

# AN EXAMINATION OF THE ONTARIO LAW REFORM COMMISSION REPORT ON CLASS ACTIONS

Thomas A. Cromwell\*

## I. INTRODUCTION

The Law Reform Commission of Ontario has released its long-awaited *Report on Class Actions*,<sup>1</sup> the topic originally having been referred to it for comprehensive study in 1976. The *Report* is an important document not only with respect to class actions, but to procedural reform generally. Characterized by a clear discussion of many policy issues and a willingness to use empirical evidence, the Commission's approach to its task demands the attention of all procedural reformers. Its careful statement of the existing law and its discussions of several basic features of litigation provide a valuable sourcebook for the study of a wide variety of procedural issues. Yet, despite these characteristics, the Commission's approach is not flawless nor are all of its recommendations acceptable. However, the *Report* is of high quality and merits close study.

## II. BACKGROUND: THE NEED FOR REFORM

The present class actions rule in Ontario is, in substance, identical to that enacted in England in 1873.<sup>2</sup> The present Ontario rule provides:

Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of, all.<sup>3</sup>

The rule is clearly inadequate to deal with complex class actions. The need for reform was expressed by Arnup, J.A. speaking for the Ontario Court of Appeal in the leading case of *Naken v. General Motors of Canada Ltd.*:

In these days of mass merchandising of consumer goods, accompanied as it often is by widespread or national advertising, large numbers of persons are almost inevitably going to find themselves in approximately the same situation if the article in question has a defect that turns up when the article is put to use. In many instances the pecuniary damages suffered by any one purchaser will be small, even if the article is useless. It is not practical for any one purchaser to sue a huge manufacturer for his individual damages, but the sum of the damages suffered by each individual purchaser may be very large indeed.<sup>4</sup>

---

\* Faculty of Law, Dalhousie University.

<sup>1</sup> ONTARIO LAW REFORM COMMISSION, REPORT ON CLASS ACTIONS (1982).

<sup>2</sup> Supreme Court of Judicature Act 1873, 36 & 37 Vict., c. 66, sched., r. 10. For additional historical material, see generally Gillespie, *The Scope of Class Actions in Canada*, 11 MAN. L.J. 215 (1981) and Kazanjian, *Class Actions in Canada*, 11 OSGOODE HALL L.J. 397 (1973).

<sup>3</sup> ONT. R.P. 75.

<sup>4</sup> 21 O.R. (2d) 780, 784-85, 92 D.L.R. (3d) 100, at 104 (C.A. 1979).

The need for legislative intervention was more graphically, albeit less explicitly, expressed in the judgment of the Supreme Court of Canada in the same case.<sup>5</sup> While the Court of Appeal would have allowed the action to proceed in class form once the plaintiff redefined the class, the Supreme Court held that it could proceed only as a joined action brought by the several named plaintiffs. With respect to Rule 75, Estey J. for the Court said:

It is my conclusion that the rule, consisting as it does of one sentence of some thirty words, is totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty of this one.<sup>6a</sup>

Thus, the Commission's conclusion that "Rule 75 suffers from a host of procedural deficiencies that . . . can be addressed only by wholesale reform of the law. . ."<sup>6</sup> is amply justified.

### III. ADVANTAGES AND DEFICIENCIES

There are three main potential advantages of the class action procedure. First, it may avoid a multiplicity of actions where numerous persons have similar claims. Second, it may permit the vindication of claims that are numerous, but individually uneconomical to litigate. Third, this improved access to justice may, in turn, encourage defendants to be more scrupulous in adhering to their legal obligations. However, some of the deficiencies of existing class action procedures restrict these advantages to a limited number of situations and fail to guard against possible abuse. In particular, under the existing rules, the representative plaintiff is completely self-appointed and may conduct, settle or discontinue the proceedings without consulting or notifying class members.<sup>7</sup> As well, the defendant can look solely to the representative plaintiff for discovery and costs if awarded.<sup>8</sup> Further, although a successful class action may require considerable judicial administration in the assessment and distribution of monetary relief, little guidance is given as to how this should be done. Finally, the procedures for determining the suitability of the suit for class action status is not appropriate for the task.<sup>9</sup>

Curing these defects is not simply a matter of fashioning new procedural rules, as a number of difficult policy choices must be made as well. Increased litigation of small claims gives rise to the danger that the

---

<sup>5</sup> 46 N.R. 139, 144 D.L.R. (3d) 385 (S.C.C. 1983).

<sup>5a</sup> *Id.* at 168, 144 D.L.R. (3d) at 410.

<sup>6</sup> *Supra* note 1, at 76.

<sup>7</sup> *See, e.g.*, *Abraham v. Prosoccer Ltd.*, 31 O.R. (2d) 475, 119 D.L.R. (3d) 167 (H.C. 1980) and *Cobbold v. Time Canada Ltd.*, 28 O.R. (2d) 326, 109 D.L.R. (3d) 611 (H.C. 1980).

<sup>8</sup> *See* *Stephenson v. Air Canada*, 26 O.R. (2d) 369, at 371, 103 D.L.R. (3d) 148, at 151 (H.C. 1980) and *Naken v. General Motors of Canada Ltd.*, *supra* note 5, at 164, 144 D.L.R. (3d) at 406.

<sup>9</sup> The main device is an application under Rule 126 so that as a general rule, evidence about the merits of the case is not admissible and the ability of the representative plaintiff to fairly represent the class is not considered.

courts will become clogged with what might appear to be trivial claims.<sup>10</sup> An improved class action procedure may encourage a judgment-proof "representative" plaintiff, for whom an adverse costs award is no deterrent, to pursue a large but ill-founded action hoping for a substantial "nuisance value" settlement. Class actions vindicate rights on behalf of those who may have taken no steps whatever to seek relief on their own behalf and this appears to be a marked departure from the principles of "party prosecution" and "party presentation" that are essential features of the adversary process.<sup>11</sup> While increased compliance with the law may result, can it be assumed that the rules of procedure are an appropriate vehicle to help achieve this objective? Such is the range of issues facing the Commission.

#### IV. THE COMMISSION'S POLICY CHOICES

Perhaps the most interesting and controversial portion of the *Report* is the section in which the Commission attempts a "cost-benefit" analysis of class actions. In this analysis three goals are identified. First, the procedure ought to ensure judicial economy.<sup>12</sup> "[I]f a class action procedure were not available, most of these claims would be litigated individually, leading to duplicative and costly hearings, at least in situations where there are too many potential plaintiffs for joinder to be feasible."<sup>13</sup> Second, class actions procedure ought to help lift social, psychological and economic barriers which, at present, effectively block access to the courts. Finally, the Commission embraces behaviour modification, if not as a goal, at least as an important and positive side effect: "[T]he potential of class actions to provide the incentives for increased compliance with the law, through the prevention of unjust enrichment or cost internalization, reinforces the 'judicial economy' and 'access' arguments in favour of the adoption of an expanded class action procedure in Ontario."<sup>14</sup> The second and third points are particularly significant.

How accessible should the courts be? Justice ought to be available to all, but litigation ought to be discouraged. Perhaps only the common law system could hold to both of these apparently conflicting principles so firmly. The existing rules of procedure attempt to keep the two in balance primarily by a combination of economic controls, one of the most important of which is the discretion of the court with respect to costs. The general rule that costs follow the event discourages weak suits from being brought or dubious defences from being advanced. Awarding those costs on the party and party scale will not afford the

---

<sup>10</sup> See, e.g., *Cobbold v. Time Canada Ltd.*, *supra* note 7, where the assessed damages were one dollar for each class member.

<sup>11</sup> See J. FLEMING JR., CIVIL PROCEDURE 3-8 (1965).

<sup>12</sup> *Supra* note 1, at 118-19.

<sup>13</sup> *Id.* at 118. But see *Bath v. Birnstihl*, 11 O.R. (2d) 770 (H.C. 1975), where joinder of 183 named plaintiffs was upheld.

<sup>14</sup> *Supra* note 1, at 145-46.

winner complete indemnity and thus helps ensure that the action or defence is not only meritorious, but is of sufficient importance to the successful party to justify this expense.<sup>15</sup> The Commission acknowledges that an increased access to class action procedure may reduce the effectiveness of these and other mechanisms which control the amount and seriousness of litigation.

The Commission discusses these matters in detail and makes extensive use of empirical evidence in the process. It concludes that with appropriate safeguards, potential abuse of the expanded procedure can be minimized and that the volume of litigation will likely not place impossible demands on present judicial resources.<sup>16</sup> However, these considerations fail to address the point that expanded class action procedure may permit prosecution of claims that are not only individually uneconomical to litigate, but are so small as to be considered trivial. This is not to suggest that all uneconomical claims are trivial; however, there is a point at which the amount in dispute on an individual basis is so small that the claim is not worth pursuing. For example in *Cobbold v. Time Canada Ltd.*, had the trial judge awarded damages, he would have assessed them at one dollar for each member of the class.<sup>17</sup> In *McLellan v. Insurance Corporation of British Columbia*,<sup>18</sup> the representative plaintiff's claim was for thirty-six dollars. These may be cases in which the amount of the individual's claims is so small that it does not justify expenditure of the court's time. Even if one accepts the Commission's arguments that class actions will improve access to justice, through the lowering of economic barriers and through helping overcome social and psychological barriers to obtaining relief, they do not provide justification for making individually trivial claims recoverable in the courts. Only a desire to deter or reform the defendant would do so.

The Commission is prepared to accept this sort of "behaviour modification" as an essential aspect of its proposed reforms. It argues that it inevitably forms part of any procedure for the enforcement of legal obligations and points to injunctive relief and punitive damages as particularly clear examples. The view of some commentators that the "proper function of civil litigation is to redress specific conflicts between private individuals, and not to discourage future misconduct"<sup>19</sup> is specifically rejected. Indeed, the Commission is not only prepared to accept behaviour modification as an essential aspect, but as the *sole* rationale for certain of its proposals, as the following passage illustrates:

It might be argued that, even if behaviour modification can be accepted as an unavoidable and potentially valuable by-product of the achievement of compensation through class and nonclass actions, there is no role for deterrence

---

<sup>15</sup> For a good discussion of these issues, see *Wadsworth v. MacDonald*, 16 N.S.R. (2d) 592 (App. Div. 1976) and Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

<sup>16</sup> *Supra* note 1, at 192-93.

<sup>17</sup> *Supra* note 7.

<sup>18</sup> 29 B.C.L.R. 83, 125 D.L.R. (3d) 365 (S.C. 1981), *aff'd* 32 B.C.L.R. 154, 130 D.L.R. (3d) 349 (C.A. 1981).

<sup>19</sup> *Supra* note 1, at 145.

standing alone when compensation cannot be achieved. This issue is indeed unique to class actions, since in individual suits the individual plaintiff will always be present and in a position to accept any monetary award. The argument is not persuasive, however. It is difficult to see why one defendant should be required to disgorge unjust benefits to an individual plaintiff, or in a class action — where liability is assessed on a balance of probabilities — because the defendant has injured a readily identifiable class with compensable individually recoverable or nonrecoverable claims, while another defendant, who has engaged in similar misconduct, should be entitled to keep the fruits of the wrong, unless a substantial fine has been extracted by means of criminal proceedings — where guilt must be established beyond a reasonable doubt — simply because class members do not claim their share of the recovery, are hard to locate, or have claims that are nonviable.<sup>20</sup>

## V. THE SPECIFIC PROCEDURAL RECOMMENDATIONS

A draft Act of 57 sections forms an appendix to the *Report*.<sup>21</sup> If enacted, it would form the basic code for the conduct of class actions other than those brought by a person in a representative capacity authorized by any other Act, or those which were required to be brought by a person in a representative capacity prior to the Act.<sup>22</sup> The existing rules of court under the Judicature Act<sup>23</sup> would apply unless inconsistent with it, and the Rules Committee would have power to make necessary additional rules.<sup>24</sup>

The first phase of the proposed procedure is the certification process in which the Court passes on the suitability of the action for class treatment and the adequacy of the representative plaintiff to conduct it. If the plaintiff wishes to proceed under the Act, he must apply for certification. To certify, the court must find that:

- (a) the action is brought in good faith and there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class;
- (b) the class is numerous;
- (c) there are questions of fact or law common to the class;
- (d) a class action would be superior to other available methods for the fair and efficient resolution of the controversy; and
- (e) the representative plaintiff would fairly and adequately protect the interests of the class.<sup>25</sup>

The court is directed to consider certain specific matters in making these findings<sup>26</sup> and is given an overriding discretion not to certify if it is of the opinion that “the adverse effects of the proceedings upon the class, the courts or the public would outweigh the benefits to the class, . . . if

---

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 857-78.

<sup>22</sup> Class Action Act, proposed Act by the Ontario Law Reform Commission [hereafter cited as Draft Act], s. 56.

<sup>23</sup> R.S.O. 1980, c. 223.

<sup>24</sup> S. 53.

<sup>25</sup> Sub. 3(3).

<sup>26</sup> S. 4.

the action were certified".<sup>27</sup> At the certification stage, both the representative plaintiff and the defendant must file affidavits and both parties are subject to examination.<sup>28</sup>

The certification process overcomes many of the present procedural defects. Although still self-appointed, the representative plaintiff must satisfy the court that the class will be fairly represented<sup>29</sup> and must seek the court's approval of any settlement of the action.<sup>30</sup> The suitability of the action for class action treatment will no longer have to be tested on the assumed factual basis of an application under Rule 126, but on the basis of substantial evidence from both sides. The action must also be found to have "a reasonable possibility"<sup>31</sup> of succeeding and this, together with the overriding judicial discretion not to certify, ought to protect defendants from frivolous claims and the courts from inundation.

The Commission's recommendations concerning exclusion from the class and notice to class members are more controversial. Unless excluded, all persons within the description of the class will be included and the court is given a discretion with respect to whether class members will be notified after certification<sup>32</sup> and whether any members will be permitted to exclude themselves.<sup>33</sup>

The discretionary, as opposed to a mandatory, notice provisions are advanced for practical reasons. Notice may be prohibitively expensive if the class is very large and probably quite unnecessary if the individual members have little to add to the resolution of the legal issues. For example, where the action concerns unlawful overcharging by a utility company, the amount due to each customer would be a matter of arithmetical calculation not requiring evidence from class members and the class action judgment would not be likely to interfere with any other claims which individual class members might have against the defendant. However, these practical considerations do not overcome those philosophical arguments which will be discussed in the next section.<sup>34</sup> The provision denying class members an absolute right to be excluded cannot be justified by these practical considerations or, it is suggested, by any others.

Once the action is certified and the questions of notice of certification and exclusion have been settled, the action moves toward the next phase, the trial of the common issues. The representative plaintiff and defendant may obtain discovery of each other in the usual way and other class members may be examined by the defendant with leave of the court.<sup>35</sup> The action is required to be tried without a jury<sup>36</sup> and, apart from some

---

<sup>27</sup> Sub. 6(1).

<sup>28</sup> S. 8.

<sup>29</sup> S. 5.

<sup>30</sup> S. 36.

<sup>31</sup> Para. 3(3)(a).

<sup>32</sup> S. 16.

<sup>33</sup> S. 20.

<sup>34</sup> See VI. CRITIQUE, *infra*.

<sup>35</sup> S. 21.

<sup>36</sup> S. 50.

provisions with respect to assessment of damages and admissibility of statistical evidence, there are no special rules governing the conduct of the trial.<sup>37</sup>

If, after the common issues have been resolved, individual issues remain, the action moves into its third phase, the trial of individual questions.<sup>38</sup> The court is given wide discretion to fashion a procedure appropriate to the particular case.<sup>39</sup> Perhaps the most interesting aspects of this phase of the proceedings are the provisions respecting assessment and distribution of monetary awards.

Section 22 authorizes what the Commission refers to as aggregate assessment of monetary relief.<sup>40</sup> The court will be permitted, in the circumstances described in the section, to determine the total amount owing by the defendant to the class as a whole or to a part thereof, and to give judgment accordingly. Individual assessment is needed only where this sort of aggregate assessment is not possible.<sup>41</sup>

After assessment, the court is given a range of possibilities for the distribution of the award. The defendant may be ordered to calculate and distribute the shares to class members directly in appropriate circumstances.<sup>42</sup> The court can authorize any procedure that would minimize the burden upon the class members in proving their claims<sup>43</sup> and if the calculation of exact shares is impracticable, an average distribution may be ordered.<sup>44</sup> Undistributed funds, in the discretion of the court may be distributed on a *cy-près* basis,<sup>45</sup> forfeited to the Crown or returned to the defendant.<sup>46</sup>

Other notable features of the Act include a distinctive set of costs provisions establishing a "no-way" costs regime as a general rule,<sup>47</sup> providing for contingent fees<sup>48</sup> and eliminating security for costs except

---

<sup>37</sup> Ss. 22-30, 49.

<sup>38</sup> Ss. 31-32.

<sup>39</sup> Sub. 31(2).

<sup>40</sup> *Supra* note 1, at 531. Section 22 reads as follows:

In a class action where,

- (a) monetary relief is claimed on behalf of the members of the class;
- (b) no questions of fact or law other than the assessment of monetary relief remain to be determined in order to establish the liability of the defendant to some or all members of the class; and
- (c) the total amount of the defendant's liability, or part thereof, to some or all of the members of the class can be assessed without proof by the individual members of the class with the same degree of accuracy as in an ordinary action,

the court shall determine the aggregate amount of the defendant's liability and give judgment accordingly.

See also ss. 23-28.

<sup>41</sup> Sub. 31(1).

<sup>42</sup> Sub. 23(1).

<sup>43</sup> Sub. 25(2).

<sup>44</sup> S. 26.

<sup>45</sup> S. 27.

<sup>46</sup> S. 28.

<sup>47</sup> Sub. 41(1).

<sup>48</sup> Sub. 41(2).

in individual proceedings.<sup>49</sup>

## VI. CRITIQUE

Even this brief summary of the proposed Act shows that a number of its provisions are neither consistent nor readily reconcilable with some of the basic principles of the adversary systems generally or with the existing rules of procedure. Although the goals of the Commission are not inappropriate, the question becomes whether this new procedural regime, apparently based on different premises than those underlying the bulk of existing civil procedure, can be integrated with it successfully. The problems may be even more fundamental, since a number of the Commission's policy choices mandate a radical overhaul not only of class action procedure, but also of the rules of practice generally. It is not necessary to reject the idea of this more radical reform to question whether, in its absence, the class actions recommendations ought to be adopted.

The preliminary merits test proposed for class actions is one example of a reform that is not supported by any feature unique to class actions. Under the proposed Act, the courts will be asked to decide at the certification stage whether the plaintiff's action has a reasonable possibility of succeeding on the basis of evidence submitted by both parties.<sup>50</sup> In other types of actions, an application to strike out a statement of claim on the basis that it is frivolous or vexatious, or fails to disclose a cause of action is the primary device for ending unmeritorious claims at an early stage. However, in such applications the court must assume that the plaintiff's allegations are capable of being established and, except in unusual circumstances, evidence will not be admissible.<sup>51</sup> The rationale for this very limited pre-trial screening is that courts should be reluctant to make assessments of the strength of the case or defence until trial. The parties should not be deprived of their "day in court" on the basis of a "trial by affidavit". While the Commission is correct in stating that the existing rule would be "a far from effective device for eliminating unmeritorious class actions",<sup>52</sup> it is no more or no less effective in eliminating unmeritorious claims generally. Thus, whether or not one accepts the rationale for the existing position, if the procedural rules are to be reasonably consistent, the need for the apparent inconsistency which would result from the Commission's proposal must be justified by some peculiar feature of class actions.

---

<sup>49</sup> Sub. 42(1).

<sup>50</sup> Para. 3(3)(a).

<sup>51</sup> See generally, G. WATSON, S. BORINS, N. WILLIAMS, *CANADIAN CIVIL PROCEDURE* 6-40 (2d ed. 1977).

<sup>52</sup> P. 311. Note that the Civil Procedure Revision Committee proposes a more stringent pre-trial screening and would admit affidavit evidence directed to the merits of the case: *REPORT OF THE CIVIL PROCEDURE REVISION COMMITTEE* (Ministry of the Attorney-General, Ontario, 1980).



The Commission attempts this justification by employing three arguments. First, it says that a preliminary merits test will give the defendant some protection against plaintiffs making large but unmeritorious claims in the hope of nuisance value settlements.<sup>53</sup> Second, the additional control is needed to replace the traditional costs award, which, as has been mentioned, the Commission would discard.<sup>54</sup> Third, the proposed test will help “minimize the pressures that class actions will bring to bear on the administration of justice”.<sup>55</sup>

None of these arguments is convincing. As for the first, large and unmeritorious claims may be brought by a non-class action plaintiff. As for the second, the Commission argues that its new merits test is required as a result of its new “no-way” costs rule. Nevertheless, we are told in the costs section of the *Report* that the traditional costs sanction is not needed because of the improved screening of unmeritorious claims by the new preliminary merits test!<sup>56</sup> In response to the third argument, many non-class actions make equal demands, but these plaintiffs are not required to pass this sort of merits test. The Commission may well have pointed to significant defects of existing procedures, but it has not made a case for basing class action procedure on essentially different assumptions than procedure for other actions.

The same may be said of other provisions in the proposed Act, particularly those concerning notice to, and “opting-out” by, class members. Under the Act, a class member may not receive notice that the action has been certified<sup>57</sup> and may not be permitted to exclude himself even if he does receive notice and applies to be excluded.<sup>58</sup> These provisions do not seem to sit comfortably with the traditional adversarial principle of party prosecution because they allow an action to proceed for the benefit of someone who has no knowledge of it or, perhaps, knows about it, but does not support it. The notice provision may be supported by the practical consideration of cost, but a procedure permitting an action to be brought on behalf of an unwilling plaintiff is so fundamentally at odds with the assumptions underlying the adversarial system that it is unsupportable.<sup>59</sup>

Although the Commission offers a number of arguments supporting its recommendations, they do not support this discretionary “opting-out” regime. The expense of notice and the impracticality of litigating individual claims are relevant considerations, but they do not override the right of choice whether or not to participate as a plaintiff in an action. One suspects that behaviour modification may be at the root of the Commission’s decision. If the class action procedure is to serve that

---

<sup>53</sup> *Supra* note 1, at 313.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 663.

<sup>56</sup> *Id.*

<sup>57</sup> Draft Act, s. 16.

<sup>58</sup> Draft Act, s. 20.

<sup>59</sup> It appears that the Chairman of the Commission agrees: see *Chairman’s Reservations*, *supra* note 1, at 851-52.

goal, it will be important for the class members to keep a united front. Otherwise, the threat of a large collective claim may be diminished. The discretionary "opting-out" regime will help ensure a limited number of exclusions and, especially in actions involving very small individual claims, thereby ensure a significant collective threat.

Some of the provisions dealing with the assessment and distribution of monetary relief are also problematic. The Commission supports "aggregate assessment" in which the total amount owing to the class or a portion of it may be assessed without individual proceedings.<sup>60</sup> If the assessment is a matter of arithmetic, this method of proceeding is not particularly contentious. However, where the claims of the individual members are for damages, the considerations are quite different. For example, the Commission says that *Naken*,<sup>61</sup> putting aside the issue of whether particular class members actually relied on the warranties made in media advertising, would be suitable for aggregate assessment.<sup>62</sup> In that case, the representative plaintiffs sought damages for breach of warranty relating to certain automobiles manufactured by the defendant. They alleged that as a result of the breach, the resale value of each car was approximately one thousand dollars less than the resale value of other comparable cars.<sup>63</sup> It is not entirely clear what "aggregate assessment" might mean in the context of that case, and one might have hoped for more guidance than the Commission gives.<sup>64</sup> Nevertheless, it is instructive to examine some of the possibilities and the problems that arise from them.

It could be that "aggregate assessment" means only this: the representative plaintiff could attempt to establish that the reputation of the defendant's product was so poor that each owner suffered as a minimum the loss alleged, ignoring the actual condition of the individual owner's particular car. This seems fair to the defendant. It would, however, be difficult for the plaintiffs to establish that proposition and there would be a risk of unfairness to class members as the judgment for that common minimum claim might preclude individuals from proving that they suffered other or greater losses.<sup>65</sup> Moreover, it appears from the *Report*, that this is not all that aggregate assessment might mean in such a case.

Another possibility, one of which the Commission appears to intend, must be examined.<sup>66</sup> A type of "aggregate assessment" could be made if the court based its calculation of damages on market evidence showing the average decline in value of the cars manufactured by the defendant as compared to the average decline in value of comparable cars manufactured by others. The class could be given judgment for the

---

<sup>60</sup> Draft Act, s. 22.

<sup>61</sup> *Supra* note 5.

<sup>62</sup> *Supra* note 1, at 546.

<sup>63</sup> *Supra* note 4, at 782-83, 92 D.L.R. (3d) at 102-03.

<sup>64</sup> *Supra* note 1, at 546-50.

<sup>65</sup> This concern was expressed by Estey J. in *Naken*, *supra* note 5, at 164-65, 144 D.L.R. (3d) at 405-06.

<sup>66</sup> *Supra* note 1, at 552.

difference multiplied by the number of members of the class. In this sort of "aggregate assessment", unlike the first sort which involves damages for "poor reputation" only, the characteristics of the individual cars are relevant. Accordingly, the amount of compensation due to each owner would vary depending on how far the particular car fell short of the warranted standard. The Commission argues that, over a large sample, this method, based on actual market data, will not be less accurate than a large number of individual assessments. In one sense, this is probably true. The total amount payable by the defendant to the class as a whole ought not to vary significantly whether the average method or the large number of individual assessment method is used, providing that the market figures are not based on a sample significantly different in relevant respects from the class, and that all class members claim their share. However, the situation of the individual class member must also be considered. To do so, we must turn to the provisions concerning distribution of the monetary award.

Section 26 of the proposed Act authorizes "average distribution" if the circumstances make the calculation of each member's exact share impractical and if failure to do so would deny recovery to a substantial number of class members.<sup>67</sup> Presumably *Naken* would fall within this section, otherwise the whole point of the "aggregate assessment", the avoidance of a multiplicity of individual assessments, would be lost. However, the average distribution is bound to result in approximately one-half of the members of the class being overcompensated and the other half being undercompensated. While this may not be unfair to the defendant in the sense that he has paid no more to the class in total, it is not in any real sense an award of compensatory damages. And it is only fair to the defendant if either all class members claim their share of the amount assessed against him, or any residue resulting from a failure to claim is returned to him. However, the court may order either a *cy-près* distribution or that the residue be forfeited to the Crown, so that the fairness to the defendant may be illusory.

This is another instance in which behaviour modification appears to be the overriding consideration. All of these provisions combine so that neither difficulty of proof, nor inconvenience to, or lack of interest by, class members will necessarily save the defendant from paying the full amount that he owes to the class as a whole. When the Commission states that it does "not eschew the goal of behaviour modification",<sup>68</sup> it is, at least, guilty of misleading understatement.

## VII. CONCLUSION

This *Report* should spark controversy. It asks fundamental questions and if its answers to them are correct, they mandate a radical overhaul,

---

<sup>67</sup> Draft Act, s. 26.

<sup>68</sup> *Supra* note 1, at 145.

not only of class actions, but also of civil procedure generally. Whether or not the existing structures will be able to accommodate these proposals remains to be seen. If enacted, they will test the courts' ability to adapt to new ways of thinking about civil litigation.