the additional damages claimed, in the amount of \$67,500,000).

finance class litigation have been extended, and it may now not only make specific grants for costs incurred in any financial year, as was previously the case; but also oblige itself for the future, thus ensuring class representatives of its support throughout the course of litigation.⁸¹ A class representative may of course still act without assistance from the *Fonds*, (with or without a contingent fee agreement).⁸² It is also possible to combine a contingent fee agreement with financing from the *Fonds*, thus providing counsel as well as party incentive.⁸³ A class representative, and his or her counsel, may thus act without personal financial risk, if the *Fonds* agrees to finance the case fully. In the event of failure the *Fonds* will cover taxable costs to the other side and the representative's own costs and legal fees (on a solicitor-client basis). In the event of success, any fees incurred by the representative unrecoverable from the defendant will be paid from the amount recovered by judgment,⁸⁴ or by the *Fonds*. Records of the *Fonds* for the last fiscal year indicate an average grant of \$4,845 for proceedings at the stage of authorization alone (for fees of counsel for the class and experts, disbursements, costs of notices and, where applicable, defendant's taxable costs).⁸⁵

These reforms took effect on June 30, 1982, but to date they appear to have had no impact on the rate of class action litigation, which even appears in a state of decline. In the period June 30, 1982 to November 15, 1983, only twenty class action authorization demands were filed in Superior Court.⁸⁶ It is possible that this low level of present activity is merely the result of negative reaction to the earlier, unamended, class action procedure. It is also possible, however, that it is symptomatic of more fun-

⁸¹ L.Q./S.Q. 1982, c. 37, art. 25, amending arts. 43 and 44 of the *Loi sur le recours collectif*/An Act respecting the Class Action, *supra*, footnote 57.

⁸² *Supra*, footnote 59.

⁸³ See *Nault c. Jarmark*, *supra*, footnote 67, upholding the binding nature of a contingent fee agreement vis-à-vis members of the class, though in the circumstances counsel claimed no more than that payable in the event of defeat, \$40.00 per hour according to the agreement. This type of winner's contingent fee (a percentage of judgment in case of success, normal or more modest fees in the event of loss) is said to be frequent in Québec, though no data is available. Its popularity may have increased since the creation of the *Fonds*. There is no need for counsel to finance litigation by bearing his or her own costs in the event of loss if the *Fonds* will pay normal fees for such an unsuccessful case. The *Fonds* may thus be looked to for normal support in case of loss, the judgment for richer rewards on a contingency basis in the event of success. Only the absent class members could object. Control by the court is possible, however, and the *Fonds* must be heard in all deliberations as to taxable costs and fees. *Loi sur le recours collectif*/An Act respecting Class Actions, *supra*, footnote 57, art. 31.

⁸⁴ Art. 1035, C.C.P.

⁸⁵ Calculation of the author based on amounts granted for authorization proceedings in the cases of *Bilodeau*, *Bolduc*, *Chartrand*, *Huneault*, *Labranche*, *Lebel*, *Pillin*, *Proulx* and *Vignola*, *Fonds d'aide aux recours collectifs*, *supra*, footnote 60, pp. 12-25.

⁸⁶ *Fonds d'aide aux recours collectifs*, *supra*, footnote 60.

damental problems with class litigation. The latter possibility is suggested by recent class action statistics at the federal level in the United States, where class action litigation has steadily declined from its 1970's peak of 2.7% of all litigation to a 1983 low of .4%.⁸⁷ United States statistics also show a low proportion of judgments in favour of a class (in only 12.3% of all class actions over a six and one-half year period in the United States District Court for the District of Columbia).⁸⁸ If it is thus the case that, in spite of detailed, permissive legislation and favourable costs rules, class actions are infrequently undertaken and produce a low yield, there may be systemic reasons in the adjudicative process for this phenomenon; grafting new organs on old trunks is infinitely complex.

In this regard, it is true that much contemporary literature has been devoted to the viability of the class action. This discussion, however, has been largely litigant and cost oriented. It has centred on such topics as *res judicata*, notice to the class, the adequacy of class representation, costs rules and contingency fees, forms of monetary relief and the effect of limitation periods. As in other intellectual or scientific efforts of system-building, great attention has thus been paid to cohesion and internal consistency. This is reflected in the language of much present literature, which speaks of the class action "device" or "mechanism" and its "design" and of the importance of "pragmatic" and "practical" concerns

⁸⁷ (1983), 8 Class Action Rep. 1. The percentage was .9% at the time of publication of the Report of the Ontario Law Reform Commission, *op. cit.*, footnote 2, p. 171. See also M. James O'Grady, *Consumer Remedies* (1982), 60 Can. Bar Rev. 549, at p. 575. "Despite the attractiveness of the concept, one sees little real evidence of consumer class litigation going forward in any significant volume anywhere in the world." For an illuminating statement of U.S. difficulties, see Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action* (1980), 80 Col. L. Rev. 299, at pp. 300, 301, 315, 339, 342; and, for the role of the United States Supreme Court in discouraging class litigation, Chayes, *supra*, footnote 7, at pp. 26-45.

⁸⁸ Ontario Law Reform Commission, *op. cit.*, footnote 2, p. 149. In a further 13.6% of District of Columbia cases settlement was reached prior to judgment. In U.S. practice settlement also usually intervenes if a judgment has been rendered in favour of the class, eliminating judicial supervision of recovery by individual members of the class. Criticism of these settlement patterns has centred on the role of counsel for the class. See Berry, *loc. cit.*, footnote 87, at p. 301: "These compulsions to settle distort and misdirect the deterrent and compensatory effects of class damage actions". Berry cites Charles W. Wolfram, *The Antibiotics Class Actions*, [1976] Am. B. Found. Research J. 251, at p. 358. "But widespread confidence in a properly administered system of private class action litigation is jeopardized by the almost automatic manner in which settlements have followed from class action certifications . . . the pressure on plaintiff attorneys to settle and be able to claim a sizable fee against the settlement creates a disturbing potential for an actual conflict of interest between the attorney and the class members". In the recent \$180 million pre-trial settlement of class litigation involving personal injury caused by "Agent Orange" defoliants in the Vietnam War, legal fees of some 1,100 lawyers were estimated as high as \$100 million dollars; see *In Re Agent Orange Product Liability Litigation* 506 F. Supp. 762 (1980); *The New York Times*, New York, May 8, 1984, p. 1; May 9, 1984, p. 132.

in its implementation.⁸⁹ Entirely consistent with this view are the criticisms of class actions which assume, even in the absence of empirical evidence, that class actions will be of significant effect. Class actions are thus castigated because they will "flood the courts", implement "legalized blackmail" or become "unmanageable".⁹⁰ This entire perspective is one which has largely ignored the institutional background in which the class action must function. In concentrating on the costs of litigating a class action, this discussion has largely ignored the residual burdens of adversarial and liberal adjudicative procedure; in concentrating on class management, it has largely ignored classical restraints on the judicial function; in concentrating on possible negative effects of class actions, it has ignored the legal system's own highly developed mechanisms of defence.⁹¹ A variant of this attitude is the one which sees in a presently 'conservative' Bench or Bar the cause of class action difficulties, treating what is in effect a permanent characteristic of the legal profession as an unfortunate blip in the course of class action progress. The precision of much class action discussion has therefore been obtained at the expense of treatment of larger and more opaque problems, the importance of which is only now becoming evident. In what follows an effort will be made to assess the class action procedure against essential, though often imprecise, components of the adjudicative process.

III. *Class Actions, Adjudicative Proceedings and the Judicial Function*

The first task of class action proponents is to create a class action model which in itself poses no obstacles to class action adjudication. Some highly visible and sharply defined features of the adjudicative structure must inevitably be overcome in this process, the two most obvious examples being those of costs and appeal delays. This process of designing a class action procedure perfect unto itself has now arguably been completed in Quebec, where there has been virtual elimination in appropriate cases of class representatives' liability for costs or fees and of defendants' rights of appeal from interlocutory authorization orders.⁹² Only problems of a 'conservative' Bench and Bar remain. In Ontario, however, it is doubtful, given the Quebec and United States experience, whether the model proposed by the Ontario Law Reform Commission is sufficiently facilitative to overcome even the problems associated with costs and appeals.

⁸⁹ See, for example, Chayes, *loc. cit.*, footnote 7, at p. 26; Cappelletti and Garth, *loc. cit.*, footnote 7, at p. 136; Ontario Law Reform Commission, *op. cit.*, footnote 2, at p. 2.

⁹⁰ See Ontario Law Reform Commission, *supra*, footnote 35 and accompanying text. This article *passim*, is an attempt to explain the general inaccuracy of these criticisms, but there may be particular cases of prosecution of class actions which critics would qualify as 'legalized blackmail'.

⁹¹ Cf., Vining, *Legal Identity* (1978), p. 47: "... the instrumentalist . . . sees only the movement toward the new and ignores the resistance entirely".

⁹² See text accompanying footnotes 72-84.

As to costs, the Ontario Commission rejects public funding of class actions⁹³ and proposes a 'no-way' rule, by virtue of which costs in principle would not be recoverable from the other side. Class representatives would thereby be freed from the burden of compensating successful defendants on a party and party basis,⁹⁴ though the court would retain a discretion to award costs in certification proceedings if the action should not have been brought.⁹⁵ The risk of a costs award has therefore not been entirely eliminated. A more significant obstacle, however, is to be found in the vehicle for overcoming a class representative's liability, on a solicitor and client basis, to the class lawyer. In the event the action is successful, fees of the class lawyer would be taken from the class award, as is the case in Quebec.⁹⁶ In the event of an unsuccessful action, however, the suggestion is simply to shift the loss from the class representative to the class lawyer, through allowing a form of court-supervised contingency fee agreement. Thus, in the event of failure, no fees would be payable to the lawyer, though in the event of success the fee ordered by the court to be taken from the class award would include an amount to compensate for the risk of non-payment in the event of loss. It is very doubtful, however, whether court-supervised fee awards can compensate adequately for the risk undertaken by counsel acting on a contingency basis. Courts cannot be seen to be making 'windfall' awards of fees, and risk-compensation awards, if they represent true compensation, must have this appearance. They must, over time, compensate counsel, wholly or in significant part, for other cases lost. Successful classes must bear the financial burden of counsel for unsuccessful ones. Judges will not, however, for reasons developed later in this paper, assume the burden of cost allocation throughout all cases by issuing apparently disproportionate awards in individual cases. The American experience is already evidence of this, where, in fixing contingent awards,⁹⁷ increasing weight is given to time and labour expended by the

⁹³ Ontario Law Reform Commission, *op. cit.*, footnote 2, p. 713. The Commission expresses its belief in 'private initiative' and apprehension as to the bureaucratic necessities of administering a fund.

⁹⁴ Act respecting Class Actions, *supra*, footnote 21, s. 41.

⁹⁵ Ontario Law Reform Commission, *op. cit.*, footnote 2, p. 709. The proposed Ontario rules on costs follow the U.S. model in adopting a 'no-way' rule and in authorizing a form of quasi-contingent fees (as to which see *infra* footnote 97 and accompanying text) but depart from the U.S. model in allowing costs awards to be made in certification proceedings which should not have been brought. For U.S. costs practice, see Ontario Law Reform Commission, *op. cit.*, footnote 2, pp. 664-668.

⁹⁶ Act respecting Class Actions, *supra*, footnote 21, s. 45; art. 1035, C.C.P. The class representative is thereby freed of his or her individual liability for solicitor-client costs.

⁹⁷ Ontario Law Reform Commission, *op. cit.*, footnote 2, pp. 672-678, with the references. This phenomenon may be significant in explaining the decline of class action litigation in the U.S.: *Supra*, text accompanying notes 87, 88. Given the fact that few U.S. class actions give rise to judgments in favour of the class (12.3%) true risk compensation from granted awards might even be impossible. Nor does the Ontario Commission provide

lawyer. In short, the method proposed by the Ontario Commission will not provide adequate compensation to lawyers bearing the cost of losing class actions, and lawyers will therefore not prosecute class actions in any appreciable number. The Ontario Commission has therefore not moved significantly from one of the fundamental premises of the existing adjudicative system, that its costs are largely borne by parties and their counsel, according to rough rules of equality. Making a minor shift in cost allocation on one side of the litigation, from plaintiff's representative to plaintiff's counsel, neither reduces the burden of costs nor opens reliable new sources of revenue. Access to justice is unlikely to be improved. Either one is committed to overcoming costs of a traditionally onerous and optional system of justice, or one is not.

The underlying commitment of the Ontario Commission to traditional procedure is also evident in its proposals relating to appeals as of right from orders made at the stage of authorization or certification. The importance of such rights of appeal is evident from the fact that years of appellate delay may have to be added to the front end of class action proceedings, with evidently similar prospects at the rear end after years of litigation on the merits. In the United States, appeals from certification orders have been all but eliminated, leaving unsuccessful defendants only the further battlegrounds of trial and full appeal, and unsuccessful plaintiffs the prospects of going it alone (and possibly challenging the non-certification order on full appeal) or dropping out.⁹⁸ The rationale is apparently clear: that which was meant as a large-gauge screening process should not become time-consuming and refined through appellate rule-making. Quebec has partially adopted this view, in a discriminatory fashion, by eliminating defendant appeals from authorization orders while continuing to allow them on the part of class representatives.⁹⁹ The Ontario proposals, however, call for full rights of appeal by both sides to the Divisional Court from orders made at the stage of certification.¹⁰⁰ Neither side, of course, will exercise a monopoly in abusive appeals. The burden of preliminary appeal proceedings will, however, when added to the remaining difficulties of class litigation, be overpowering in many cases.

any formula for calculating compensation for risk, or give any indication of the relevance of: estimates of success or failure in the individual case (before or after judgment, by counsel or by the court), previous class action litigation by the counsel in question, or "industry-wide" statistics on class action successes and failures. All of these questions or problems arise over and above those traditionally associated with contingent fees, notably reconciling the financial interest of counsel in the outcome of the case with his or her ethical responsibilities towards the court.

⁹⁸ Ontario Law Reform Commission, *ibid.*, pp. 812-819, with the references.

⁹⁹ *Supra*, footnote 73.

¹⁰⁰ Act respecting Class Actions, *supra*, footnote 21, s. 37. Appeal to the Court of Appeal from the order of the Divisional Court would be possible with leave; Supreme Court of Ontario, Rules of Practice, R.R.O. 1980, Reg. 540, Rule 499b.

Ontario's class action model therefore appears less likely than those of Quebec and the United States to overcome traditional problems of costs and delay. Even were it more facilitative in those regards, however, it would face the residual limits of the adjudicative process and the judicial function which have substantially impeded class action litigation in Quebec and the United States.

The civil adjudicative process, whether of the adversarial or of the investigative tradition,¹⁰¹ is profoundly marked by liberal political philosophy. The individual is free to sue or not sue, to defend or not defend. If litigation is decided upon, its terms are a matter of party choice and courts will respect this choice. Both sides are free to make their case, and courts will follow them through a wide range of procedural devices chosen to allow full presentation of fact and law. It is a process sympathetic to detail, profoundly conscious of principles of natural fairness, and tolerant of uncompromising struggle. Because of all this, and because of the ensuing expense, it seeks both to bestow this attention where it is most needed, and to ensure that it is not wasted. Only true adversaries are thus blessed with standing, aggregation of claims is excluded for purposes of establishing jurisdiction, resolved disputes are declared moot, and a decision rendered becomes permanent law for those (though only those) having sought it. If each of these ingredients is inevitably elastic and subject to interpretation, the entire process remains faithful to its dominant ethic. The judiciary (particularly the elitist one of the common law tradition) is thus not a force of police, and the entire corpus of civil or private law is revealed, through the nature of its enforcement mechanism, as an optional device for acute conflict resolution. The so-called 'publicization' of private law, through broadening of rules of standing, reliance on general clauses of Bills of Rights, or efforts to engage in class litigation, may remain a marginal phenomenon absent fundamental changes in institutions. It is perhaps more appropriate to speak of the 'privatization' or dilution of the concept of public law.¹⁰²

What are the consequences of this for the class representative and class lawyer in particular? They face, over years of time, an implacable and resourceful opponent (as most cases now demonstrate), large numbers of procedural obstacles, the burden of advancing what are usually controversial claims of small individual amounts on behalf of absent parties, and a

¹⁰¹ See the remarks *infra*, text accompanying footnote 136, for limits inherent in the role of even the investigative judge of Continental jurisdictions. The procedures of Ontario and Quebec fall squarely within the adversarial tradition.

¹⁰² Practices in the enforcement of criminal law are particularly suggestive in this regard, notably those of plea bargaining and diversion as techniques for avoidance of encumbered court roles. Prosecutorial discretion also plays an essential role in limiting court intervention, perhaps most notably in preventing prosecution, absent proof of fault, in vast numbers of cases involving so-called 'strict liability' offences. See Law Reform Commission of Canada, *Studies on Strict Liability* (1974), pp. 10, 63-153.

judiciary trained in principle to leave them to their own devices and to ignore parties not before the court. In Quebec the obstacle course reads as follows (the author apologizes for its length, but it is neither of his invention nor imagination):

- (1) petition to the *Fonds* for funding;¹⁰³
- (2) preliminary screening by the *Fonds* to determine need and merits;¹⁰⁴
- (3) possible contested appeal from refusal of the *Fonds* to the Provincial Court;¹⁰⁵
- (4) possible contested review by the Superior Court of exercise of jurisdiction by the *Fonds* or the Provincial Court;¹⁰⁶
- (5) possible contested appeal with leave to the Court of Appeal from review by the Superior Court;¹⁰⁷
- (6) possible further contested appeal with leave to the Supreme Court of Canada;¹⁰⁸
- (7) petition to the Superior Court for authorization to commence class action;¹⁰⁹
- (8) request by defendant for delay to permit written contestation;¹¹⁰
- (9) filing of affidavit evidence by both sides;¹¹¹
- (10) possible examination on affidavit evidence;¹¹²
- (11) possible contested motion that application unfounded in law;¹¹³

¹⁰³ See the requirements in the Règlement concernant la demande d'aide aux recours collectifs/Regulation respecting the application for assistance for a class action, R.R.Q. 1981, c. R-2.1, r. 1.

¹⁰⁴ Loi sur le recours collectif/An Act respecting the Class Action, L.R.Q./R.S.Q. c. R-2.1, art. 23.

¹⁰⁵ *Ibid.*, arts. 35-37; *Association québécoise pour l'application du droit à l'exemption de l'enseignement religieux c. Fonds d'aide aux recours collectifs*, [1979] C.P. 408; *Dorion-Rossignol c. Fonds d'aide aux recours collectifs*, [1980] C.P. 390; *Bédard c. Fonds d'aide aux recours collectifs*, [1981] C.P. 171.

¹⁰⁶ Art. 846, C.C.P.; *Association québécoise pour l'application du droit à l'exemption de l'enseignement religieux c. Dumais*, [1980] C.S. 155.

¹⁰⁷ Art. 29, C.C.P.

¹⁰⁸ Supreme Court Act, R.S.C. 1970, c. S-19, s. 41(1), as amended.

¹⁰⁹ Art. 1002, C.C.P.; Règles de pratique de la Cour supérieure du Québec en matières civiles/Rules of practice of the Superior Court of Quebec in civil matters, R.R.Q. 1981, c. C-25, s. 8, Section/Division XII.

¹¹⁰ *Ibid.*, Rule 53.

¹¹¹ *Ibid.*, Rules 51-54; art. 1002, C.C.P.

¹¹² *Ibid.*, Rule 55.

¹¹³ Art. 165.4, C.C.P.; *G.L. c. Le Procureur Général du Québec*, [1981] C.S. 1167.

- (12) possible contested appeal by petitioner with leave to the Court of Appeal in the event of successful motion;¹¹⁴
- (13) possible further contested appeal with leave to the Supreme Court of Canada;¹¹⁵
- (14) contested application in the Superior Court;¹¹⁶
- (15) possible contested appeal to the Court of Appeal in the event of refusal of authorization;¹¹⁷
- (16) possible further contested appeal with leave to the Supreme Court of Canada;¹¹⁸
- (17) publication of notice to class members;¹¹⁹
- (18) issuance and service of writ (a foot is now in the door);¹²⁰
- (19) all normal pre-trial procedure, including possible discovery and all preliminary motions and exceptions and possible appeals therefrom;¹²¹
- (20) all motions relating to particular problems of class management;¹²²
- (21) trial and judgment on common questions;¹²³
- (22) possible contested appeal as of right by both sides to the Court of Appeal;¹²⁴
- (23) possible further contested appeal with leave to the Supreme Court of Canada;¹²⁵
- (24) individual reclamations of class members, which may be contested;¹²⁶
- (25) execution.¹²⁷

¹¹⁴ Art. 29, C.C.P.

¹¹⁵ Supreme Court Act, *supra*, footnote 108.

¹¹⁶ Arts. 1002, 1003, C.C.P.

¹¹⁷ Art. 1010, C.C.P.

¹¹⁸ Supreme Court Act, *supra*, footnote 108.

¹¹⁹ Arts. 1005, 1006, C.C.P.

¹²⁰ Arts. 1011, 110, C.C.P.

¹²¹ Arts. 1011, 1019, C.C.P. In the case of *Monastesse c. La Fraternité des chauffeurs . . . de la C.T.C.U.M.*, (C.S. Mtl. 500-06-000014-809), proceedings on a motion for joinder of a third party reached the level of the Supreme Court of Canada, though the Court refused permission to appeal the order of the Quebec Court of Appeal.

¹²² Art. 1045, C.C.P.

¹²³ Arts. 1027-1040, C.C.P.

¹²⁴ Art. 1041, C.C.P.

¹²⁵ Supreme Court Act, *supra*, footnote 108.

¹²⁶ Arts. 1039, 1040, C.C.P.

¹²⁷ Arts. 525-732, C.C.P.

Most of this list (which would be almost as long in Ontario) is peculiar to class action procedure and over and above traditional, lengthy, and expensive adversarial procedure. It is true that the class representative in Quebec may be freed of concerns of costs and abusive defendant appeals from authorization orders, but an author has recently referred to that which remains as the "time-consuming, and potentially nerve-wracking burden of product or service litigation".¹²⁸ This is the social cost of class action litigation itself, largely if not totally ignored in discussions of class action costs, and focussed almost entirely, in terms of prosecution of the case, on the class representative. In one of the most contested Quebec class action cases to date, that of Quebec City mass-transit users against the Quebec City Urban Transit Commission for compensation for lack of service, the class representative, after succeeding in the Supreme Court of Canada on the issue of authorization, abandoned the case entirely,¹²⁹ unwilling to face years of future litigation. Life is too short for class actions.

Not only is the system strewn with formal obstacles, but there remains the burden of convincing judges that a particular class action should proceed. How does a judiciary, particularly one trained in the adversarial tradition, react to class action proceedings? Very negatively, one might expect, since much of procedural law is judicial in origin and rooted (it will be argued later) in profound convictions as to the judicial function. Why should an independent and elitist order of adjudicators now begin to re-write, even with legislative prodding, centuries old concepts of *res judicata*, standing and adjudication according to rigorous examination of detailed evidence presented in open court? This change might flow from a changed concept of the judicial function (as to which, again, more later), but absent such an institutional upheaval the bias of existing law clearly favours rejection of class action attempts. How can one know that a self-designated representative will adequately represent a class, knowing little of the representative or class, and knowing little of how accountable

¹²⁸ O'Grady, *loc. cit.*, footnote 87, at p. 575: The burden imposed on class representatives may also be exacerbated in some cases by fear of reprisals. If such fear is, as suggested by the Ontario Law Reform Commission (*supra*, footnote 16), a deterrent to individual suit by members of the class, how much greater must be the fear on the part of the class representative. Is it reasonable to expect that, of those afraid to sue for themselves, one will emerge to sue for all? A U.S. author has spoken of the need for a "minor hero" if an individual is to challenge the status quo in many situations; Owen M. Fiss, *The Forms of Justice* (1979), 93 Harv. L. Rev. 1, at p. 19.

¹²⁹ *C.R.U.T.C.Q. c. Q.U.C.T.C.*, [1981] 1 S.C.R. 424; *Fonds d'aide aux recours collectifs*, *Registre des recours collectifs*, p. 10. For comment on the decision of the Supreme Court, see W.A. Bogart, *Class Actions, The Court and Commentators* (1982), 3 *The Sup. Ct. Law Rev.* 425. In another action on behalf of mass-transit users against a union allegedly responsible for an illegal strike, three years of intense interlocutory proceedings (including two petitions for leave to appeal to the Supreme Court of Canada) have resulted in expenditures thus far of \$27,613 by the *Fonds*, with trial some distance in the future: See *Monastesse c. La Fraternité des chauffeurs . . . de la C.T.C.U.M.*, *supra*, footnote 121.

representatives are towards their classes.¹³⁰ Why is fact-finding before a Master superior to, or even equivalent to, fact-finding before a judge? How can the ruling on individual claims be assimilated to mere 'labelling' and how is 'labelling' to be distinguished ultimately from 'qualification' and adjudication? How can the judiciary establish such a distinction in the court system while tearing it down in matters of judicial review of the executive?¹³¹ Why should the class action device be allowed to distort the traditional adjudicative process, when concepts of legal aid, small claims courts, administrative tribunals, arbitration and conciliation have left it intact, and have still greatly widened the dispute resolution process? The decision of the Supreme Court of Canada in *Naken* is thus as much an affirmation of a holistic concept of adjudication in the traditional mould as it is a demonstration of the *lacunae* of Rule 75. It is remarkable, given this underlying current, that the courts of Quebec have been as receptive as they have been to class actions, the twenty-eight authorizations thus far rendered at first instance representing 41% of cases actually proceeded with and not abandoned, settled or pending.¹³² In Ontario the percentage might well be lower, given the requirement that a proposed class action must survive an imprecise costs-benefit test at the stage of authorization,¹³³ in addition to more well-known (and very open-ended) requirements of class action. In short, previous law has been to the effect that class actions are dangerous and should be excluded; legislation stating simply that they may be undertaken if the court thinks it appropriate is not legislation courts can readily follow. It exposes them to the tyranny of general clauses while requiring them to beat a retreat on centuries of crystallized wisdom defining the judicial role.

This implicit hostility of the adjudicative system to class actions is exacerbated by the fact that judges in class actions must become actively involved in their prosecution. It is not enough simply to revise rules of *res judicata*, standing and proof and then proceed as before. Absent parties must be protected by the court (conflict of interest of class representatives

¹³⁰ Cappelletti and Garth, *loc. cit.*, footnote 7, at p. 139.

¹³¹ The notion of "labelling" is referred to by Estey J. in *Naken*, *supra*, footnote 1, at pp. 908 (S.C.R.), 405 (D.L.R.) to describe a process of identifying members of a class entitled to individual judgment in certain types of case. The emphasis is on the routine or mechanized character of the proceedings. No judgment, however, is automatic or mechanical, a conclusion implicit in the extension of judicial control over executive acts to ensure compliance with procedural fairness: see David J. Mullan, *Administrative Law* (2nd ed., 1979), pp. 3-97—3-107, with references. Resort to administrative law concepts within the judiciary may be seen as a precursor of the bureaucratization of court structures, as to which see Vining, *Justice and the Bureaucratization of Appellate Courts* (1982), 2 Windsor Yearbook of Access to Justice 3, and, for inherent dangers of court bureaucratization, *infra*, note 150 and accompanying text.

¹³² *Supra*, footnote 66.

¹³³ *Supra*, footnote 24.

and their counsel is a common theme in class action discussion) and the size and complexity of the litigation requires active management from above as opposed to simple party direction. In the United States it has been said, and not in a critical manner, that the role of the class action judge has changed in some cases from that of a "passive adjudicator" to that of an "active systems manager".¹³⁴ Yet many judges, and others, feel that it is a contradiction in terms to speak of a "judge" as an "active systems manager", and therefore reject any procedures calling for judicial procedural initiatives.¹³⁵ All traditional arguments favouring adversarial (accusatorial) as opposed to investigative (inquisitorial) procedure come here into play, though judges of both traditions have regularly declined more active managerial roles.¹³⁶ There is the further circumstance that no legislator has sought to indicate with any precision how class action management should be effected. Judges must thus not merely manage, they must manage *inventively*. Most judges, in most places and at most times, choose not to be inventive.

This judicial posture in matters of procedure is of course but a part of a larger judicial ethic. Impartiality and restraint in the direction of proceedings is necessary to ensure impartiality and restraint in judgment. Impartiality and restraint in judgment is immanent in the judicial function and represents the underlying ground for the elaborate institutional guarantees

¹³⁴ Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the 'Class Action Problem'* (1979), 92 Harv. L. Rev. 664, at p. 667.

¹³⁵ This is the view expressed by the Chairman of the Ontario Law Reform Commission, Dr. Mendes da Costa, *supra*, footnote 37. See, for vigorous criticism of judicial procedural initiatives in the United States, in the particular context of pre-trial proceedings, Judith Resnick, *Managerial Judges* (1982), 96 Harv. L. Rev. 374.

¹³⁶ In France legislative exhortation of the judiciary to more vigorous and individual control of dockets is reflected in changes in terminology, from "juge chargé de suivre la procédure" to "juge des mises en état" to, most recently, "juge de la mise en état". For the evolution in legislation see Jean Vincent & Serge Guinchard, *Procédure civile* (20th ed., 1981), pp. 603-623. The French judge, however, persists in deciding motions (though more of them and often at an earlier stage than in North America procedure) rather than initiating action. For the "faillite de la mise en état" see A. Damien, *L'implosion judiciaire*, G.P. 1980.2.390, at p. 391; and, for similar difficulties at the appellate level, Roger Perrot, *Dix ans d'application de la procédure d'appel: Bilan et perspectives*, G.P. 7-8 Sept. 1983, p. 3. In the Federal Republic of Germany "countless" procedural reforms have attempted acceleration of procedure: Othmar Jauernig, *Zivilprozessrecht* (19th ed., 1981), p. 83 and more generally pp. 82-89. For the most recent, see Harald Franzki, *Die Vereinfachungsnovelle und ihre bisherige Bewährung in der Verfahrenswirklichkeit*, NJW 1979.9; Peter Gottwald, *Simplified Civil Procedure in West Germany* (1983), 31 Am. J. Comp. L. 687. In Holland a commentator stated recently: "Even when the court has formal authority to establish a timetable for the proceedings and may order measures that should prepare the case for decision, it is mostly the parties who prompt them. Where the Court does in fact intervene on its own account, doctrinal differences of opinion are the immediate result". H.U. Jessurun d'Oliveira, *Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation* (1983), 30 Netherlands Int. L. Rev. 161, at p. 172.

of independence enjoyed by contemporary judges.¹³⁷ Impartiality implies a passive role in the direction of societal affairs, a willingness to await authoritative external sources; restraint implies decision-making according to proof, judicial orders limited to facts proved (and therefore capable of simple forms of execution, as opposed to more burdensome measures of implementation) and judicial action in response only to clear requests. Consider however the compatibility of the class action with this millennial-old ethic of judicial decision-making.

A class action is an action on behalf of an absent class. A class (ignoring for the moment Marxist variations) is a group each member of which is taken to have one or more identical characteristics, or, in the language of Rule 75, "the same interest". The judiciary renders judgment in favour of, or against, the class, and its judgment is said to be binding on all members of the class. The judiciary thus is requested to act on behalf of people who have not requested judicial intervention, to give judgment in the absence of proof of the requisite elements of each class member's claim, to thereby *presume* commonality in the sense of general though unproved characteristics,¹³⁸ and to issue orders necessarily requiring

¹³⁷ See H. Patrick Glenn, *La responsabilité des juges* (1983), 28 McGill L.J. 228, at pp. 249-261, 275-283.

¹³⁸ The requirement of presuming commonality is necessary because courts refuse to extend the concept of legal personality beyond those fictitious or corporate persons whose existence is derived from consensual acts of their members or a grant from the State, in both cases subject to a large number of restrictions and formal conditions. The entire law of physical and corporate persons, to say nothing of substantive law generally, thus informs us of the legal system's fundamental concern with defining the rights and obligations of each of us. The court's traditional function of hearing all the facts of a case and giving an order capable of execution is the mechanism for ensuring that these rights and obligations are respected, in as scrupulous, careful and final a way as possible. *Ad hoc* groups of unconsenting members are not legal persons, and their recognition as such would destroy what is probably the most fundamental concept of the Western legal tradition, the person as responsible subject of law. The class action procedure thus asks that we accept an apparently less damaging fiction, that unproved cases of different persons are identical and can be safely treated as such by judges in rendering class action judgments. Yet, as stated by Estey J. in *Naken, supra*, footnote 1, at p. 405: "The range of circumstances which may be found to exist between [members of a class] is almost infinite", and refusal to hear of such circumstances is a refusal to exercise the judicial function. Commonality can be established only at the expense of particularity. Where judges have been drawn into class action litigation, notably in the U.S., the requirements of a 'commonality' test for authorization of a class action remain totally obscure. See Ontario Law Reform Commission, *op. cit.*, footnote 2, at pp. 336-338. This is inevitable, since a finding of commonality between absent persons based on affidavit evidence is a rejection both of the notion of the individual case and of the requirement of adequate proof of claims. Once such limits of the judicial function have been abandoned, commonality is anything one wishes it to be, and rules are made for classes considered appropriate. The decline of class action litigation in the U.S. (*supra*, footnote 87 and accompanying text) may thus ultimately be a result of awareness by the U.S. judiciary that authorization of class actions on "common questions" is synonymous with a refusal to exercise the judicial function in regard to possible claims of particularity. At least one U.S. author, in the mass of literature, has referred to "... the

further adjudication for purpose of implementation. This is of course a description not of judicial decision-making in the traditional sense, but of legislation, the creation, often at some interested party's initiative, of general norms applicable to generically described groups of varying dimension and necessitating further structures of implementation or adjudication. The class action is therefore not, in spite of protestations to this effect, merely a new adjudicative procedure.¹³⁹ It is highly exceptional in character (witness the controls to which it is subject) and it is quite possible to see in it a new form of the *arrêt de règlement* of the unlamented pre-Revolutionary French judiciary,¹⁴⁰ a "serious judicial usurpation of the functions of the legislature".¹⁴¹ It is not without interest that its origins

dubious premise that class members will always share a finite number of readily identifiable common issues", and concluded that "[t]his premise is false . . . The class opponent can unearth an infinite variety of uncommon issues". Berry, *loc. cit.*, footnote 87, p. 303. As to the extent to which such judgments do constitute *res judicata*, see *infra*, footnote 154 and accompanying text.

¹³⁹ Hubert Reid, *La loi sur le recours collectif: premières interprétations judiciaires* (1979), 39 R. du B. 1018, at p. 1029. The legislative characteristics of class action adjudication have been well described in the U.S.A. in Geoffrey B. Hazard, *The Effect of the Class Action Device upon the Substantive Law* (1973), 58 F.R.D. 307, at p. 308: "Its unique characteristic is the assertion that a large number of individuals are, in one aspect of their legal status, indistinguishable from each other and that they should therefore be considered essentially as one. The members of the class can say this of themselves, precisely because in this aspect of their legal status they were treated as one by their antagonist, or so they claim. . . . The legislative viewpoint involves thinking in large numbers, in terms of classes and sub-classes. . . ." Perhaps the most distinctly legislative feature of the class action judgment is that it purports to create individual remedies for each member of the class, as opposed to simply injunctive or declaratory relief or damages limited to those of a named plaintiff. The class action is thus a much more radical concept than that of eliminating requirements of standing and allowing a member of a group all members of which have been similarly affected by an act of the defendant to seek injunctive or declaratory relief, or damages for the named plaintiff's individual harm. A broader concept of standing has been espoused by the Supreme Court of Canada in public law actions: see *Thorson v. Attorney-General of Canada* (No. 2), [1975] 1 S.C.R. 138, (1974), 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, (1975), 55 D.L.R. (3d) 632; *Minister of Justice of Canada v. Borowski*, [1982] 1 W.W.R. 97, (1981), 130 D.L.R. (3d) 588. Quebec courts have also displayed a willingness in some cases to adjudicate individual claims for damages might have been precluded by traditional concepts of standing, given the similarity of plaintiff's claim to those of other members of the public. See *Syndicat des Postiers du Canada c. Santana Inc.*, [1978] C.A. 114 (granting \$1,000 in damages to the corporation for damage caused by illegal postal strike); cf., in the U.K., *Gouriet v. Union of Post Office Workers*, [1977] A.C. 435, [1977] 3 All E.R. 70 (H.L.). In the U.S., however, even a broader concept of standing has found disfavour: see Robert Allen Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform* (1977), 30 Rutgers L. Rev. 863; Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment* (1977), 62 Cornell L. Rev. 663. Cf. earlier U.S. developments described in Vining, *op. cit.*, footnote 91.

¹⁴⁰ As to which see J. Dawson, *The Oracles of the Law* (1968), pp. 308-311, 376, 379. The use of such regulatory decrees was most frequent in the area of private law.

¹⁴¹ J.A. Jolowicz, *The Protection of Diffuse, Fragmented, and Collective Interests in Civil Litigation*, United Kingdom National Report, Second International Congress on the

are in Equity, and one commentator has concluded that "Equity had entered this field as an instrument of royal political and social policy rather than as a strictly 'adjudicative' tribunal".¹⁴²

To say that class actions involve the judiciary in a legislative function is not, however, in the view of many, to condemn them. Increased judicial power is today frequently defended as inevitable in the conditions of western, liberal society. This synchronic concept of "modernity" would see the judiciary expanding in influence in response to the growth of measures of mass social control. The class action becomes simply a useful device in the fulfillment of this contemporary judicial role.¹⁴³ A more universalist justification may be found in historic doctrines of judicial law-making, particularly those of common law countries. For if class action judgments are a form of law-making, in what manner can they be distinguished from binding precedent, long accepted as a necessary form of judicial commitment in the absence of legislative guidance? Yet neither of these broad possible justifications for class action development can be taken as established, and there is much to indicate they are mistaken.

Do modern conditions force a new role upon our judges? Much of the judicial system itself would suggest a negative response, since it remains in general outline as hostile as ever before to the pursuit of even individual claims. An elitist judiciary, small in number, functioning in an expensive and time-consuming court system with limited rights of appellate review, is not an obvious challenger to established bureaucracies. To the extent there has been no significant increase in judicial resources it may be presumed that society has not renounced the ideal of limited, and therefore more impartial, judicial activity. Access to justice, in the measure that it uses up this valuable commodity of impartial decisions, is therefore actively discouraged by existing judicial structures. Yet, it is said, this lag of current institutions must be corrected and is in itself no guide to a correct model. Inertia must not be confused with wisdom. Not only must courts be adequately staffed to meet increasing caseloads, they must widen the scope of judicial enquiry and be more receptive to re-allocation of power within

Law of Civil Procedure, Wurzburg, 1983, p. 15, cited in Cappelletti and Garth, *loc. cit.*, footnote 7, at p. 142.

¹⁴² Yeazell, *loc. cit.*, footnote 14, at p. 893.

¹⁴³ See, with qualifications, Chayes, *loc. cit.*, footnote 7, *passim*; Cappelletti and Garth, *loc. cit.*, footnote 7, *passim*. Compare, however, Vining, *op. cit.*, footnote 91, p. 49: "... we accept too easily the proposition that the organization of society has in fact changed in the respects important here, in particular that it has been deatomized, institutionalized, and end-oriented. Think of the many human beings in preindustrial society related through their dependence on territorial magnates, or guilds, or church organizations. They were not alegal institutions. The powers of the decision-making officers from squire to bishop were not absolute. Members had rights, and both powers and rights were derived from the law and ultimately enforced by courts. Those organizations too had institutional imperatives".

the state. One of the recurring justifications for class actions is that of assisting less powerful elements of society. Improved access to justice, concludes the Ontario Law Reform Commission, a good thing in itself, will result in desirable behaviour modifications,¹⁴⁴ and the class action is therefore justifiable as a means to those ends.

The unanswered question in the debate thus far is why increased access to justice and any possible behaviour modification justifies such a significant distortion of the judicial function. Even if one accepts the need for increased access to justice and behaviour modification, as well as the potential of class actions to effect them,¹⁴⁵ why do these arguable benefits outweigh the hazards of inviting the judiciary into the legislative arena? There is no discussion in the report of the Ontario Law Reform Commission of this question, in spite of its view that class actions will result in behaviour modification. Are there no institutional hazards for the judiciary in openly legislating changes in the structure of power in society? Will a judiciary which has engaged in class legislation for a half-century have impaired its adjudicative authority?

If one admits to such institutional dangers in implementing class actions, how are they to be justified? A radical response, naively Marxist, might argue that class actions are a useful element of class struggle and that institutional limitations are of no fundamental consequence in this struggle. The social significance of class actions would be borne out by Quebec class action statistics, indicating a massive pattern of physical persons acting as plaintiffs against corporate or governmental defendants.¹⁴⁶ It is unlikely, however, that Marxists will applaud class action legislation for these reasons, which assume both the continuing existence of the legal superstructure in one form or another, and its relative autonomy in providing some check on the owners of means of production. Even were the judiciary to collapse under the weight of such new functions, nothing would prevent the emergence of more repressive structures. The class action device would be thus merely a bourgeois, liberal invention capable of no more significant advancement of class interests than that which can be effected by the legal system as a whole. Any possible resulting reallocation of wealth would

¹⁴⁴ *Supra*, text accompanying footnotes 15-19.

¹⁴⁵ For doubts as to serious behaviour modification flowing from class actions, see Simon Chester, *Class Actions to Protect the Environment: A Real Weapon or Another Lawyer's Word Game*, in Swaigen (ed.), *Environmental Rights in Canada*, p. 60, at pp. 66-68; and for non-instrumentalist views of common law adjudication, Richard A. Epstein, *The Social Consequences of Common Law Rules* (1982), 95 Harv. L. Rev. 1717; John McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History* (1983), 3 O.J.L.S. 155.

¹⁴⁶ *Fonds d'aide aux recours collectifs*, *supra*, footnote 60, p. 9. 93.62% of class actions to date have been brought by physical persons. Defendants have been profit-making corporations (56.38%), cities and towns (9.57%), the Quebec government (7.45%), public organizations (14.89%), physical persons (7.45%) and unions (4.26%).

merely delay development of true class consciousness, and the only possible advantage in the creation of class actions could therefore be one of propaganda, flowing from their failure. Such propaganda would attribute the failure of class actions not to the autonomy and restraint of the judiciary but to the subservience of its members to economic forces. Nothing new, however, would be thereby added to Marxist discourse.

Truly radical support for class actions is thus infrequent, and justification for them is most profitably sought within the cadre of more traditional and instrumentalist legal thought. Institutional dangers to traditional separation of powers must thus be shown to be minimal (as opposed to ignored) and taken as offset by apparent gains in accessibility to institutions and some possible (though in all probability minor) shifting of resources. Some tentative efforts in this direction may be seen in statements to the effect that the judiciary in rendering class action judgments relies on pre-established law or standards, or that the effect of class actions on existing substantive law will not be significant.¹⁴⁷ The judiciary is thus not inventing new solutions. There are two problems with these embryonic justifications. The first is that they may be wrong. Class actions open the door to a wider range of litigants and this may force courts to make new law, for classes of people on the basis of unproved facts.¹⁴⁸ The second is that even if they are right, it cannot be thereby said that courts are adjudicating in a traditional manner. Even in applying a pre-established rule a class action court is legislating (the parallel to delegated legislation seems evident) in deciding on its application to a generalized form of activity, absent proof of individual claims and in a manner requiring further adjudication or measures of implementation. How can we know that the dangers of judges giving orders not based on proof are overcome by the fact that people can obtain such orders, and that they might have some effect?

¹⁴⁷ Ontario Law Reform Commission, *op. cit.*, footnote 2, pp. 202-207.

¹⁴⁸ See, for example, in Quebec, *C.R.U.T.C.Q. c. Q.U.C.T.C.*, *supra*, footnote 129, (deciding on a transport commission's obligations toward transit users); *Beullac c. P.G. du Québec* (C.S. Mtl. 500-06-000011-797, action in damages against police for unauthorized fingerprinting); *G.L. c. P.Q. du Québec*, [1983] C.S. 278, (petition for declaration stating rights of transsexuals to health services); *Pelletier c. Sun Life du Canada* (C.A. Mtl. 500-09-001088-814, J.E. 83-278, legality of deduction by insurance companies from insurance payments of invalidity payments made by government agency). It may also be doubted whether the class action procedure is without effect on existing substantive law. In matters of tort or delict, for example, proof of damage caused by the defendant to each claimant has been a traditional pre-requisite to any judgment, but a class action judgment may be rendered absent such proof. This question is discussed in a paper presented to the February, 1984 meeting of the Tort/Delict Section of the Canadian Association of Law Teachers (H. Patrick Glenn, *Class Actions and the Theory of Tort and Delict* (1985), 35 U. of T.L.J., forthcoming). The view that courts in all cases simply apply pre-existing law is in any event a remarkably formalistic view of the judicial process. A competing view would hold every judicial decision to be law-making, and law itself to be constantly in the process of definition. This view, when coupled with the class action mechanism, would place the judiciary at the leading edge of legislative activity.

Are we improving access to justice by imposing judges on people rather than bringing people, and their proof, to judges? Are class actions not a distortion of justice, properly conceived, rather than improved access to it?¹⁴⁹ It is true that it is impossible to measure the dangers presented by class actions to the authority of the judiciary, as it is impossible to measure the dangers of innovative judicial law-making. The strength of the judiciary must be, however, in the inherent authority of its distinterested, rational voice. The tenured judiciary has no other source of strength. Even in jurisdictions which seek to root judicial authority in popular, democratic approval, such approval will not be forthcoming for the engaged judiciary. In California, where the Supreme Court has often received law-review approval for its innovative law-making and class action initiatives, popular support for all members of the court in confirmation polls has steadily declined from figures of 90% in the 1960's and earlier to 75% in the mid-1970's to a low of 65% in the controversy-filled 1978 poll.¹⁵⁰ What are the costs of using up judicial authority? Those who argue that class actions are justified by modern conditions have chosen not to answer this question.

The more universalist justification for class actions would situate the class action judgment in the tradition of judicial law-making, particularly in the common law tradition. Judges may legislate in the form of class action judgments because judges have always legislated, in the creation of the common law. The class action judgment only makes explicit the reach of a judgment beyond the parties physically present before the court, and it is artificial to say that judges cannot do expressly what they regularly do by implication. The class action judgment is thereby no different in character, for example, from the judgment of the Supreme Court of Canada in *Fleming v. Atkinson*,¹⁵¹ establishing a broad common law rule of liability of owners of cattle straying onto highways, and the common law adjudicative function cannot be limited to the individualized appreciation of facts, as found in the dissenting judgment of Locke J. in that case.¹⁵² This is a more subtle argument, raising some nice questions as to the nature of

¹⁴⁹ "This is why, when people dispute, they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice." Aristotle, *The Nicomachean Ethics* (Ross. trans., Oxford University Press, 1980), p. 115. Animate justice is to be distinguished from judicial enthusiasm.

¹⁵⁰ Preble Stolz, *Judging Judges* (1981), pp. 120, 425, 426. This process of decline appears inevitable if the breadth of judicial pronouncement approaches the level of generality of political debate; the political court will face the same difficulties in obtaining support on broad issues as the political party. It is worth emphasizing that the decline in public support of the California Supreme Court had begun well before the difficulties of 1978. The Court also underwent considerable bureaucratization during this period Stolz, *ibid.*, pp. 101, 102, 108-110.

¹⁵¹ [1959] S.C.R. 513, (1959), 18 D.L.R. (2d) 81.

¹⁵² *Ibid.*, at pp. 517 (S.C.R.), 84 (D.L.R.).

precedent and *res judicata*, but it too must presently be taken as unproved if not mistaken. There are two main reasons for reaching this conclusion.

The first is that the argument is founded on the representative character of broadly-formulated norms created by law-making tribunals. Yet this type of judicial activity, far from representing a general model of adjudication, continues to represent its most controversial expression, and the bulk of judicial activity at all levels remains acutely sensitive to variation of individual fact. This is the reason for the slow growth of the common law; even the notion of an appellate, law-making court is of relatively recent origin. The class action mechanism would extend the controversial process of judicial law-making for groups to first-instance tribunals, traditionally the most sensitive to fact and whose decisions have had the least effect beyond the parties actually before the court. The class action mechanism therefore extends an already controversial law-making function.

The second reason is more technical in character, but no less important. A precedent, rooted as it is in the facts and proof of an earlier and different case, has little or no effect on the possibility of subsequent litigation. The precedent may affect the *outcome* of later cases, if it is relied upon and not distinguished, but parties remain free to litigate and to broadly canvass questions of law and fact in the process. The notion of *res judicata* is more preclusive, and may be seen as a form of crystallized precedent. Litigation will be precluded by the effect of *res judicata* if it seeks to duplicate an earlier case, and the traditional signposts of this duplication are that the same parties are seeking once again the same remedies based on the same ground of law. Where these signposts are not present, however, cases are taken to be different, and the way is thereby open to full and traditional examination of the case as presented. This traditional analysis may be seen as particularly appropriate in the common law tradition, applicable in this respect also in Quebec, in which there is no presumption that the judge knows and applies the law and in which parties and counsel bear the burden of researching and presenting arguments of law. A difference in parties may mean a different case because different law is presented, though this is rarely openly acknowledged.

It should be evident from these distinctions that the legislative character of the class action judgment cannot be justified by analogy to law-making precedents. The class action judgment will certainly stand as precedent for later cases, and no issue is taken with that (though in Quebec the precedent will be of a weaker variant than in Ontario). More significantly, it purports to legislate for an entire class of parties whose cases have not been presented to the court, in a way said to constitute *res judicata*—the most binding form of rule-making known to the law and supposedly precluding subsequent litigation on the issues decided. The legislative decree of a court in a class action suit is meant to be self-executing, in the sense that no-one affected can challenge its subsequent application to them. Class action decrees are therefore legislation of a most remarkable kind.

and take the judiciary not only beyond its traditional adjudicative function, but arguably well beyond most legislative forms of activity as well. At this point judicial hesitation in rendering class action decrees should be at least understandable. One might conclude that not only are class actions judgments undesirable, they are even impossible, since absent parties cannot and will not be bound in a liberal, adversarial judicial system. There is evidence for this conclusion already in the United States, where courts which have rendered class action decrees have subsequently refused to consider them binding on class members absent from initial, though certified, proceedings.¹⁵³ This unravelling of class action judgments not only imperils whatever efficiency may be brought about by class action proceedings; it will result in discrimination as between class action plaintiffs and defendants in the measure that judgments will probably stand as self-executing legislation vis-à-vis defendants and successful classes and represent no more than unfavourable precedent for unsuccessful class members absent from the initial proceedings.¹⁵⁴ Class action judgments thus have no parallel with the relatively benign character of precedents in the common law world. They are of vastly greater potential effect, and this effect is the direct product of denying, in discriminatory fashion, rights of hearing in a court of law to a party to litigation.

Conclusion

Class action procedures, where they exist, now appear to be failing, both as significant measures of social reform and as procedures viable even on a limited scale in the court system.¹⁵⁵ There are profound and systemic reasons for this, which no amount of legislative design or fine-tuning can overcome. Parties and counsel are rejecting class actions because they are too onerous and problematical (aside from questions of costs) in a judicial system which responds to radically different priorities. Judges reject class actions because they see them as incompatible with both their procedural and adjudicative functions, and in this they are probably correct. Class action implementation therefore accomplishes little, and anything which is accomplished is at the critical expense of judicial authority and the principles of fundamental justice.

¹⁵³ Developments in the Law-Class Actions (1976), 89 Harv. L. Rev. 1318, at p. 1394, with references.

¹⁵⁴ *Ibid.*, at p. 1398. "It thus seems unlikely that . . . *res judicata* can provide any greater degree of binding effect against a losing class than *stare decisis* in the majority of cases brought as class suits in the federal courts." It is also possible that judgments will not constitute *res judicata* against members of a winning class, if the defendant is able to distinguish in a way judged significant the claims of individual members from that of the class representative. The class judgment is thus inherently fragile, but the U.S. experience cited above indicates that its preclusive effect may operate more severely against defendants than against plaintiffs.

¹⁵⁵ *Supra*, text accompanying footnotes 87, 88.