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Class Actions to Remedy Mass Consumer Wrongs: Repugnant Solution or Controllable Genie? The Canadian Experience

Jacob Ziegel*

I. NATURE OF PROBLEM

From a Canadian perspective, by far the most important and pressing problem facing postindustrial societies is not the adoption of more consumer legislation but the non- or negligible enforcement of existing laws. The problem is bad enough when it is experienced by consumers with individual grievances, but it grows exponentially when the wrong affects not just a handful of consumers but thousands of consumers. Drawing on the Canadian experience, examples abound all around us: false advertising, collusive price fixing, harmful drugs and therapeutic devices, usurious interest rates, unlawful banking charges, “vanishing premiums” in life insurance contracts, inflated prices for automobile repairs, and other consumer services.

II. GOVERNMENTS AS PART OF THE PROBLEM, NOT THE SOLUTION

In Canada (and the same is surely true of other countries in the Western hemisphere), there is no shortage of federal and provincial consumer legislation. Much of it has been adopted over the past forty years. Only rarely is the legislation accompanied by machinery for its effective enforcement. Between 1960 and 1980, the federal government in Canada and many of its provinces established new ministries and new

* Professor of Law Emeritus, University of Toronto. This short paper was presented at the biennial conference of the International Academy of Commercial and Consumer held in Bamberg, Germany, on August 1-3, 2008. This paper also retraces, and updates, ground covered by me in an earlier publication. See Jacob Ziegel, *Consumer Class Actions in Canada and the Class Action Remedy*, in LIBER AMICORUM BERND STAUDER, DROIT DE LA CONSOMMATION/KONSUMENTENRECHT/CONSUMER LAW 587 (Luc Thevenoz & Norbert Reich eds., Schulthess 2006).

agencies whose ostensible purpose was to promote consumer interests and to protect consumers against market abuses and wrongful practices. Regrettably, these initiatives only had a short shelf life and, with modest exceptions, the new ministries were later quietly closed down or merged into other much larger government departments.¹ The federal and provincial governments were able to perform this vanishing trick because consumers, as a pressure group, are notoriously unorganized and, unlike most other economic interest groups, rarely wield significant political power.

As a result—and again I speak largely from a Canadian perspective—the consumer is left largely to his or her own devices. Litigation in Canada is, for the most part, enormously expensive and time consuming. Actions in Small Claims Courts, while provided for under provincial law and not requiring the retention of lawyers, nevertheless demand much patience and effort. Most consumers do not find it worthwhile to expend the energy necessary to obtain redress for smaller claims but prefer to take their lumps and learn from experience. Various government agencies—federal, provincial, municipal—may have the power to intervene but, for the most part, their resources, too, are very limited and rarely extend to ensuring mass relief for consumers adversely affected by the wrongful conduct.

Hence the question posed at the beginning of this paper. The question is whether a solution can be wrought that addresses in scope and effectiveness the magnitude of the problem where the wrong affects a plurality of consumers. All developed societies have had to confront this dilemma, and most still do. However, there is little consensus about the right solution, even among members of the same legal family and with similar economies. This paper concerns one of the much debated and most controversial of the alternatives, the class action solution, which has now been adopted in legislative form by all the provinces in Canada, with the exception of Prince Edward Island, and by the federal government in the form of amendments to the rules of procedure of the Federal Court of Canada. By class action I mean a representative action brought by one or more plaintiffs on behalf of themselves and all other

1. *Cf.* COMMERCIAL AND CONSUMER SALES TRANSACTIONS: CASES, TEXT AND MATERIALS 16-17 (Jacob S. Ziegel & Anthony J. Duggan eds., 4th ed. 2002) (“If it is accurate to describe the 1960s and 1970s as the golden age of postwar consumerism, it seems equally safe to predict that historians will record the 80s as largely a period of consolidation and retrenchment and, in several provinces, even a period of dismemberment of programs already in place. . . . [E]ven in its heyday there was often more form than substance to governmental commitment to consumer protection.”).

members of the class seeking relief for a wrong alleged to have been committed against them by the defendant.²

III. COMMON LAW BACKGROUND

In common law jurisdictions, the class action remedy (then known as a 'representative action') was actually developed by the English Courts of Equity long before it also became available in the common law courts. However, because Equity's remedial powers were limited to cases where the Equity courts had jurisdiction, so was the scope of the representative action. The future must have looked promising when the common law courts and courts of equity were fused in England in 1873 and all the royal courts of justice were endowed with a full panoply of remedies, including the power to award damages.

However, any expectations for an enlarged role for the representative action were quickly dashed as it transpired that the post-1873 courts had little sympathy for representative actions in which the gist of the claim was for damages. In particular, in a leading case, *Markt & Co v. Knight Steamship Co. Ltd.*, the English Court of Appeal held that a representative action could not be brought in a claim for damages based on breach of contract because the damages had to be separately assessed for each member of the class.³ In 1983, in another leading case, *Naken v. General Motors of Canada Ltd.*,⁴ the Supreme Court of Canada gave a broader explanation for rejecting representative claims seeking damages by reasoning that the sparse rules of court governing representative claims were quite inadequate to enable the courts to handle such claims. In the Court's view, it was up to the provincial

2. There is a difference of opinion among judges in the few cases in which the issue has been raised whether the legislation also permits class actions for declaratory judgments. In one such recent action brought in Ontario the representative plaintiff sought a declaration that an oath of allegiance to the Crown required of new Canadian citizens was unconstitutional since it violated the class members' freedom of conscience under the Canadian Charter of Rights and Freedoms. The Ontario court refused to strike out the action as vexatious because the representative had previously litigated the same action in a personal action brought by him against the federal government. However, the court did not address the issue whether a declaratory action was admissible or appropriate under the Ontario Class Proceedings Act. See *Roach v. Canada*, [2007] 86 O.R.3d 101 (Can.); cf. *A.L. v. Ontario (Minister of Community and Social Services)*, [2003] O.J. 2405 (O.S.C.J. June 16, 2003), *rev'd on other grounds*, *Larcade v. Ontario (Minister of Community and Social Services)*, [2005] O.J. 1924 (O.S.C.J. Div. Ct. May 13, 2005). In *L.A. v. Ontario*, a class action seeking damages and a declaration that the defendants had breached their statutory duties, Judge Cullity held *inter alia* that a class proceeding was not the preferable procedure under the Ontario Class Proceedings Act and that the members of the class could obtain adequate relief by bringing individual actions for a declaration.

3. [1910] 2 K.B. 1021.

4. [1983] 1 S.C.R. 72 (Can.).

legislatures to put meat on the bone if the Parliamentarians wanted representative actions to be taken seriously.

IV. SUBSEQUENT DEVELOPMENTS

Canadian consumer advocates felt they knew what the appropriate remedy should be because they were familiar with Rule 23 of the Federal Rules of Civil Procedure in the US and believed that a Canadian counterpart could play the same beneficial role in Canada. Surprisingly, it was Quebec, a civil law jurisdiction, which first adopted the class action remedy (*recours collectifs*) in 1978 in its revised Code of Civil Procedure.⁵ The common law provinces did not join the band until 1992 when Ontario adopted its Class Proceedings Act (CPA).⁶ Since then all the common law provinces, with the exception of Prince Edward Island (Canada's smallest province), have enacted similar legislation.

V. INFLUENCE OF THE OLRC REPORT

A major factor in Ontario's decision to adopt class action legislation was the monumental three-volume report on Class Actions, produced by the Ontario Law Reform Commission in 1982 ("The Report").⁷ The Report was six years in the making, and has rightly been hailed as the most thorough and carefully researched class actions report produced in the Commonwealth. The Report found that the existing remedies in Ontario, with respect to mass wrongs, were seriously inadequate and that well crafted and carefully considered class action legislation was the right solution because it accomplished three key objectives.⁸ *First*, it promoted economic justice by providing a mechanism for the redress of

5. Art 999-1051, added by S. Que. 1978, c.8, s.3, as am. There are conflicting theories explaining Quebec's pioneering role in introducing class action legislation in Canada. Professor Glenn of McGill University has suggested that it was because, although Quebec is a civil law jurisdiction in many respects, in the procedural sphere the Quebec courts had adopted the common law model of litigation. H. Patrick Glenn, *The Dilemma of Class Action Reform*, 6 OXFORD J. LEGAL STUD. 262, 262 (1986). Even if Professor Glenn is correct about the common law influence, it does not explain why Quebec adopted class action legislation long before the common law provinces did. A better explanation offered to the author by Professor Ronald Macdonald, also of McGill University, is that a strong social democratic government was in power in Quebec in the late 1970s and that the decision to follow the Rule 23 model was based on ideological grounds and had little to do with common law influences on Quebec rules of procedure.

6. Ontario, Class Proceedings Act, S.O. 1992, c.6 [hereinafter Ont. Act].

7. See ONTARIO LAW REFORM COMMISSION, REPORT ON CLASS ACTIONS (Ministry of the Attorney General 1982).

8. *Id.* at 117-45. These goals have been frequently cited with approval in subsequent Canadian judgments, including a leading judgment of the Supreme Court of Canada. See *Hollicks v. Toronto (City)*, [2001] 3 S.C.R. 158 (Can.).

grievances that would otherwise remain unanswered.⁹ *Second*, it led to economies in the use of judicial resources.¹⁰ This was because, in the absence of a class action remedy, members of the class would be obliged to bring individual actions which, if the class was large enough, could overwhelm judicial resources.¹¹ *Third*, the threat of a class action will lead to behavioural modification by putative defendants who would not be deterred by the threat of individual actions but would be deterred by the possibility of a large damage award, quite possibly running into the millions of dollars.¹² These class action goals have been frequently reiterated by Canadian courts, in considering defendants' attempts to have a class action dismissed before it could proceed to trial. However, the advantages do not take into account some of the less attractive features of class actions, the very features that have often persuaded governments in other jurisdictions to reject the class action remedy. I consider these objections in a later part of this presentation.

VI. PRECONDITIONS TO CERTIFICATIONS OF ACTION

There are some differences among the class action provisions of the common law provinces and even greater differences between the Ontario Act and the Quebec provisions. However, all the common law provinces share in common the following five requirements a class plaintiff must satisfy before a court will issue a certificate authorizing the plaintiff to proceed to trial of the action:¹³

1. The plaintiff must have a cognizable cause of action.
2. The members of the class must be identifiable.
3. The claims of the class members must raise common issues.
4. A class action must be the 'preferable procedure' for the resolution of the common issues.

9. ONTARIO LAW REFORM COMMISSION, *supra* note 7, at 117-45.

10. *Id.*

11. This prediction has been corroborated by British experience since 2006. There, the district courts were deluged with hundreds of actions by bank customers against British banks following allegation by *Which?*, a consumer magazine, that the banks were levying excessive charges for overdrafts and other bank services. *See Banks' Profits '£2.5bn a year' From Overdraft Fees*, WHICH?, July 8, 2008, available at <http://www.which.co.uk/news/2008/07/banks-profits-25bn-a-year-from-overdraft-fees-151247.jsp>; see also Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*, at 121 et seq. (2008) (research paper submitted to the Civil Justice Council of England and Wales), available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf.

12. *See* ONTARIO LAW REFORM COMMISSION, *supra* note 7.

13. Ont. Act, s.5.

5. The representative plaintiff is a person who (i) will fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying members of the class of the proceeding, and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Statistics show that, in practice, only about five percent of class actions proceed to trial. The other actions are settled at an earlier stage, are discontinued by the plaintiff, or are dismissed by the court. The heavy lifting by the parties occurs during the precertification stage as the defendant challenges one or more (and frequently all five) of the preconditions to certification. This phase of the action may run for five years or more because of the voluminous affidavit material filed by the defendant, the complexities of the factual and legal issues, and the frequency of appeals from the decision of the motion judge.¹⁴ A conspicuous feature of the Canadian class action scene is the critical supervisory role played by the courts at every phase of the proceedings.

VII. OPTING IN AND OPTING OUT; AND NATIONAL CLASS ACTIONS

All of the provincial legislation requires intraprovincial members of a class who wish to be excluded from certification or from any settlement of the action *to opt out* of the action or any proposed settlement; they are not required to opt in before they can be considered to be members of the class. This feature of Canadian class action law—highly controversial in

14. The practice in Ontario is for a judge to be assigned to a class action at the beginning of the suit and to remain the judge of record for the remainder of the case. *Garland v. Consumers' Gas Co.* is a good example of the litigiousness of class actions. [2004] 1 S.C.R. 629, 2004 SCC 25 (Can.). The action was started in 1994 and was not finally disposed of until 2007. In between there were numerous motions before the judge of first instances, several appeals to the Ontario Court of Appeal, and two appeals to the Supreme Court of Canada. The main issue in *Garland* was whether the defendant utility's late payment penalties ("LPP") had breached section 347 of the Canadian Criminal Code limiting maximum interest rates to 60 per cent per annum even though the LPP had been approved by the Ontario Energy Board before it was introduced by Consumers' Gas. The action was finally settled for about \$22 million, half of which was earmarked to cover counsel fees and disbursements. The other half, by agreement of the parties and with the court's approval, was paid over, *cy-près*, to a fund, "Out of the Cold," that provided financial assistance to low income families who could not afford to pay their winter heating bills. This *cy-près* use of part of the settlement monies was agreed upon between the parties because it would have been too expensive for Consumers' Gas to calculate and remit the small amounts payable to its several million customers.

the United Kingdom and many parts of the European Union—was regarded in the OLCRC Report as fundamental to the viability of class actions and has never been seriously questioned in Canada.

More controversial are the questions whether a Canadian province also has the constitutional power to extend the opt-out rule to non-residents of the province, in which the class action is started—in other words, whether a province has the power to authorize a national class action—and whether other provinces are obliged to recognize a class action purporting to have extraprovincial reach. The British Columbia Act provides¹⁵ that non-residents can only be included in an action if they opt in. The Ontario and Manitoba courts have held¹⁶ that non-residents can be included on an opt-in basis, if there is a substantial connection between the action and the province. In 2008, a divided Quebec Court of Appeal reached the opposite conclusion.¹⁷

An even more troubling issue—and one that has arisen with increasing frequency in recent years—occurs where a class action involving the same defendant is brought in more than one province. Frequently counsel will agree among themselves regarding which of them is to have carriage of the case, and in which province, and how settlement negotiations are to be conducted and on what terms. Absent such agreement, it remains unclear whether a class action in one province will preclude the bringing of an action in another province. These issues too remain to be resolved by the Supreme Court of Canada. In a comprehensive report, the Uniform Law Conference of Canada has recommended¹⁸ the establishment of a national class action register so that counsel and the courts can readily establish when a class action has been started anywhere in Canada. However, the Report stopped short of recommending the establishment of a multiprovincial judicial panel

15. B.C. Class Proceedings Act, SBC 1995, c. 21, s. 16(2) [hereinafter B.C. Act].

16. See e.g., *Nantais v. Teletronic Pty.*, [1996] 28 O.R.3d 523 (Can.); *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] 74 O.R.3d 321 (Can.); *Ward v. Canada*, [2007] 220 Man. R.2d 224 (Can.).

17. *Hocking v. Haziza and HSBC Bank Canada*, [2008] QCCA 800 (Can.). In *Lepine v. Post Office*, the Quebec Court of Appeal also affirmed a lower court decision refusing to recognize an Ontario class action settlement purporting to include Quebec members of the class but the decision was based on the alleged inadequacy of the notice given the Quebec class members of the Ontario proceedings. *Lepine v. Post Office*, [2007] QCA 97 (Can.). At this time of writing (November 2008), the *Lepine* case is on appeal to the Supreme Court of Canada but the Supreme Court's decision is not expected till some time in 2009. See Janet Walker, *Recognizing Multijurisdiction Class Action Judgments within Canada: Key Questions—Suggested Answers*, 46 CAN. BUS. L.J. 450 (2008).

18. Uniform Law Conference of Canada, Report of the Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations (2005).

(similar to the Multidistrict Litigation panel system used by federal courts in the US) to determine which province is to have carriage of a class action. The national class action register is in course of being implemented and Canadian judges are discussing among themselves the feasibility of a multiprovincial judicial panel.

VIII. FORMS OF CLASS ACTION JUDGMENTS AND CLASS ACTION SETTLEMENTS

A frequent objection by defendants to a class action is that the costs of ascertaining who are the members of the class, and the damages they have suffered as a result of the defendant's conduct, will greatly exceed any likely compensation payable to the members if the action is successful. The provincial class action legislation provides the courts with a variety of tools to address these and other issues. For example, the court may render judgment in favour of the class on the issue of the defendant's liability but require members of the class to bring individual actions to prove the quantum of damages suffered by them. Alternatively, the individual assessments may be referred for determination by a court official or outside arbitrator. The court may also award judgment in a lump sum and entitle members of the class to make individual claims against the fund on a pro rata basis.¹⁹ The legislation also authorizes the use statistical techniques to determine the quantum of illicit gains made by a culpable defendant²⁰ and may make a *cy-près* award requiring the gain to be paid to a worthy cause where the costs of identifying and distributing the gains among members of the class would exceed any likely benefits to the class.²¹

All the class action legislation provides that a settlement reached between the parties has no legal effect unless and until it has been approved by the court.²² Canadian courts take their adjudicative role very seriously and will frequently write lengthy judgments to justify the settlement agreed upon by the parties or requiring the parties to make amendments to the agreement. Notice must also be given to members of

19. Ont. Act, ss.24-25.

20. *Id.* at s.23.

21. For example, in *Consumers' Gas*, cited *supra* note 14, the parties agreed that the amount of the defendant's unlawful gain (approximately Can.\$10 million) should be paid to a fund providing indigent families with assistance in meeting their winter heating bills. In *Markson v. MBNA Canada Bank*, [2007] O.J. 1684 (O.C.A. May 2, 2007), the Ontario Court of Appeal approved the use of statistical techniques to determine how many of the Bank's customers had paid bank charges that exceeded the ceiling permitted by section 347 of the Canadian Criminal Code. See also *Cassano v. Toronto-Dominion Bank*, [2007] O.J. 4406 (O.C.A. Nov. 14, 2007) (strongly affirming the courts' flexible powers in dealing with the remedial aspects of a successful action).

22. *E.g.*, Ont. Act, s.29(2).

the class entitling the members to opt out of the settlement or to file objections to the terms of the settlement.²³ So far, however, Canadian courts have not gone to the length of requiring an opinion from a third party on the fairness of the settlement, although there is much to be said for this prophylactic device.²⁴

Closely related to class action settlements is the question of the amount and payment of class action counsel's fees and disbursements. The fees and disbursements may amount to a sizable share of the total settlement figure. Individual class action members may only receive a token amount, or they may only be entitled to free repair or replacement of a defective part, or to a longer period of service where the service was interrupted because of the defendant's fault. Typically, the class action legislation does not spell out, or does not spell out fully, how counsel's fee is to be determined and how the approach differs among the provincial courts. In Ontario and the other provinces, it is common for plaintiff's solicitor and the named plaintiff in the class action to enter into a written fee and costs agreement before the action is initiated. In the overwhelming number of cases, the representative plaintiff will lack the means to pay the solicitor and would be unwilling to lend his name to the action if the benefit of a successful action would largely accrue to the other members of the class. Typically, all fees and costs agreements require the court's approval for their effectiveness.²⁵ A distinguishing feature of the statutory provisions applying to contingency fee agreements is that they entitle the plaintiff's solicitor to apply to the court to have the solicitor's "base fee" increased by a multiple to be applied to the base fee ("multiplier").²⁶ Multiplier applications are the norm and have given rise to complex judgments in their own right.²⁷ The purpose of a multiplier award is to compensate the plaintiff's firm for the high risks and uncertainty involved in agreeing to represent the plaintiff as

23. *See id.* at s.8(1).

24. In the case of settlements in other areas of the law involving infants or other persons under a legal disability, Canadian courts have long required the approval of the Public Guardian or other public official. There is nothing in the class action legislation precluding a judge from requiring a fairness opinion from a third party. Additionally, it is a little surprising that Canadian judges have not exercised this power where individual class members have little to gain from the proposed settlement and have a negligible incentive to appear on the settlement hearing to voice their objections.

25. *See id.* at ss.32-33. In practice, and for his own protection, the plaintiff's solicitor will usually enter into a written fees and costs agreement with the named plaintiff before the action is initiated. It is also common for the agreement to provide that the solicitor will only be entitled to recover his fee and disbursements from the plaintiff if the action is successful.

26. *See e.g., id.* at s.33(2).

27. A leading Ontario case is *Gagne v. Silcorp Limited*, [1998] 41 O.R.3d 417 (Can.).

well as the long period of time that will often elapse before judgment is rendered or the action is settled before trial. In large and complex class action litigation, the approved counsel fee may run into the millions of dollars, and this may give rise to the impression that class actions are a feeding trough for hungry lawyers. The impression is largely unfounded. It is especially so if one remembers that it may have taken five or more years for the action to be settled or to come to trial and that counsel ran the risk of not recovering any fee and not recovering the firm's disbursements (usually very heavy) if the action was unsuccessful.²⁸

IX. COSTS AGAINST UNSUCCESSFUL PLAINTIFF

Recovering costs against unsuccessful plaintiffs is an area where the provinces have adopted different approaches. In Ontario, the basic class action rule is that costs follow the event.²⁹ This means that the unsuccessful representative plaintiff may be exposed to very heavy costs, possibly amounting to hundreds of thousands of dollars, which, in most cases, he cannot begin to absorb himself.³⁰ The Ontario Act provides that the court may relieve the unsuccessful plaintiff from having to pay costs if the class action was a test case, raised a novel point of law, or involved a matter of public interest.³¹ The British Columbia³², Saskatchewan³³ and Manitoba³⁴ Acts are more plaintiff-friendly and provide that costs may only be awarded against the plaintiff if the action was frivolous, and even then the award is discretionary. Plaintiffs'

28. See e.g., *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (Can.). In the *Consumers' Gas* case, the total settlement amount approved by the court was approx \$22 million, of which plaintiff's counsel received approx \$12 million to cover counsel's fees and disbursements over the fifteen year litigation period. This is not an extravagant amount by any measure.

29. See Ont. Act, s.31.

30. Not all representative plaintiffs are impecunious. In the *Kerr v. Danier Leather Inc.* litigation, the Ontario Court of Appeal refused to relieve the plaintiff from having to pay the costs of the unsuccessful action, reputed to amount to a million dollars or more, because the plaintiff had deep pockets and was a major shareholder in the defendant company. [2005] 77 O.R.3d 321 (Can.). The Supreme Court of Canada upheld this aspect of the Court of Appeal's judgment as well, [2007] 3 S.C.R. 331, 2007 SCC 44 (Can.), and Justice Binnie, writing the Court's opinion, went out of his way to point out that the plaintiff had engaged in a calculated gamble in starting the class action, and that it was therefore not unfair to penalize the plaintiff. Aside from such special cases as *Danier Leather*, there is a point of view, which the writer shares, that counsel has a duty to warn the representative plaintiff of the costs risk if the action is unsuccessful. Some observers go further and argue that plaintiff's counsel has an obligation to indemnify the plaintiff against a costs award where counsel has selected the representative plaintiff in the case.

31. See Ont. Act, s. 31(1).

32. See Class Proceedings Act, 1995 S.B.C., ch.21.

33. See The Class Actions Act, 2001 S.S., ch. 21.

34. See The Class Proceedings Act, 2002 S.M., ch. 130.

counsel take the position that this is the right approach since plaintiff's counsel and, in some cases the plaintiff himself, have to dig deeply into their pockets to keep the class action going without running the additional risk of having to indemnify the defendant if the action is unsuccessful. The Quebec class action law has finessed the problem in a unique way. It allows a successful defendant to recover costs but only on the scale of costs approved in the small claims division of the Quebec Court.³⁵

X. CLASS ACTION FUNDING

In the overwhelming number of class actions, the representative plaintiff is in no better position to fund the action than he is in a position to absorb the costs of an unsuccessful action. Only two of the provinces, Ontario and Quebec, have meaningfully addressed the issue in Canada, although the Quebec approach is the more ambitious of the two.³⁶ In Ontario, the provincial government established a class proceedings fund about the time the CPA came into effect and contributed the sum of five million dollars to establish the fund.³⁷ The Ontario legislation also established a board, whose members are appointed by the Law Foundation of Canada, to administer the fund and to consider applications from plaintiff's counsel for financial support.³⁸ The support is only available to cover disbursements, not any part of counsel's fees.³⁹ The risk of non-payment of fees remains with counsel. If the Fund agrees to support the litigation and the action is unsuccessful, the defendant is entitled to apply to the Fund for recovery of the defendant's costs.⁴⁰ If the action is successful, the plaintiff will be required to repay the contribution to the plaintiff's costs made by the Fund. In addition, the Fund will be entitled to receive ten percent of the judgment awarded in favour of the class. In practice, the Ontario provisions have not had much impact on the funding of class actions, and this for two reasons. First, most plaintiffs' counsel view the Fund as seriously underfunded given the number of class actions in progress at any time. Because of this feature, counsel do not deem it worth while to expend the time necessary to satisfy the administrators' demanding requirements to qualify for funding assistance. The second reason is that most counsel take the position that, if they are expected to absorb the risk of non-

35. See An Act Respecting the Class Action, 2000 R.S.Q., c. R-2.1, Title II.

36. See Law Society Amendment Act (Class Proceedings Funding), 1992 S.O., c. L 8; see also An Act Respecting the Class Action, *supra* note 35.

37. See Law Society Amendment Act, *supra* note 36, at s.59.1(1).

38. See *id.* at ss.55.3, 59.1, 59.2.

39. See *id.* at s.59.1(2).

40. See *id.* at s.59.4(1).

payment of their fees if the action is unsuccessful, they might as well continue to finance the disbursements as well.

In Quebec, the scope of the *Fonds d'aide aux recours collectifs* ("Fonds") provided for under the province's class actions law,⁴¹ is significantly more ambitious in scope than the Ontario plan. The *Fonds* is an ongoing financial responsibility of the Quebec government and, if the application is granted, the financial assistance will cover, up to the agreed amount, the plaintiff's attorney fees and disbursements (including the fees of expert witnesses) as well as other expenses related to the preparation of or bringing of the case.⁴² Therefore, the Quebec government plays an active financial role in supporting class actions.

XI. OTHER IMPEDIMENTS TO CLASS ACTIONS

Apart from the certification requirements and the financial challenges facing plaintiff's counsel, there are other obstacles that stand in the way of Canadian class actions. Two are of particular importance. The first is the proliferating use of arbitration clauses in consumer agreements obliging consumers to resort to arbitration to settle any disputes and prohibiting recourse to class actions. The validity and fairness of such arbitration provisions in consumer agreements has triggered an enormous volume of litigation and scholarly discussion in the United States. So far as Canada is concerned, the position is unsettled. Before legislation was introduced to resolve the issue, the majority of Ontario courts held that the arbitration provisions were contrary to public policy and were unenforceable. The Ontario government clarified the position in 2005 by adopting an amendment to the province's Consumer Protection Act⁴³ invalidating the effectiveness of such arbitration provisions. The British Columbia courts have adopted a more nuanced position and have held that the existence of arbitration provisions in the parties' agreement is merely another factor to be taken into consideration by the court in determining whether a class action is the preferable procedure for handling the plaintiff's complaint.⁴⁴

These relatively tranquil waters were deeply disturbed by the Supreme Court of Canada's holding, in a divided opinion, in *Union des*

41. See An Act Respecting the Class Action, *supra* note 35, at Title II.

42. See *id.* at art. 29; see also *Fonds d'aide aux recours collectifs, Rapports annuel 2006-07*, available at <http://canlii.org/qc/laws/regu/r-2.1r.4/20060718/whole.html> (providing further details about the operation of the Quebec plan).

43. Stat. Ont. 2004, c.19, s.4, amending Stat. Ont. 2002, c.30, Sched. A.

44. *Mackinnon v. National Money Mart Co.*, [2004] B.C.L.R.2d (Can.).

*consommateurs v. Dell Computers Corp.*⁴⁵ that arbitration provisions in consumer agreements were not contrary to the public interest or the provisions of Quebec's *Code civil*. The majority judgment also held that, in any event, any objections by the consumer about the enforceability of the arbitration clause had to be raised before the arbitrator and could not be entertained by the courts. The Supreme Court's decision generated a lot of commentary,⁴⁶ much of it critical. Remarkably, so far as Quebec itself was concerned, the decision itself was dead on arrival because the Quebec Assembly had passed an amendment on the day argument on the case opened in the Supreme Court invalidating mandatory consumer arbitration provisions. However, the *Dell* decision may continue to influence common law courts in those provinces that have not enacted invalidating provisions.⁴⁷

The other impediments facing consumer class actions are less of an immediate threat but constitute a greater long term danger. This 'threat' is that federal and provincial legislation will severely restrict or even outlaw certain types of class actions against governments. Many of the class actions launched over the past fifteen years have been against the several levels of government—federal, provincial and municipal—alleging breach of the defendants' common law duties of care or statutory obligations to the same effect, or holding a government entity vicariously liable for wrongs committed by agents acting on behalf of the governmental agency. In several of the cases, the damages claimed to have been suffered by members of the class have run into a billion dollars or more. The surprise is that the federal and provincial governments have not acted earlier to restrain such class actions or to provide alternative means for settling them. The precedents certainly exist where federal and provincial governments have adopted legislation,

45. *Union des consommateurs v. Dell Computers Corp.*, [2007] 2 S.C.R. 801, 2007 SCC 34 (Can.). The Court released a companion decision to the same effect and on the same day in *Muroff v. Rogers Wireless Inc.*, [2007] 2 S.C.R. 921, 2007 SCC 35 (Can.).

46. See e.g., Shelley McGill, *The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses*, 43 CAN. BUS. L.J. 359 (2006); Shelley McGill, *Consumer Arbitration and Class Actions: The impact of Dell Computer Corp. v. Union des consommateurs*, 45 CAN. BUS. L.J. 334 (2007).

47. In British Columbia, two trial courts have held that the Supreme Court's decision is not binding on British Columbia courts because of important differences in the class action and commercial arbitration legislation of Quebec and British Columbia. See *Mackinnon v. National Money Mart Co.*, [2008] 293 D.L.R.4th 478; *Seidel v. Telus Communications Inc.*, [2008] B.C.J. 1347 (B.C.S.C. July 16, 2008) (Masuhara, J.). Both judgments are under appeal. The Ontario Court of Appeal has reached the same conclusion as the British Columbia courts though on somewhat different grounds. See *Smith Estate v. National Mart Co.*, [2008] 92 O.R.3d 224 (O.C.A.) (As previously noted, a 2005 amendment to the Ontario Consumer Protection Act invalidated mandatory arbitration clauses in consumer agreements. The Ontario actions in *Mackinnon*, *supra*, involved proceedings that were commenced before 2005.)

and in some cases made it retroactive,⁴⁸ outlawing individual and collective claims of various kinds. It may be that the difference between those cases and the cases that have triggered class actions is that the latter have usually involved claims for personal injuries or psychological harm,⁴⁹ or of physical damage to the class members' property,⁵⁰ and that governments were concerned about the public backlash if they were perceived to be shirking their responsibilities. The difference of course between claims against governments and class action claims against profit making enterprises is that the latter carry insurance or can self-insure against claims for defective products and services and, if the worse comes to the worst, can seek protection under Canada's bankruptcy legislation. Governmental services are provided on a non-profit basis for the public benefit and, unless the defendant governmental agency is separately incorporated, any claims that are settled must ultimately be paid for by all taxpayers.⁵¹

XII. THE FUTURE OF CLASS ACTIONS IN CANADA

No great controversy surrounded the introduction of class action legislation in Canada in the 1990s or more recently, and there is no visible pressure by business groups or government agencies to dismantle the legislation or to make radical changes. There may be a variety of reasons for this acquiescence. The few cases that have gone to trial have not involved juries and the defendants have not faced the threat of huge damage awards common in some parts of the United States. Theoretically, punitive damages are claimable in Canadian class actions,

48. See e.g., Ont., Estate Administration Tax Act 1998 (precluding recovery of unlawfully imposed probate fees); see also Wolfe D. Goodman, *Unlawful Taxes and the Supreme Court's Decision in Eurig*, 31 CAN. BUS. L.J. 291, 298 (1999); *Authorson v. Canada (Attorney General)*, [2007] 86 O.R.3d 321 (O.C.A.) (upholding validity of amendments to the federal Department of Veterans Affairs Act retroactively precluding actions against the Department for breach of its fiduciary duties in failing to invest properly veterans' pension funds under its administration).

49. The hepatitis infected blood cases brought against the federal and provincial governments in the early 1990s fall into this category. So do the claims brought against the federal government for physical and sexual abuse suffered by native students at residential schools established by the federal government in the last century, though the schools themselves were run by various Christian denominations or independent contractors retained by the government.

50. As in the class action brought against the federal government by Canadian cattle farmers alleging they suffered heavy losses because the federal government negligently admitted into Canada British cattle suffering from the 'mad cow' disease.

51. There are exceptions, but for the most part it is not usual in Canada for government departments and agencies to be separately incorporated—why not is unclear since conferment of corporate personality on a department or agency would be quite simple.

as they may be claimed in other civil actions,⁵² but apparently there is no reported case of punitive damages being awarded in a class action context. Again, as previously noted, Canadian judges have taken very seriously their roles as gatekeepers to screen out frivolous, extravagant, or unwieldy claims with the result that perhaps less than half of the class actions have reached the certification stage.⁵³ Yet another reason is that the deep pockets of defendants have enabled them to put up a stiff fight and either to defeat the claims entirely or to settle them on an acceptable basis. No doubt, Canadian businesses and governments would prefer not to be encumbered with class actions. I suspect, however, they have sensibly concluded that Canadian public opinion would not tolerate repeal of the legislation and that the average voter views the legislation as an important bulwark by the “little guy” against the overweening power of big business and big government.

XIII. WHAT CAN OTHER COUNTRIES LEARN FROM THE CANADIAN EXPERIENCE?

I offer the following list:

1. For the reasons explained in the last section, class actions to address mass wrongs, at least as structured in Canada, are not the unmitigated evil they are often perceived to be in continental Europe (though surely not in all EU countries) or the United Kingdom. Class actions, coupled with contingent fees for the lawyers who initiate them, are not an ideal solution but they are the second best solution if governments are unable or unwilling to absorb the costs of other remedial vehicles.
2. Adoption of the opting-out principle for the efficient conduct of class actions is unavoidable if class actions are to achieve optimal results.⁵⁴ Traditional objections in Europe to the opting out approach are not persuasive and

52. *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18 (Can.).

53. Ward Branch, at paragraphs 4.41950 et seq. of *Class Actions in Canada* (a loose leaf service published by Canada Law), cites the following statistics. In Quebec, as of the end of 2007, there were 872 motions for certification and 399 certification decisions. Certification was granted in 231 cases, 58 actions were tried on their merits and 36 judgments were rendered in the plaintiffs' favour. With respect to Ontario, as of February 2008, there had been 224 certification hearings. Of 126 contested certification hearings, 74 were certified after the hearing. Another 96 certification orders were issued by consent. Twelve cases were settled, wholly or partially, after certification. Five cases were determined on their merits and 4-5 cases were dismissed.

54. Professor Mulheron, *supra* note 11, has shown this convincingly with respect to the effect of Group Litigation Orders (“GLOs”) in England and the restriction of GLOs to litigants who have opted in.

have more to do with objections to an entrepreneurial litigation culture than with the establishment of effective means to remedy mass wrongs. Judicial oversight of class actions can, and should be able to, avoid abuses linked to use of the opting out rule and other class action abuses.

3. A class action system, precluding the use of juries and the availability of punitive damages, can be implemented and avoid the abuses associated with US class action practices. Also, very reputable lawyers can be attracted to act as plaintiffs' counsel in class actions. Based on the Canadian experience, the common complaint that plaintiffs' lawyers are largely driven by greed is unwarranted.⁵⁵ Defendant companies and governments can mitigate the burden and costs of class actions by investigating and offering prompt redress when substantiated complaints first come to light, e.g., reversing excessive banking charges, correcting false product claims, and appointing mediators to assess claims and recommend suitable settlements. However, allowing defendants *ex ante* to deny consumer plaintiffs the right to sue in the regular courts is not an appropriate policy.
4. The question whether, and to what extent, governments should be exposed to class actions involving large pecuniary claims requires further investigation. So should be the issue whether a ceiling should be imposed on the amount of recoverable damages where claims are made against governments.

XIV. CONCLUSION

In law, as in other spheres of public policy, difficult choices often have to be made between competing values. In the area of mass wrongs against consumers, the choice is between governments doing too little and allowing the harm to go without a remedy or allowing carefully regulated class actions under court supervision to bridge at least part of the gap. I believe Canadian experience supports the latter choice.

55. Note also the common belief in Canada that defendants' lawyers in class actions do at least as well financially as plaintiffs' lawyers, and that, unlike plaintiffs' lawyers, they don't have to worry about recovering their fees!