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### Safety in Numbers or Lost in the Crowd? Litigation of Mass Claims and Access to Justice in Ontario

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Résumé de l'article

Née voilà plus de trente ans, la Loi de 1992 sur les recours collectifs [LRC] de l'Ontario a constitué une source d'inspiration pour l'adoption, au cours des trois dernières décennies, d'une loi semblable tant ailleurs au Canada qu'à l'étranger. Cette loi est reconnue à juste titre comme un important vecteur de changement social. Cependant, l'usure se fait sentir là comme ailleurs et certaines fissures commencent à apparaître. Par suite de récentes modifications apportées à l'article 5 de la LRC, les conditions préalables à la certification sont devenues plus restrictives. De plus, certains professionnels spécialisés en recours collectifs commencent à penser que la LRC est un instrument imprécis et qu'il est préférable de ne pas se fonder sur cette loi pour faire valoir certaines réclamations collectives. Bien que le recours collectif puisse encore constituer une solution avantageuse pour les plus petites créances, les créances plus importantes qui nécessitent un traitement individuel risquent d'être diluées dans la masse. Cependant, peu d'indications sont données sur la marche à suivre à l'extérieur du cadre de la LRC, ce qui peut entraîner des incertitudes et des délais.

Dans cet article, l'auteure propose un ensemble de lignes directrices informelles à suivre pour faire valoir des réclamations collectives en Ontario, à la lumière de l'expérience relative aux litiges couvrant plusieurs districts aux États-Unis et aux litiges collectifs en Angleterre et au pays de Galles, ainsi que de la théorie et de l'évolution de la typologie de ces réclamations. Ces lignes directrices permettront de réduire les incertitudes et les délais en facilitant les accords entre les parties sur la procédure à suivre. Elles présenteront également une orientation plus que nécessaire sur un phénomène qui prend de l'ampleur.

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## Safety in Numbers or Lost in the Crowd? Litigation of Mass Claims and Access to Justice in Ontario

Suzanne Chiodo\*

*Ontario's Class Proceedings Act [CPA] is 30 years old. In the past three decades, it has inspired similar legislation across Canada and around the world, and its capacity for bringing about social change has been widely acknowledged. But, like all things that mature, some cracks are beginning to show. The certification test under section 5 of the CPA has been made more restrictive by recent legislative amendments. In addition, class action practitioners are starting to recognize that the CPA can be a blunt instrument and that some mass claims are better litigated outside of that context. While smaller claims may find safety in numbers in a class action, larger claims that require more individualized treatment may get lost in the crowd. Outside of the CPA, however, there is minimal guidance in this area, and this can lead to uncertainty and delay.*

*This article proposes a set of informal guidelines for the litigation of mass claims in Ontario, informed by multidistrict litigation in the US and group litigation in England & Wales, as well as the theory and history of mass claims typology. This guidance will reduce uncertainty and delay by facilitating agreement between parties on procedural steps and provide much-needed direction for a growing phenomenon.*

*Née voilà plus de trente ans, la Loi de 1992 sur les recours collectifs [LRC] de l'Ontario a constitué une source d'inspiration pour l'adoption, au cours des trois dernières décennies, d'une loi semblable tant ailleurs au Canada qu'à l'étranger. Cette loi est reconnue à juste titre comme un important vecteur de changement social. Cependant, l'usure se fait sentir là comme ailleurs et certaines fissures commencent à apparaître. Par suite de récentes modifications apportées à l'article 5 de la LRC, les conditions préalables à la certification sont devenues plus restrictives. De plus, certains professionnels spécialisés en recours collectifs commencent à penser que la LRC est un instrument imprécis et qu'il est préférable de ne pas se fonder sur cette loi pour faire valoir certaines réclamations collectives. Bien que le recours collectif puisse encore constituer une solution avantageuse pour les plus petites créances, les créances plus importantes qui nécessitent un traitement individuel risquent d'être diluées dans la masse. Cependant, peu d'indications sont données sur la marche à suivre à l'extérieur du cadre de la LRC, ce qui peut entraîner des incertitudes et des délais.*

*Dans cet article, l'auteure propose un ensemble de lignes directrices informelles à suivre pour faire valoir des réclamations collectives en Ontario, à la lumière de l'expérience relative aux litiges couvrant plusieurs districts aux États-Unis et aux litiges collectifs en Angleterre et au pays de Galles, ainsi que de la théorie et de l'évolution de la typologie de ces réclamations. Ces lignes directrices permettront de réduire les incertitudes et les délais en facilitant les accords entre les parties sur la procédure à suivre. Elles présenteront également une orientation plus que nécessaire sur un phénomène qui prend de l'ampleur.*

## I. INTRODUCTION

Class actions have come of age in Ontario. With one of the most established class action regimes in the world (only Québec and the US are older), Ontario's *Class Proceedings Act* [CPA] has matured and its use has expanded. At 30 years old, the CPA is now being used in numerous areas of the law, from consumer protection and data privacy to *Charter* litigation and environmental protection. The capacity of class actions for bringing about societal change has been widely acknowledged; most recently, they have been used to pursue constitutional damages for the harms resulting from climate change.<sup>1</sup> They also promote some of the central values of our civil justice system: namely, access to justice, judicial economy, and behaviour modification. Without a fair, efficient, and accessible means of enforcing our rights, the vulnerable are at the mercy of the powerful, the underprivileged are at the mercy of the wealthy, and the law-abiding are at the mercy of the lawbreakers. Class actions therefore support a functioning civil justice system, which is a cornerstone of our democracy and key to the rule of law. Since its enactment in the early 1990s, the CPA has inspired class proceedings legislation across Canada and around the world, including the UK's first class actions regime in the area of competition law.

But, like all things that mature, some cracks are beginning to show. Changes made to the CPA in October 2020<sup>2</sup> arguably make the certification test more restrictive, and this trend is spreading to other provinces.<sup>3</sup> Certification, where the court decides whether the action is suitable for class treatment,<sup>4</sup> has always been a major step in a class proceeding. Judicial interpretation of this requirement across Canada's common-law provinces means that the certification test has become a fairly low bar,<sup>5</sup> including the consideration of whether a class proceeding is the preferable procedure.<sup>6</sup> However, the amendments to Ontario's CPA mean that a class proceeding will only satisfy this preferable procedure criterion if (at a minimum) it is "superior to all reasonably available means of determining the entitlement of the class members to relief", and if "the questions of fact or law common to the class members predominate over any questions affecting only individual class members".<sup>7</sup> These superiority and predominance requirements may make it more difficult to bring class proceedings<sup>8</sup> where a common issue makes up a very limited aspect of the liability question and many individual issues remain to be decided (for example, in cases involving systemic negligence).<sup>9</sup> In cases where the common issues do not predominate, Ontario courts may now find that another way of proceeding is superior: this could include joinder, consolidation, or hearing together under Rules 5 and 6 of the Ontario *Rules of Civil Procedure*.<sup>10</sup> Quite apart from these

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<sup>1</sup> Jasminka Kalajdzic, "Climate Change Class Actions in Canada" (2021) 100 SCLR 31.

<sup>2</sup> *Smarter and Stronger Justice Act, 2020*, SO 2020, c 11 [Bill 161].

<sup>3</sup> Prince Edward Island's *Class Proceedings Act*, RSPEI 1988, c C-9.01, came into force on June 1, 2022, and adopts the more restrictive test in Ontario's *Class Proceedings Act*, SO 1992, c 6 [CPA]. The Law Reform Commission of Saskatchewan is also reviewing its *Class Actions Act*, SS 2001, c C-12.01, and its consultation report also considers the more restrictive test: Law Reform Commission of Saskatchewan, *Reform of the Class Actions Act: Consultation Report* (Saskatoon: LRCS, 2021), online: <<https://lawreformcommission.sk.ca/Class-Actions-Act-Consultation-Report.pdf>>.

<sup>4</sup> CPA, *supra* note 3, s 5(1).

<sup>5</sup> *Hollick v Toronto (City)*, 2001 SCC 68 [Hollick]; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57.

<sup>6</sup> CPA, *supra* note 3, s 5(1); *AIC Limited v Fischer*, 2013 SCC 69.

<sup>7</sup> CPA, *supra* note 3, s 5(1.1).

<sup>8</sup> At the time of writing, there was no case law interpreting these new requirements.

<sup>9</sup> See e.g. *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ONCA).

<sup>10</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 5 and 6 [Rules].

changes, a number of recent decisions have acknowledged that, especially in cases involving systemic negligence, a common issues trial in a class proceeding could add complexity and delay while doing little to advance class members' individual claims.<sup>11</sup>

In addition, class action commentators are starting to recognize that the *CPA* is not suitable for all cases, and that some mass claims are better litigated outside of that context. For small claims in areas such as consumer protection or data privacy, class proceedings make such claims economically viable and offer access to justice as well as behaviour modification.<sup>12</sup> Where claims are small, class members are less likely to realize that they have even been injured, so class proceedings statutes offer protections such as the approval of the representative plaintiff at certification, notice requirements, and court supervision for settlement and other major steps. For larger claims, however, the cost and delay involved in these procedures may mean that a class proceeding is not proportionate.<sup>13</sup> Where damages are potentially significant and individual issues such as causation are key, claims can get lost in the crowd of a class. Commentary on institutional abuse claims, for example, indicates that such claims may attract much lower judgment awards or settlement amounts in a class proceeding than if they had been litigated individually, and plaintiffs whose claims arise from traumatic events may become retraumatized.<sup>14</sup> They may also take much longer, with the certification process adding years to the pursuit of claims which may ultimately revolve around the issues individual to each claim.<sup>15</sup>

However, apart from class proceedings,<sup>16</sup> the only formal procedures in Ontario (and in Canada generally) for the litigation of claims that arise from similar issues of fact or law are:

- Joinder, which means that multiple plaintiffs or applicants who are represented by the same lawyer may be part of the same proceeding where their claims arise from the same transaction or occurrence, or give rise to common questions of law or fact;<sup>17</sup>
- Consolidation, which means that two or more existing proceedings may be consolidated into one proceeding, in circumstances that are similar (but not necessarily identical) to joinder;<sup>18</sup> and
- Hearing together, which means that two or more existing proceedings are subject to common steps (such as common discoveries and a common trial), but each proceeding maintains its individual existence.<sup>19</sup>

<sup>11</sup> See e.g. *Carcillo v Canadian Hockey League*, 2023 ONSC 886 [*Carcillo*].

<sup>12</sup> *O'Brien v Bard Canada Inc*, 2015 ONSC 2470, at para 225 [*O'Brien*]. They may not promote judicial economy (the other aim of class proceedings), because the class members' claims would not be litigated apart from the class action, so the class action actually facilitates an increased burden on judicial resources: Garry D Watson, "Class Actions: The Canadian Experience" (2001) 11 *Duke J Comp & Intl L* 269 at 270.

<sup>13</sup> The proportionality requirement that has been foundational to the Ontario *Rules of Civil Procedure* since its enactment in 2010: Rules, *supra* note 10, Rule 1.04(1.1). The Rules apply to proceedings under the *CPA*: *CPA*, *supra* note 3, s 35.

<sup>14</sup> See discussion in Part III, below.

<sup>15</sup> *Carcillo*, *supra* note 11, at paras 397-420.

<sup>16</sup> Under Rule 12.07 (Rules, *supra* note 10), proceedings may also be brought against a group of defendants who have the 'same interest', a term that arises from the centuries-old representative rule. That rule is available in other jurisdictions (such as British Columbia) for both plaintiffs and defendants.

<sup>17</sup> Rules, *supra* note 10, Rule 5.02(1). This governs joinder of parties; different claims may also be joined in the same proceeding under Rule 5.01 (joinder of claims).

<sup>18</sup> *Ibid*, Rule 6.01(1). The parties are not required to be represented by the same lawyer.

<sup>19</sup> *Ibid*. Again, the circumstances in which cases will be heard together are similar (but not identical) to joinder.

While this article does not argue that these procedures are inadequate for the litigation of mass claims, the guidance for their use in the mass claims context is minimal. There is no framework in Canada that performs the function of Group Litigation Orders [GLOs] in England & Wales<sup>20</sup> or Multidistrict Litigation [MDL] in the United States, which govern the management of mass claims that are not pursued as a class action. It is becoming increasingly clear to class action lawyers, litigants, and judges, both in Ontario and elsewhere in Canada, that the lack of guidance on this issue leads to unpredictability,<sup>21</sup> which in turn causes delay.

A very recent class action decision illustrates this uncertainty and need for guidance. In *Carcillo v Canadian Hockey League*,<sup>22</sup> Justice Perell of the Ontario Superior Court held that a class proceeding against more than 60 teams and leagues of the Canadian Hockey League (as well as the CHL itself) failed to satisfy four of the five requirements of s 5(1) of the *CPA*.<sup>23</sup> His Honour held that the action could not be certified because its fundamental premise was not legally viable, namely, “that each of [the 64 defendants] are jointly and severally liable for each other’s wrongdoings regardless of whether the particular team participated in the wrongdoing”.<sup>24</sup> Justice Perell decided instead to permit the proceeding to continue<sup>25</sup> as 60+ “opt-in joinder actions”<sup>26</sup> against each of the defendants, to be designed according to *CPA* s 25 which deals with the determination of individual issues. This approach raises numerous questions. Would the plaintiffs in each action act as a representative plaintiff for the players in the relevant team? If so, how can the *CPA* apply to an action that has not been certified? If not (so that each player has

<sup>20</sup> All references to England in this article refer to the jurisdiction of England & Wales.

<sup>21</sup> Robin Linley, “Step Aside, Class Actions: Mass Torts Are Here” (11 October 2022), online: *Blakes* <[www.blakes.com/insights/five-under-5/2022/step-aside-class-actions-mass-torts-are-here](http://www.blakes.com/insights/five-under-5/2022/step-aside-class-actions-mass-torts-are-here)> [<https://perma.cc/AB6S-NLSQ>].

<sup>22</sup> *Supra* note 11.

<sup>23</sup> The five conjunctive requirements for certification under *CPA*, *supra* note 3, s 5(1), are similar across all Canada’s common-law provinces and are as follows:

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

As noted previously, Ontario has additional requirements under the preferable procedure criterion, and these are listed in s 5(1.1).

<sup>24</sup> *Carcillo*, *supra* note 11 at para 27.

<sup>25</sup> Under *CPA*, *supra* note 3 s 7(2), if a court refused to certify a proceeding as a class proceeding, it may permit the proceeding to continue in altered form. Justice Perell also relied upon *CPA* s 12, which allows the court to make any order it considers appropriate respecting the conduct of a class proceeding. Whether *CPA* s 12 allows a court to bypass the common issues stage of a class proceeding, which is essentially what Justice Perell proposed in *Carcillo*, is beyond the scope of this article. However, see Paul-Erik Veel et al, “The Limits of Case Management: A Review and Principled Approach to the Court’s General Management Powers” (2021) 16:2 *CCAR* 143.

<sup>26</sup> *Carcillo*, *supra* note 1122 at para 447. Justice Perell clarified in a prior decision that the test for joinder under *CPA*, *supra* note 3, s 7 is the same as the test for joinder under Rules, *supra* note 10, Rule 5: *RG v The Hospital for Sick Children*, 2019 ONSC 5696, at paras 15 and 71-75 [RG].

to sue individually and the actions are joined or consolidated under the *Rules*), why invoke the *CPA* at all?<sup>27</sup>

The decision raises several other issues that are relevant to the matters discussed in this article. While Justice Perell noted the advantages of litigating systemic abuse claims by way of a class proceeding, namely, that the systemic questions could be answered in common as well as the availability of aggregate damages,<sup>28</sup> he also noted some major disadvantages that will be discussed throughout this article. First, if the common (systemic) questions only form a small part of the liability picture, or are very hard to extricate from individual, non-systemic questions, then “the case may become unmanageable or unproductive”.<sup>29</sup> This would lead to complexity and delay in the common issues determinations, following which the individual issues for each class member would still have to be determined.<sup>30</sup> Second, if there is no aggregate damages award after an expensive and protracted common issues trial, then counsel and their clients will be out of pocket for several more years and “the game [would not be] worth the candle.”<sup>31</sup> Given the disadvantages of class proceedings for systemic negligence and other cases, guidance on pursuing them efficiently outside of that context is much needed.

While guidance on the litigation of mass claims is necessary, a formal procedural mechanism akin to the GLO is likely to be overly burdensome and unnecessary for reasons discussed throughout this article. I therefore propose informal guidance that will operate within the current *Rules* on joinder, consolidation, and hearing together – guidance that will also be applicable across provinces in a way that, for constitutional reasons on which I elaborate below, a formal procedural mechanism cannot. Due to the relative novelty of the mass claims phenomenon, there is virtually no Canadian literature on this subject; this article will therefore draw on the experiences of England and the United States [US].

With regard to terminology, I use the term ‘mass claims’ to refer to claims arising out of the same transaction or occurrence or series of transactions or occurrences,<sup>32</sup> or which share one or more common or related issues of law or fact.<sup>33</sup> I do not use the US term ‘mass tort’, because non-tort claims (for example, in contract) can also be litigated as mass claims. Nor do I use the term ‘multi-party action’, a term that arose in England in the 1980s and 1990s and is occasionally in use today,<sup>34</sup> because the framework I describe does not necessarily involve one action with multiple parties,<sup>35</sup> but can also involve numerous actions that are consolidated or heard together.<sup>36</sup>

In Part II of this article, I discuss the issue of access to justice for these mass claims. I look to theory and history to distinguish smaller claims that would not be economically viable to bring as individual actions (what John Coffee calls ‘Type B’ claims<sup>37</sup> – for example, the price-fixing class action against

<sup>27</sup> Justice Perell stated in *RG*, *ibid*, that under *CPA*, *supra* note 3, s 7 the class proceeding may continue as another proceeding, but “the continued proceeding would not be a proceeding governed by the *Class Proceedings Act, 1992*” (at para 72). His Honour did not refer to this statement in *Carcillo*, *ibid*.

<sup>28</sup> *Carcillo*, *ibid*, at paras 397-398.

<sup>29</sup> *Ibid* at para 400.

<sup>30</sup> *Ibid* at para 413-416.

<sup>31</sup> *Ibid* at para 418.

<sup>32</sup> *Rules*, *supra* note 10, Rules 5.02(1)(a) (joinder of parties) and 6.01(1)(b) (consolidation).

<sup>33</sup> *Rules*, *supra* note 10, Rules 5.02(1)(b) and 6.01(1)(a); *The Civil Procedure Rules 1998* (England & Wales), SI 1998 No 2132 (L 17), Rule 19.10 (group litigation orders) [CPR]; *Multidistrict Litigation Act*, 28 USC § 1407(a) [*MDL Act*].

<sup>34</sup> Christopher Hodges & Geraint Webb, eds, *Multi-Party Actions* (Oxford: Oxford University Press, 2001, 2d ed forthcoming 2025).

<sup>35</sup> *Rules*, *supra* note 10, Rule 5.02 (joinder of parties).

<sup>36</sup> *Rules*, *supra* note 10, Rule 6.01 (consolidation or hearing together).

<sup>37</sup> John C Coffee Jr, “The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action” (1987) 54 *U Chi L Rev* 877 at 904-906 [Coffee].

Loblaws where it is alleged that anti-competitive behaviour raised the price of bread for Canadian consumers),<sup>38</sup> from larger ‘Type A’ claims such as those for systemic abuse that were the subject of the class action in *Carcillo*.<sup>39</sup> In Part III, I discuss the problem: that class actions are not the most appropriate procedure for many Type A claims, and that they may actually reduce access to justice for people with such claims. In Part IV, I propose an informal framework for the litigation of multiple similar claims in Ontario. Part V concludes.

## II. ACCESS TO JUSTICE FOR MASS CLAIMS

Mass claims can vary dramatically in nature. Procedures that are suitable for some kinds of claims will not be suitable for others. According to the principle of proportionality, procedures must be tailored to the nature of the dispute. This principle is articulated in Rule 1.04(1.1), which states that, “[i]n applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”<sup>40</sup> The most suitable forum for resolving a dispute is therefore “not always that with the most painstaking procedure,” as Justice Karakatsanis stated in *Hryniak v Mauldin*.<sup>41</sup> Procedures must also be accessible, and cost and delay have an impact on accessibility.<sup>42</sup> It follows that the resolution of mass claims must also be proportionate, accessible, and suitable to the nature of the dispute.

Class actions jurisprudence and scholarship in the United States has long acknowledged that the procedure is not a ‘one size fits all’ solution for all mass claims.<sup>43</sup> John Coffee’s taxonomy of such claims is well-known in the US. According to Coffee, there are three types of mass claims.<sup>44</sup> Type A claims are individually economically viable; they would be litigated even in the absence of a class action. Type B claims are individually non-viable – they are too small to be economically worth litigating outside of a class action, because the available recovery would be dwarfed by the costs of litigating them. Type C class actions involve a mix of Type A and Type B claims – for example, a class proceeding for a defective diet aid where some class members suffered liver injury from the consumption of the product, whereas others simply suffered economic loss from purchasing an ineffective product.<sup>45</sup> Class actions for Type B claims are particularly well-supported by access to justice arguments: they would not be prosecuted at all outside of a class action, and the aggregation of those claims enables them to be prosecuted and thereby vindicate rights that would otherwise be illusory.<sup>46</sup>

The legal systems of the US and England have also acknowledged that different kinds of procedures are required for different kinds of mass claims. In the US, a procedure for the centralization and case

<sup>38</sup> *David v Loblaw*, 2021 ONSC 7331.

<sup>39</sup> *Supra* note 11.

<sup>40</sup> Rules, *supra* note 10, Rule 1.04(1.1).

<sup>41</sup> *Hryniak v Mauldin*, 2014 SCC 7 at para 28.

<sup>42</sup> *Ibid.* See also AAS Zuckerman, “A Reform of Civil Procedure – Rationing Procedure Rather Than Access to Justice” (1995) 22 JL & Soc’y 155 at 162.

<sup>43</sup> This has also been recognized in Ontario: *1146845 Ontario Inc v Pillar to Post Inc*, 2014 ONSC 7400 at para 84.

<sup>44</sup> Coffee, *supra* note 37 at 904-906.

<sup>45</sup> See *Arshi v Iovate Health Sciences Inc*, Toronto CV-09-377907-00CP, settlement approved in October 2015 (decision not reported).

<sup>46</sup> Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) at 120 [OLRC Report]; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 3rd ed (London: Sweet & Maxwell 2013) at ch 12, para 38; Coffee, *supra* note 37 at 906.

management of multiple claims – that is, multidistrict litigation<sup>47</sup> – arose around the same time as the reform to Rule 23 of the *Federal Rules of Civil Procedure* that created the modern-day opt-out class action.<sup>48</sup> Where multiple individual actions giving rise to common questions are commenced in multiple judicial districts, multidistrict litigation allows for the transfer of those actions to one judicial district, so the cases can be managed by one judicial officer. Once the common questions between the cases have been tried, then they are remitted back to their original judicial districts for determination of the individual questions. In the present day, mass torts in the US are generally litigated by way of an MDL and not a class action,<sup>49</sup> because cases in which individual issues (such as causation and damages) predominate cannot pass the requirement in Rule 23 that “the questions of law or fact common to class members predominate over any questions affecting only individual members”.<sup>50</sup> Furthermore, cases involving relatively high-value claims can be litigated individually, and therefore a class action will not be found to be “superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>51</sup>

In England, class actions have generally not been considered appropriate for larger Type A claims involving individual issues of causation or damages.<sup>52</sup> Most government proposals and draft rules on class actions have been in areas which give rise to small claims, including consumer protection, financial services, data protection, and competition law.<sup>53</sup>

In the early days of class actions in Canada, one of the primary aims of enacting such legislation was to provide access to justice for people whose claims were too small to be worth litigating individually. The focus on small claims first arose when class action legislation was being debated in Québec. Pierre Marois, the Minister of Social Development who had introduced the bill, stated several times that its provisions would only apply to groups whose members could not all easily be identified and/or joined; in other words, large classes “the composition of [which] makes the application of article 59 or 67 difficult or impracticable”.<sup>54</sup> Others made similar observations.<sup>55</sup> This focus on small claims was also demonstrated

<sup>47</sup> *MDL Act*, *supra* note 33.

<sup>48</sup> *Federal Rules of Civil Procedure*, 37 CFR § 2.116, Title IV, Rule 23 [Rule 23].

<sup>49</sup> Alexandra D Lahav, “Mass Tort Class Actions – Past, Present, and Future” (2017) 92 NYU L Rev 998 at 1009-1010 [Lahav, “Mass Tort Class Actions”].

<sup>50</sup> Rule 23, *supra* note 48, Rule 23(b)(3); *ibid*.

<sup>51</sup> Rule 23, *supra* note 48, Rule 23(b)(3); Lahav, “Mass Tort Class Actions”, *supra* note 49.

<sup>52</sup> One notable exception is Lord Woolf’s recommendation that the new CPR (*supra* note 33) include rules for a ‘multi-party situation’ that would cater for opt-in or opt-out class actions, although that recommendation was never followed: Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty’s Stationery Office, 1996) [Woolf Report]. In addition, the Civil Justice Council recommended in 2008 that the government enact class proceedings legislation that would be applicable to all areas of the law: Civil Justice Council, *Final Report: Improving Access to Justice through Collective Actions* (London: CJC, 2008). The government did not take up this recommendation, however, and instead chose to consider class proceedings legislation on a sector-by-sector basis: Ministry of Justice, *The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’* (London: The Stationery Office, 2009).

<sup>53</sup> See Department of Business, Energy and Industrial Strategy, *Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers* (London: BEIS, 2021) at 127; Financial Services Act 2010 (UK), 2010 c 28 (from which the class action provisions were dropped prior to the 2010 general election); *Data Protection (Independent Complaint) Bill* [HL] (UK), 2019-2021 sess, Bill 76, which did not go past first reading. Class actions have also been enacted in the field of competition law: *Competition Act 1998* (UK), 1998 c 41, ss 49A and 49B (as amended by the *Consumer Rights Act 2015* (UK), 2015 c 15, Schedule 8).

<sup>54</sup> *Code of Civil Procedure*, CQLR c C-25, Book IX, Title II, 1003(c). This is part of the certification test in Québec: Québec, Journal des débats, Troisième session – 31ième Législature: audition des memoires sur le project de loi no 39, 7 March 1978 (Pierre Marois) [Québec Hansard].

<sup>55</sup> Québec Hansard, *supra* note 54 (Serge Fontaine).



in the approach of the Québec courts. In *Tremaine c AH Robins Canada inc*,<sup>56</sup> the court of first instance dismissed the motion for authorization.<sup>57</sup> This was partly on the basis that the purpose of class proceedings in Québec was to facilitate access to justice for individually non-viable claims and that, because the product liability claims were each significant, they should be prosecuted individually.<sup>58</sup> In Ontario, there was also a perception that class proceedings statutes were meant to facilitate small claims only, and that significant damages claims should proceed by way of individual actions.<sup>59</sup> In *Abdool v Anaheim Management Ltd*, the claim of each individual investor was \$300,000. The Court therefore refused to certify the action, holding that, “as each plaintiff had a very substantial claim the goal of the Act in advancing small claims was not met by the individual plaintiffs.”<sup>60</sup>

The case management of multiple larger claims in Canada was under way before class proceedings legislation made its way across the country, because numerous proceedings on similar issues were presenting problems of judicial economy. This can be seen in the prosecution of the wrongful sterilization cases, which was discussed in depth in the Alberta Law Reform Institute’s report on class actions.<sup>61</sup> After more than 200 wrongful sterilization cases were commenced against the Alberta government, the province’s Chief Justice appointed a case management judge (and later a trial judge) to handle them. The following procedural innovations were put into place:<sup>62</sup>

- A plaintiff committee of three counsel to represent and communicate with the 60 to 70 individual lawyers involved in the cases;
- Regular case management and target dates;
- Notice to potential plaintiffs asking them to come to court by a certain date if they wanted to be included in the litigation; and
- Selection of 17 lead cases to be subject to the special procedures (as representative of all the cases), with a separate track for the remaining cases to keep them running.<sup>63</sup>

The process reportedly led to a satisfactory outcome for most of the claims.<sup>64</sup> When considering class proceedings, ALRI gave serious consideration to the alternative approach of facilitating the judicial case management of group litigation.<sup>65</sup> It was part of what was known as the ‘Alberta model’, and a significant

<sup>56</sup> *Tremaine c AH Robins Canada inc*, [1987] JQ no 299 [*Tremaine*].

<sup>57</sup> The approximate equivalent to a certification motion in Québec.

<sup>58</sup> *Tremaine*, *supra* note 56 at paras 61-62 and 66-68.

<sup>59</sup> This was also the intention behind the 1966 changes to Rule 23, *supra* note 48: see Martin H Redish, “Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals” (2003) U Chi Legal F 71 at 102.

<sup>60</sup> *Abdool v Anaheim Management Ltd*, 1993 CanLII 5430 (ONSC) [*Abdool*].

<sup>61</sup> Alberta Law Reform Institute, *Class Actions: Final Report No 85* (Edmonton: ALRI, 2000) at 22-23 [ALRI Report]. Nearly 3,000 Albertans were sterilized between 1928 and 1972 under a eugenics law to prevent so-called ‘mental defectives’ from passing on their genes.

<sup>62</sup> *Ibid* at 22-23.

<sup>63</sup> However, see the Manitoba Law Reform Commission’s concerns regarding test cases: Manitoba Law Reform Commission, *Class Proceedings, no 100* (Winnipeg: MLRC, 1999) at 10-12 [MLRC Report].

<sup>64</sup> ALRI Report, *supra* note 61 at 23.

<sup>65</sup> *Ibid* at 38-42.

portion of the ALRI's *Class Actions: Final Report* is devoted to a consideration of this issue.<sup>66</sup> The 'Alberta model' consisted of three approaches:<sup>67</sup>

- i. Commencing a separate action for each plaintiff, and then trying test cases to determine the common issues; this was followed in some of the residential school cases, where over 4,000 claims were advanced in more than 1,400 actions;<sup>68</sup>
- ii. Joining all the plaintiffs with a common claim in one 'multi-party action'; this was also used in the residential schools litigation;<sup>69</sup>
- iii. Proceeding with a representative action under Rule 42, where numerous persons having a 'common interest' could be represented by a plaintiff.<sup>70</sup>

While the Report noted some advantages to the group litigation approach, including flexibility and litigant autonomy,<sup>71</sup> it also noted the inherent uncertainties (because procedures were re-created case by case), and the delays caused by the parties' need to come to agreement on various steps.<sup>72</sup> In addition, group litigation lawyers in Alberta expressed a strong interest in class proceedings legislation,<sup>73</sup> and class actions were seen as superior to existing procedures in promoting access to justice and judicial economy.<sup>74</sup> The Manitoba Law Reform Commission also rejected an opt-in approach to group litigation<sup>75</sup> because each plaintiff was required to participate fully in the litigation,<sup>76</sup> which made it "cumbersome, expensive, and [gave rise to] ethical questions for lawyers, especially in the event of inter-client conflict."<sup>77</sup> It considered test cases to be of limited utility because they were not binding on cases involving similar subject-matter, plaintiffs had no obligation to consider other plaintiffs' interests when dealing with their cases, and test case plaintiffs tended to reap a damages windfall compared to subsequent litigants.<sup>78</sup>

<sup>66</sup> Alberta Law Reform Institute, *Invitational Consultation Session on Multiple-Plaintiff Similar-Claim Litigation: Relationship between Class Actions and Case Management* (Edmonton: ALRI, 2000). The group litigation approach had governed two of the major scandals in the province's history: residential schools (in which thousands of plaintiffs were involved) and wrongful sterilization (in which approximately 700 plaintiffs were involved). The case management process for these matters is described in the ALRI Report, *supra* note 61 at 22-24.

<sup>67</sup> *Metera v Financial Planning Group*, 2003 ABQB 326 at para 11 [*Metera*].

<sup>68</sup> *Indian Residential Schools, Re*, 2002 ABQB 667 (Alta QB) at para 2 [*Indian Residential Schools I*], and [2000] AJ No 466 (Alta QB) at para 6 [*Indian Residential Schools 2*].

<sup>69</sup> *Adam v Canada*, [2000] AJ No 210 (ABQB) at para 20 [*Adam*]; *Alexander v Pacific Trans-Ocean Resources Ltd*, [1991] AJ No 961 (CA) [*Alexander*].

<sup>70</sup> Alberta's Rule 42 stated that, "[w]here numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all." Following the Supreme Court of Canada's ruling in *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 [*Dutton*], Rule 42 and its equivalent in other provinces is generally available in the same circumstances as a class action (see *supra* note 16 and accompanying text).

<sup>71</sup> ALRI Report, *supra* note 61 at 24.

<sup>72</sup> *Ibid* at 24-25.

<sup>73</sup> *Ibid* at xxii, 1-2.

<sup>74</sup> *Ibid* at 48 and 53.

<sup>75</sup> In opt-in class actions, each claimant is required to take steps to take part in the proceeding; in opt-out class actions, each claimant that comes under the class definition (e.g. "all Canadians who consumed Vioxx between 2008 and 2015") is included in the proceeding unless they take steps to opt out.

<sup>76</sup> Although this is not necessarily the case in all opt-in group litigation, as evidenced by the English Group Litigation Order framework, articulated below.

<sup>77</sup> MLRC Report, *supra* note 63 at 9.

<sup>78</sup> *Ibid* at 10-12.

For these reasons, Alberta and Manitoba rejected a group litigation-type framework in favour of class actions legislation.<sup>79</sup> However, after several decades of jurisprudence, lawyers and judges in this area are beginning to realize that class actions can rob certain kinds of mass claims of the flexibility and litigant autonomy noted by the Alberta Law Reform Institute, including choice of counsel, decisions regarding settlement, and (in certain contexts) claimants' ability to talk about their experiences. In addition, guidance on the litigation of mass claims outside of the class actions regime can ameliorate some of the problems noted by the ALRI, including procedural uncertainty and delay. The next part discusses the problems that have arisen in class actions in the context of larger claims. Part IV considers solutions to those problems.

### III. CLASS ACTIONS AS A BLUNT INSTRUMENT FOR TYPE A CLAIMS

Class actions were intended to provide not simply access to the courts, but to overcome social and psychological barriers to redress.<sup>80</sup> In certain Type A claims involving significant individual damages, however, the class action has proven to be a blunt instrument that has actually caused psychological harm. The most notorious example is that of the Indian Residential Schools Settlement Agreement [IRSSA] that arose from the class action (as well as individual cases and claims through federal government alternative dispute resolution processes) against the Government of Canada for the abuse perpetrated in the Indian Residential Schools. The report of the National Centre for Truth and Reconciliation, *Lessons Learned: Survivor Perspectives*,<sup>81</sup> revealed numerous problems with the IRSSA.<sup>82</sup> Among these were the lack of opportunity for survivors to tell their stories in a culturally safe setting;<sup>83</sup> the sidelining of survivors from the creation and administration of the settlement;<sup>84</sup> lack of communication and information barriers;<sup>85</sup> and a dehumanizing, bureaucratic, and legalistic process.<sup>86</sup> The Alberta Law Reform Institute also noted the importance of cultural sensitivity and allowing survivors to tell their stories in the context of class actions:<sup>87</sup>

In cases of personal victimization, such as the wrongful sterilization and residential schools cases, the opportunity for class members to tell their story to a person in authority may be as important as monetary relief. The need to be 'heard' may remain even after a successful judgement or settlement. Class counsel should be sensitive to the different needs and justice sought by class members in such actions.

<sup>79</sup> *Ibid* at 36; ALRI Report, *supra* note 61 at 51, 64-65.

<sup>80</sup> OLRC Report, *supra* note 46 at 127-129. The OLRC discussed barriers such as the ignorance of substantive legal rights or the ignorance that an injury has occurred at all (both of which could be overcome by being included in an opt-out class), and fear of confronting the defendant or fear of involvement in the legal system (both of which could be overcome by not having to be a named party to, or have active involvement in, the litigation).

<sup>81</sup> National Centre for Truth and Reconciliation, *Lessons Learned: Survivor Perspectives* (Winnipeg: NCTR, 2020) [*Lessons Learned*].

<sup>82</sup> See also TCW Farrow, "Residential Schools Litigation and the Legal Profession" (2014) 64:4 UTLJ 596 at 609-611, in which the problematic and predatory conduct of certain plaintiff-side lawyers is discussed.

<sup>83</sup> *Lessons Learned*, *supra* note 81 at 20-21, 31-33, 48.

<sup>84</sup> *Ibid* at 62.

<sup>85</sup> *Ibid* at 28-29, 34-35.

<sup>86</sup> *Ibid* at 30. Following reports of misconduct by some lawyers involved in the IRSSA, the Canadian Bar Association and the Law Society of Upper Canada (as it then was) both issued guidelines for lawyers acting for residential school survivors.

<sup>87</sup> ALRI Report, *supra* note 61 at 169. Unfortunately, as evidenced by the IRSSA experience, the ALRI's call went unheeded.

The re-victimization of survivors is not restricted to the IRSSA. In the Huronia class actions arising from abuse at the Huronia Regional Centre and related institutions, survivors expressed dissatisfaction at the lack of control over the litigation, the amount of compensation, and the fact that the unclaimed remainder of the settlement went back to the Ontario government.<sup>88</sup> One of the hopes for the class action lawsuits was that they would “provide one vehicle for stories of abuse to be made public” and give survivors the opportunity “to speak their truth to the powerful force of the Ontario judicial system”.<sup>89</sup> However, as with the IRSSA, survivors reported being sidelined and alienated by the process.<sup>90</sup> While re-victimization is not limited to class action litigation, the lack of litigant autonomy in class actions can increase feelings of helplessness and not being able to tell one’s story.

Class actions can be a blunt instrument in other ways. One of the main objectives of class proceedings is to “improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually”<sup>91</sup> – that is, to facilitate the pursuit of Type B claims according to the typology discussed above. For Type A claims, however – claims that are not too costly to prosecute individually, where significant potential damages would justify the cost of litigation (and thereby enable the plaintiff to get legal assistance on a contingency fee basis) – class actions can actually inhibit access to justice. The potential for this has been recognized in the context of motions to stay individual proceedings in favour of a related class action,<sup>92</sup> with regard to motions to join or consolidate individual actions with a class proceeding or have them heard together,<sup>93</sup> and in refusing to extend the time for delivery of a statement of defence in an individual action while a class action was proceeding.<sup>94</sup>

There is also anecdotal evidence that comparable claims receive much lower amounts (by way of damages awards or settlement) in a class action than they do when litigated individually. Counsel in institutional abuse cases have reported that, in a class action, the quantum of damages is usually much lower than the recovery in an individual action.<sup>95</sup> In certain product liability cases such as the Transvaginal Mesh class action, plaintiffs’ counsel have also stated that the average of the individual settlements per plaintiff was significantly higher than compensation allocated in the various class actions.<sup>96</sup>

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<sup>88</sup> Marg Bruineman, “HRC class action revealed abuse and much about the legal system” (28 July 2020), online: *OrilliaMatters.com* <[www.orilliamatters.com/local-news/hrc-class-action-revealed-abuse-and-much-about-the-legal-system-2594553](http://www.orilliamatters.com/local-news/hrc-class-action-revealed-abuse-and-much-about-the-legal-system-2594553)> [<https://perma.cc/N6U7-X42A>]; Molly Thomas, “Why class-action lawsuits aren’t always what abuse survivors hope for” *CTV News* (20 March 2021), online: <[www.ctvnews.ca/w5/why-class-action-lawsuits-aren-t-always-what-abuse-survivors-hope-for-1.5354641](http://www.ctvnews.ca/w5/why-class-action-lawsuits-aren-t-always-what-abuse-survivors-hope-for-1.5354641)> [<https://perma.cc/J49U-VM9B>]. While there was no reversion in the Huronia class action itself (all unclaimed funds were distributed *cy-près*), the related class actions involving the Rideau and Southwestern Regional Centres did involve reversion of funds to the defendants.

<sup>89</sup> Kate Rossiter & Annalise Clarkson, “Opening Ontario’s “Saddest Chapter:” A Social History of Huronia Regional Centre” (2013) 2:3 CJDS 1 at 24, 26.

<sup>90</sup> Patricia Seth et al, “Survivors and Sisters Talk About the Huronia Class Action Lawsuit, Control, and the Kind of Support We Want” (2015) 21:2 JODD 60 at 62, 64-65.

<sup>91</sup> *Dutton*, *supra* note 70 at para 28.

<sup>92</sup> *Workman Optometry v Aviva Insurance*, 2021 ONSC 3843 at para 9; *Singh v RBC Insurance Agency Ltd*, 2020 ONSC 5368 at para 75; *Vaeth v North American Palladium Ltd*, 2016 ONSC 5015 at para 56.

<sup>93</sup> *Northfield Capital Corporation v Aurelian Resources Inc*, 2007 CanLII 6917 (ONSC) at paras 37-40; *Obonsawin (cob Native Leasing Services) v Canada*, [2002] OJ No 2502 (SCJ) at paras 23-24.

<sup>94</sup> *Dumoulin v Ontario (Ontario Realty Corp)*, [2004] OJ No 2778 at paras 8-10 [*Dumoulin*].

<sup>95</sup> Loretta Merritt, “The Problem with Class Actions for Historical Sexual Abuse Cases”, (28 October 2022), online: *Torkin Manes LegalPoint* <[www.torkinmanes.com/our-resources/publications-presentations/publication/the-problem-with-class-actions-for-historical-sexual-abuse-cases-2022](http://www.torkinmanes.com/our-resources/publications-presentations/publication/the-problem-with-class-actions-for-historical-sexual-abuse-cases-2022)> [<https://perma.cc/CG2L-FKBU>].

<sup>96</sup> Marg Waddell & Paul Miller, “Mass or Class?” (Paper delivered at Ontario Trial Lawyers Association 2020 Spring Conference, Toronto, 8 May 2020) [unpublished, on file with author] slide 27.

For claims with significant damages and numerous individual issues, class proceedings present a disadvantage in other ways. Recent amendments to the ‘preferable procedure’ stage of the certification test in s 5(1)(d) of the *CPA*<sup>97</sup> are expected to make it harder for cases to get certified, especially where common issues make up only a small part of the class’s claims and individual issues such as causation and damages predominate.<sup>98</sup> Prior to the 2020 amendments to the *CPA*, the preferable procedure requirement could be established even where there were substantial individual issues. The common issues did not have to predominate over the individual issues, but their resolution had to “significantly advance the action”.<sup>99</sup> The recent amendments, however, are almost identical in wording to that of US Rule 23(b)(3).<sup>100</sup> Most US courts have interpreted Rule 23(b)(3) to require that the common issues “ha[ve] a direct impact on every class member’s effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim ... of each class member”.<sup>101</sup> In other words, the common issues must be key to resolving each class member’s claim. If individual issues predominate, then the class action will not be certified.

The possibility that this interpretation will be imported into the Ontario jurisprudence has alarmed many stakeholders.<sup>102</sup> This alarm may be unwarranted due to the lower standard of proof at certification in Canada compared to the US,<sup>103</sup> as well as the case law that requires Canada’s class proceedings statutes to be “construed generously ... in a way that gives full effect to the benefits foreseen by the drafters”.<sup>104</sup> Nevertheless, the prospect of such an interpretation has led some sources to predict the “death of personal injury class actions”.<sup>105</sup> For example, causation is an individual issue in many class actions involving personal injury. A drug may be recalled because of the risk that it will cause a certain health problem, but that problem could also be caused by any number of factors. That causative link will therefore require individual assessment. Because causation is key to establishing liability, if that question is individualized then it could be fatal to certification.<sup>106</sup> Issues of individual causation have meant that mass tort class actions have rarely been certified in the US.<sup>107</sup>

Quite apart from the recent *CPA* amendments, several decisions have recognized that cases where individual issues overwhelm the common issues (such as in systemic negligence cases, where there may only be one common issue) may not be suitable for class treatment. In *Carcillo*,<sup>108</sup> for example, Justice Perell observed that the certification of a common question regarding systemic negligence could lead to a protracted, complicated, and unmanageable common issues stage because of “the serious problem of

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<sup>97</sup> *CPA*, *supra* note 3, s 5(1.1).

<sup>98</sup> Suzanne Chiodo, “‘Keep Calm and Stay Classy’: Bill 161 and Proposed Changes to the Ontario *Class Proceedings Act*” (2020) 39:2 CJQ 180.

<sup>99</sup> *Cloud v Canada (Attorney General)*, 2004 CanLII 45444 (ONCA) at paras 75-76; *Hollick*, *supra* note 5 at para 30.

<sup>100</sup> Rule 23, *supra* note 48.

<sup>101</sup> *Vega v T-Mobile USA, Inc*, 564 F 3d 1256 at 1270 (11th Cir 2009). See also *Comcast Corp v Behrend*, 133 S Ct 1426 (Supreme Court 2013).

<sup>102</sup> See e.g. letter from the Law Commission of Ontario to The Honourable Doug Downey, Ministry of the Attorney General (22 January 2020), online: <[www.lco-cdo.org/wp-content/uploads/2020/01/LCO-Letter-re-Bill-161-Class-Actions-Final-Jan-22-2020.pdf](http://www.lco-cdo.org/wp-content/uploads/2020/01/LCO-Letter-re-Bill-161-Class-Actions-Final-Jan-22-2020.pdf)>; <<https://perma.cc/T4TX-TJ4F>>.

<sup>103</sup> In the US, the standard of proof at certification is on the balance of probabilities; in Canada, the standard is ‘some basis in fact’, which is a lower standard: *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 101-102.

<sup>104</sup> *Hollick*, *supra* note 5 at paras 14-15.

<sup>105</sup> Waddell & Miller, *supra* note 96 at slide 17.

<sup>106</sup> *Ibid* at slide 16.

<sup>107</sup> Lahav, “Mass Tort Class Actions”, *supra* note 49 at 1009-1010.

<sup>108</sup> *Supra* note 11.

differentiating systemic negligence and non-systemic, individual negligence.”<sup>109</sup> His Honour noted that previous cases involving systemic negligence and abuse, including the seminal *Rumley v British Columbia*, came close to being decertified because of the extreme difficulty in separating the common issues from the individual issues.<sup>110</sup> This difficulty has also been observed in Alberta (where the predominance of common versus individual issues must be considered as one of many factors in the preferable procedure analysis).<sup>111</sup> Recently, the Court of King’s Bench refused to certify a class proceeding involving sexual abuse by a chaplain at a youth correctional facility because many of the proposed common issues were not workable, being “directly tied to, and dependent upon, the determination of individual issues ... [they] will not advance the litigation and can be counter productive.”<sup>112</sup> In addition, the certification stage and the conduct of a common issues trial would result in significant delay in the final resolution of class members’ claims.<sup>113</sup> Finally, where only a very small part of the liability picture is answered in the common issues trial, then aggregate damages will not be awarded at that stage. As Justice Perell noted in *Carcillo*, this would mean that “the returns from the enterprise of the class action do not warrant the time, money or effort required. Colloquially or idiomatically, ‘the game is not worth the candle’.”<sup>114</sup> This has also been the experience of counsel in similar class proceedings.<sup>115</sup>

Where the common issues do not predominate over the individual issues, courts in Ontario and elsewhere may now find that another way of proceeding is superior:<sup>116</sup> this could include several alternatives under the Rules. Joinder of parties under Rule 5.02(1) means that multiple plaintiffs or applicants who are represented by the same lawyer may be part of the same proceeding where they assert “any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences”,<sup>117</sup> or “a common question of law or fact may arise in the proceeding”,<sup>118</sup> or it appears that the joinder may promote the convenient administration of justice.<sup>119</sup> Two or more existing proceedings may also be consolidated or heard together under Rule 6.01;<sup>120</sup> the parties involved are not required to be represented by the same lawyer, and the circumstances in which the court will consolidate or hear together are similar (but not identical) to joinder.<sup>121</sup> These procedural mechanisms will be discussed further in the next section.

These issues have led many firms to opt their clients out of class actions and pursue their claims on an individual basis.<sup>122</sup> The following part reviews the advantages and disadvantages of such an approach,

<sup>109</sup> *Carcillo*, *supra* note 11 at para 400.

<sup>110</sup> *Carcillo*, *ibid*, at paras 401-409, citing *Rumley v British Columbia*, 2003 BCSC 234.

<sup>111</sup> *Class Proceedings Act*, SA 2003, c C-16.5, s 5(2)(a).

<sup>112</sup> *VLM v Dominey*, 2022 ABQB 299 at para 83.

<sup>113</sup> *Ibid* at para 111.

<sup>114</sup> *Carcillo*, *supra* note 11 at 418.

<sup>115</sup> See e.g. *Cavanaugh v Grenville Christian College*, 2022 ONSC 5405.

<sup>116</sup> *CPA*, *supra* note 3, s 5(1.1)(a).

<sup>117</sup> Rules, *supra* note 10, Rule 5.02(1)(a).

<sup>118</sup> *Ibid*, Rule 5.02(1)(b).

<sup>119</sup> *Ibid*, Rule 5.02(1)(c).

<sup>120</sup> One or more proceedings may also be stayed until the other proceeding(s) are determined (*ibid*, Rule 6.01(1)(e)(i)); this is relevant to the test case approach that is discussed in the next section.

<sup>121</sup> *Ibid*, Rule 6.01(1)(c). This is broader than the third criterion under *ibid*, Rule 5.02(1)(c), and states that the court may consolidate proceedings “for any other reason”.

<sup>122</sup> Although pursued on an individual basis, such claims would nevertheless meet my definition of ‘mass claims’ articulated in the introduction to this article. By way of example, significant individual claims have been pursued in the Transvaginal Mesh Litigation and the Metal-on-Metal Hip Litigation, both of which were the subject of class proceedings.

before articulating some guidelines that could maximize those advantages while minimizing the disadvantages.

#### IV. THE WAY FORWARD FOR TYPE A CLAIMS

##### A. The Current Approaches

Type A mass claims in Ontario and elsewhere in Canada are currently pursued through a number of approaches. First, there are the mass claims that are ancillary to a class proceeding, in that the class proceeding has not been certified and the claims are proceeding by way of joinder, as suggested (in some form) by Justice Perell in *Carcillo*;<sup>123</sup> or counsel has not been granted carriage of a class proceeding, and has opted out their clients to pursue their claims individually, usually by way of joinder, consolidation, or hearing together.<sup>124</sup> Second, there are mass claims that consist of numerous individual actions from the very start of the litigation, and are also pursued through the existing Rules for joinder, consolidation, or hearing together.

The third approach is the ‘inventory’ approach. This mirrors a practice from the US, where the predominance requirement described above largely precludes tort cases from being prosecuted as a class action. ‘Mass torts’ are therefore litigated through the Multidistrict Litigation [MDL] system, which involves the commencement of individual cases on behalf of each plaintiff, that are then transferred to one judicial district. Efficiencies are created in many ways which will be described further below, but one of them is the way in which plaintiffs’ counsel amass ‘inventories’ of clients that they manage collectively. Canadian lawyers are beginning to take the same approach,<sup>125</sup> pursuing numerous individual claims in parallel (either through joinder/consolidation, or through individual actions) and settling them *en masse* or one by one. This has occurred in personal injury cases such as the Transvaginal Mesh litigation and the metal-on-metal hips litigation. Such cases are Type A, in that they typically involve significant potential damages (usually \$50,000 or more per case),<sup>126</sup> and often – but not always – involve personal injury as a result of defective products which have also been the subject of litigation in the US.<sup>127</sup> Lawyers in Canada will amass an inventory of claims in their jurisdiction, and will often work with other lawyers to share information, resources, and costs of experts. They will also have close contact with lawyers working on any parallel litigation in the US.<sup>128</sup> Depending on the progress of the US litigation (usually after a number of ‘bellwether’ trials, the results of which are generally persuasive in the settlement of related claims),<sup>129</sup> the Canadian lawyers will begin negotiating with the defendants to settle their inventory.

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<sup>123</sup> *Supra* note 11.

<sup>124</sup> See e.g. the Zimmer Durom Hip Implant litigation, in which the Ontario firm that failed to win carriage opted out its clients to pursue their claims individually: *McSherry v Zimmer GmbH*, 2016 ONSC 4606 at paras 9, 10, and 16.

<sup>125</sup> Valérie Lord, “Alternatives to Class Actions” (Paper delivered at The Fundamentals of Class Actions seminar, Ontario Bar Association, Toronto, 26 November 2020) [unpublished, on file with author] [Lord, Nov 2020].

<sup>126</sup> *Ibid*; Valérie Lord, “Class Action Claims, Mass Torts and Opt-Out Litigation” (Paper delivered at the 12th Annual Class Actions Colloquium, Ontario Bar Association, Toronto, 2 December 2020) [unpublished, on file with author] [Lord, Dec 2020].

<sup>127</sup> More Canada-specific claims are also being litigated with increasing frequency, however: see, for example, the individual claims brought by Canadian families affected by the shooting down of Ukraine International Airlines Flight PS752, discussed in *Arsalani v Islamic Republic of Iran*, 2021 ONSC 1334.

<sup>128</sup> Borden Ladner Gervais, “Class Action and Mass Tort Defense: Don’t Get Caught Off Guard in Canada” (15 October 2015), online: *BLG* <[www.blg.com/en/News-And-Publications/publication\\_4358](http://www.blg.com/en/News-And-Publications/publication_4358)> [BLG].

<sup>129</sup> A bellwether is the trial of a test case, which is generally selected as typical of a larger pool of plaintiffs.

All of these approaches are currently pursued on an informal basis. Court approval is not required for settlement of individual cases, unless they involve parties under disability<sup>130</sup> or approval is required pursuant to a statute.<sup>131</sup> Furthermore, as noted above, there are no rules or statutes in Canada that pertain directly to the litigation of mass claims. Cases therefore proceed individually or under the rules for joinder, consolidation, or hearing together. It appears that the joinder, consolidation, or hearing together of these cases is rarely disputed, because there are very few reported decisions on this point. In the past three decades in Ontario, only 30 decisions have cited the rule on joinder, and four of those were proceedings under the *CPA*. As for the rule on consolidation or hearing together, only 71 decisions in Ontario have cited that rule in the last 30 years, and six of them involved proceedings under the *CPA*. This form of litigation therefore flies largely under the radar of reported decisions.<sup>132</sup>

There are numerous advantages to the individualized approach. Plaintiffs' counsel report higher rates of recovery for their clients,<sup>133</sup> as well as being able to maintain control of their clients' cases instead of having them subsumed into a class action of which they might not have full carriage.<sup>134</sup> Because recovery is negotiated on an individualized basis, it is perceived to be more accurate than in a class action.<sup>135</sup> Although the level of individual compensation may be based on the results of the US bellwether trials, the compensation is nevertheless negotiated on an individual basis and is therefore more accurate. There is also more accountability for the level of compensation because the individual group member has a traditional lawyer-client relationship with her counsel, and is not relying on the representative plaintiff and class counsel to negotiate compensation on her behalf.

Furthermore, litigants themselves have more autonomy over the process<sup>136</sup> and have more of a chance to 'tell their story', which is particularly important in cases involving abuse or other trauma.<sup>137</sup> Compensation is much more likely to get to group members, because they are all identified individually and in advance of settlement or trial.<sup>138</sup> Plaintiffs also avoid the need for lengthy and expensive certification proceedings and can get to the discovery stage more quickly,<sup>139</sup> even though this individualized approach generally results in smaller groups and therefore less deterrence for the defendant.<sup>140</sup> Finally, individualized proceedings can also be advantageous for defendants, because they can address the issues that are usually central to mass claims – particularly causation and damages – sooner than in a class proceeding.<sup>141</sup> Both sides perceive the process as offering more strategic flexibility.<sup>142</sup>

<sup>130</sup> Rules, *supra* note 10, Rule 7.08.

<sup>131</sup> See e.g. *CPA*, *supra* note 3, s 27.1(1).

<sup>132</sup> Lord, Nov 2020, *supra* note 125; Marg Bruineman, "Opting out of class action can have its rewards" *Law Times* (29 October 2018), online: <[www.lawtimesnews.com/practice-areas/litigation/optiming-out-of-class-action-can-have-its-rewards/263274](http://www.lawtimesnews.com/practice-areas/litigation/optiming-out-of-class-action-can-have-its-rewards/263274)>; <<https://perma.cc/4D9T-7HX7>>.

<sup>133</sup> Lord, Nov 2020, *supra* note 125; BLG, *supra* note 128; Waddell & Miller, *supra* note 96; "Valérie Lord on Mass Torts" (7 October 2020), online (podcast): *Certified* <<https://certified.simplecast.com/episodes/valerie-lord-on-mass-torts>>.

<sup>134</sup> Lord, Nov 2020, *supra* note 125; BLG, *supra* note 128 at 2; Waddell & Miller, *supra* note 96 at slide 21.

<sup>135</sup> "Cheryl Woodin on Relief Available in Class Actions" (13 January 2021), online (podcast): *Certified* <<https://certified.simplecast.com/episodes/cheryl-woodin-on-relief-available-in-class-actions>>; Waddell & Miller, *supra* note 96 at slides 20-21.

<sup>136</sup> Waddell & Miller, *supra* note 96.

<sup>137</sup> Merritt, *supra* note 95.

<sup>138</sup> The other benefits of opting-in are noted in Susan MC Gibbons, "Group Litigation, Class Actions, and Collective Redress: An Anniversary Reappraisal of Lord Woolf's Three Objectives" in Déirdre Dwyer, ed, *The Civil Procedure Rules Ten Years On* (Oxford: Oxford University Press, 2009) at 122, 152.

<sup>139</sup> BLG, *supra* note 128 at 2; Waddell & Miller, *supra* note 96 at slides 20-21.

<sup>140</sup> Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003) at 3.

<sup>141</sup> BLG, *supra* note 128 at 2-3; Lord, Dec 2020, *supra* note 126.

<sup>142</sup> Lord, Dec 2020, *supra* note 126.



There are also disadvantages, however. As demonstrated by the experience in England, the US, and elsewhere, the individualized approach is much more expensive on the front-end.<sup>143</sup> While a class proceeding usually involves contacting class members, obtaining their documents, and assisting with the filing of claim forms, this invariably takes place after a judgment is obtained or a settlement is concluded. It is much riskier, from the perspective of plaintiffs' counsel, to expend such resources at the beginning of the process. It also involves case management and client maintenance throughout the life of the file, and not just in the end stages.<sup>144</sup> Furthermore, while the *CPA* and other class proceedings legislation across Canada toll the limitation period for members of the class,<sup>145</sup> no such advantage is offered by the individualized approach.<sup>146</sup> Under the *CPA*, it is just the representative plaintiff that bears the risk of adverse costs at the common issues stage;<sup>147</sup> in joinder, consolidation, or hearing together, all litigants bear that risk. Finally, the rules on joinder, consolidation, or hearing together do not provide guidance on the apportionment of costs as between the common issues and the individual issues, as well as a host of other procedural questions involving coordination between counsel, pleadings, test cases, settlement, and general case management issues.

Judicial concern has also been expressed about the joinder/consolidation/hearing together approach, and particularly the use of test cases. This can be seen in the analysis of the 'preferable procedure' stage of the certification test under s 5(1) of the *CPA*.<sup>148</sup> In *Hollick*, Chief Justice McLachlin stated that "the preferability requirement was intended to capture the question of whether a class proceeding would be preferable 'in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on'".<sup>149</sup> Courts have rarely accepted defendants' submissions that such procedures could be a viable alternative to a class action,<sup>150</sup> for several reasons:

<sup>143</sup> An extreme example is the Benzodiazepines case in England in the late 1980s and early 1990s. The Legal Aid Board spent the equivalent of \$103 million Canadian (at current-day exchange rates and adjusted for inflation) investigating and litigating the 5,500 individual claims, none of which ever reached trial. More recently, in the VW Dieselgate Group Litigation in England, one solicitor group has signed up 100,000 claimants at the cost of £1.5 million (approximately \$2.5 million Canadian). When referring to English group litigation, the word 'claimant' will be used instead of 'plaintiff', because the former has been used in England since the new CPR (*supra* note 33) was enacted in 1999.

<sup>144</sup> Lord, Dec 2020, *supra* note 126.

<sup>145</sup> In other words, when a class proceeding is commenced, the limitation period for everyone who meets the class definition is suspended: see *CPA*, *supra* note 3, s 28.

<sup>146</sup> Merritt, *supra* note 95. As Merritt notes, there is no limitation period for sexual assault cases (see *Limitations Act, 2002*, SO 2002, c 24, Sch B, s 16(1)(h)) and therefore the individualized approach may actually be more just than a class action, which could determine the rights of those who have not opted out even though trauma and other issues could prevent them from doing so.

<sup>147</sup> *CPA*, *supra* note 3, s 31(2).

<sup>148</sup> Although, as noted above, courts may be more willing to deny certification in favour of an alternative proceeding under the new 'superiority' requirement in *CPA*, *supra* note 3, s 5(1.1)(a).

<sup>149</sup> *Hollick*, *supra* note 5 at para 31, citing Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: MAG, 1990) at 32.

<sup>150</sup> Exceptions include cases such as *Moyes v Fortune Financial Corp*, 2002 CanLII 23608 (ON SC) and *Abdool v Anaheim Management Ltd*, 1995 CanLII 5597 (ON SCDC), both of which involved claims that were each so large they could be prosecuted as individual actions (individual claims were at least \$50,000 each in *Moyes* and approximately \$300,000 each in *Abdool*).

- Numerous individual proceedings to determine the same issues would not promote judicial economy;<sup>151</sup>
- There is no guarantee, absent the consent of those involved, that the determination in a test case would bind the parties in any other case;<sup>152</sup>
- The size of the class is potentially so large as to make joinder impractical;<sup>153</sup>
- Economic, social, and psychological barriers prevent class members from pursuing their individual claims;<sup>154</sup>
- Alternative procedures would not toll the limitation period for class members;<sup>155</sup>
- Alternative procedures do not have the protections and benefits offered by class proceedings legislation, such as notice to class members, the ability to aggregate damages, protection from adverse costs for class members, and the application to the entire class of any order or settlement.<sup>156</sup>

It is because of these procedural difficulties that counsel on both sides of the bar are generally agreed that more guidance for the litigation of mass claims is needed. The development of the MDL and GLO frameworks reflects a recognition that certain kinds of cases need to be aggregated to avoid duplicative litigation and the wasting of judicial resources, even if (at least in the US) they would not be appropriate for a class action.<sup>157</sup> The guidance articulated in this article is intended to assist parties in discussing and finalizing procedural options; this, in turn, should facilitate agreement and reduce the delay and uncertainty that has traditionally plagued novel processes. What would such guidance look like, and how could it best maximize the advantages and minimize the disadvantages of the current approaches? The following part proposes such guidance, drawing inspiration from England, the United States, and prior Canadian case law.

## B. Guidelines for the Litigation of Mass Claims

### 1. Inspiration from England, the US, and Canada

The question of how best to litigate mass claims is not new, and has been addressed in various ways in England, the US, and even Canada. The closest equivalent to a group litigation procedure in Canada was

<sup>151</sup> *Austin v Bell Canada*, 2019 ONSC 4757 at paras 23-25 [*Austin*]; *Evans v The Bank of Nova Scotia*, 2014 ONSC 2135 at para 112 [*Evans*]; *Heyde v Theberge Developments Limited*, 2017 ONSC 1574 at paras 84 and 87 [*Heyde*]; *Hodge v Neinstein*, 2015 ONSC 7345 at para 107, aff'd 2017 ONCA 494, leave to SCC denied 2017 CanLII 82305 (SCC) [*Hodge*]; *Lee Valley Tools Ltd v Canada Post Corporation*, 2007 CanLII 55703 (ONSC) at para 48 [*Lee Valley*]; *MacQueen v Sydney Steel Corporation*, 2011 NSSC 484 at para 66 [*MacQueen*]; *Mont-Bleu Ford Inc v Ford Motor Co of Canada*, 2000 CanLII 29055 (ON SCDC) at para 16 [*Mont-Bleu*]; *Murphy v Bdo Dunwoody LLP*, 2006 CanLII 22809 (ONSC) at para 53 [*Murphy*]; *Pardhan v Bank of Montreal*, 2012 ONSC 2229 at para 308 [*Pardhan*]; *Miller v Merck Frosst Canada Ltd*, 2013 BCSC 544 at para 233 [*Miller*].

<sup>152</sup> *Austin*, *supra* note 151 at para 26; *Brown v Canada (Attorney General)*, 2010 ONSC 3095 at para 183; *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2003 CanLII 38170 (ON SCDC) at paras 36-37; *Evans*, *supra* note 151 at paras 109, 113; *Heyde*, *supra* note 151 at para 88; *Lee Valley*, *supra* note 151 at para 46; *Mont-Bleu*, *supra* note 151 at paras 12-15; *Murphy*, *supra* note 151 at para 52. See also MLRC Report, *supra* note 63 at 10-11.

<sup>153</sup> *Bouchanskaia v Bayer Inc*, 2003 BCSC 1306 at para 149 [*Bouchanskaia*].

<sup>154</sup> *Hodge*, *supra* note 151 at paras 100-106; *Murphy*, *supra* note 151 at para 53.

<sup>155</sup> *Bouchanskaia*, *supra* note 153 at para 150; *Lee Valley*, *supra* note 151 at para 48.

<sup>156</sup> *Bouchanskaia*, *supra* note 153 at para 150; *Evans*, *supra* note 151 at paras 113 and 115; *Lee Valley*, *supra* note 151 at para 47; *MacQueen*, *supra* note 151 at para 66; *Pardhan*, *supra* note 151 at para 310.

<sup>157</sup> Alexandra D Lahav, "The Continuum of Aggregation" (2019) 53 Ga L Rev 1393 at 1398 [Lahav, "Continuum"].

the ‘Alberta model’ discussed above, which was sidelined in favour of class proceedings legislation. That model can, however, provide inspiration for any future approach in Ontario.<sup>158</sup>

In the US, multidistrict litigation provides for the transfer of multiple individual actions to one judicial district, so the cases can be managed by one judicial officer. A motion for the transfer of actions<sup>159</sup> will only be granted where:

- i. One or more common questions of fact are pending in different districts;
- ii. Transfer would serve the convenience of the parties and witnesses; and
- iii. Transfer will promote the just and efficient conduct of such actions.<sup>160</sup>

“One or more common questions of fact” will not exist where any common facts supporting centralization would be overwhelmed by individual determinations such as liability and causation.<sup>161</sup> If the individual actions are so heterogeneous that they “would undermine any efficiency”, then MDL status will not be granted.<sup>162</sup>

This procedure allows for a great deal of informality and flexibility. The *MDL Act*<sup>163</sup> is drafted in such a way that judges have been able to create *ad hoc* rules for the cases before them, leading to an evolution of procedure that mimics the development of the common law.<sup>164</sup>

In England, the Group Litigation Order [GLO] regime governs group litigation and also provides for the centralization of claims.<sup>165</sup> It emerged as Part 19.III of the *Civil Procedure Rules* in 2000, and was part of a general overhaul of the English civil procedure system based on Lord Woolf’s *Access to Justice* report released a few years previously.<sup>166</sup> That report recommended that new procedures should, amongst other things, “provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action [that is, Type A claims] but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure.”<sup>167</sup> These recommendations arose from the procedural difficulties presented by multi-party actions in the 1980s and 1990s. MPAs were not class actions, but instead a collection of individual claims arising from similar issues of fact or law; these claims were judicially case managed in an effort to increase efficiency and reduce cost. This case management was conducted on an *ad hoc* basis, and many of the procedures were simply the result of agreement between

<sup>158</sup> Defendants have made similar suggestions when opposing the certification of a class proceeding: in British Columbia, see *Miller*, *supra* note 151 at para 229.

<sup>159</sup> A motion will be made to the judicial panel on multidistrict litigation, which is a panel of seven federal judges who serve on the panel for a period of several years while remaining on their respective courts: Paul M Janicke, “The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue” (2013) 32:3 *Rev Litig* 497 at 507. Proceedings for the transfer of an action may also be initiated by the judicial panel upon its own initiative: *MDL Act*, *supra* note 33 §1407(c)(i).

<sup>160</sup> *MDL Act*, *supra* note 33 §1407(a).

<sup>161</sup> *In re Hair Relaxer Marketing, Sales Practices, & Products Liability Litigation*, filed November 15, 2022 as MDL No 3060 at 9, 10, 12.

<sup>162</sup> *Ibid* at 17.

<sup>163</sup> *MDL Act*, *supra* note 33.

<sup>164</sup> Alexandra D Lahav, “Multidistrict Litigation and Common Law Procedure” (2020) 24 *Lewis & Clark L Rev* 531 at 533, 536-540 [Lahav, “MDL Procedure”].

<sup>165</sup> CPR, *supra* note 33, CPR 19.11(2). Subsequent claims which raise one or more of the GLO issues may be transferred to the management court, stayed, or entered on the register of group litigation claims: CPR 19.11(3)(a).

<sup>166</sup> Woolf Report, *supra* note 52.

<sup>167</sup> *Ibid*, chapter 17, para 2.

the parties.<sup>168</sup> The GLO formalized these case management procedures. In that sense, although the GLO “provide[s] for the case management of claims which give rise to common or related issues of fact or law”,<sup>169</sup> it is not a class action. It requires each group member to commence their own individual claim, and those claims are case managed together in one court. It is therefore more akin to an extended joinder device,<sup>170</sup> with a focus on litigating multiple individual claims in a more proportionate way.

Because the GLO arose from the *ad hoc* case management of the late 20<sup>th</sup> century, and because it is not compulsory, such informal collective case management continues today. In fact, many practitioners express preference for the informal approach, if the parties can reach agreement on the various steps, because it is faster and more flexible for several reasons.<sup>171</sup>

In fact, it is the difficulties posed by the GLO approach (and its relative unpopularity)<sup>172</sup> that indicate that informal guidance rather than formal rules would be more useful in Ontario.<sup>173</sup> Procedurally speaking, an application for a GLO is comparable to a certification motion in a class action. Both act as a preliminary screening device.<sup>174</sup> Both tend to become mired in delay, as reported by litigators on both sides of the Atlantic. In its recent report on class actions, the Law Commission of Ontario noted that, “[v]irtually everyone consulted by the LCO cited delay as a significant issue in class action litigation.”<sup>175</sup> In England, numerous sources note the delay and bureaucracy involved in a GLO application.<sup>176</sup> Both procedures have similar criteria for commencement, as follows:<sup>177</sup>

- i. Numerosity. Both the GLO<sup>178</sup> and the CPA<sup>179</sup> require a minimum of two persons. However, joinder is likely to be just as practical when the group size is very small.

<sup>168</sup> Rachael Mulheron, “Some difficulties with group litigation orders – and why a class action is superior” (2005) 24 CJC 40 at 43 [Mulheron]; Hodges & Webb, *supra* note 34.

<sup>169</sup> CPR, *supra* note 33, CPR 19.10.

<sup>170</sup> MLRC Report, *supra* note 63 at 64; OLRC Report, *supra* note 46 at 470; ALRI Report, *supra* note 61 at 240.

<sup>171</sup> Twenty group litigation practitioners in England were questioned about their use of formal GLOs. Half of them said they used GLOs “rarely”, and less than one-third said they used them “frequently”: Suzanne Chiodo, *How do theories of access to justice, judicial economy, and behaviour modification explain developments in the class actions debate from 1970 onward in England and Canada?* (DPhil dissertation, University of Oxford, 2021) at 213, online: Oxford University Research Archive <<https://ora.ox.ac.uk/objects/uuid:b3bde5ec-4139-4491-aa8b-50e701733853>>; <<https://perma.cc/LMX6-T7AD>>.

<sup>172</sup> Since the introduction of the GLO procedure in 2000, only 111 group litigation orders have been made (an average of five per year): HM Courts & Tribunals Service, “Group litigation orders” (10 November 2022), online: *Transparency data* <[www.gov.uk/government/publications/group-litigation-orders](http://www.gov.uk/government/publications/group-litigation-orders)>.

<sup>173</sup> Litigators in England & Wales pursue the informal approach to group litigation based on the guidance in the case law, which has developed through decades of experience since the ‘multi-party actions’ of the 1980s. There is little equivalent guidance in the Canadian case law, because until a few years ago, “with a few exceptions, plaintiffs’ counsel in the class action bar have shown no eagerness to develop alternatives to class actions as a means to litigate mass wrongs and rather ... have tended to rely on class actions as the only means to pursue mass claims” (*O’Brien*, *supra* note 12 at para 230).

<sup>174</sup> For a GLO, the consent of the Lord Chief Justice or the Vice-Chancellor is required: CPR, *supra* note 33, Practice Direction 19B, para 3.3.

<sup>175</sup> Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (Toronto: LCO, 2019) at 5.

<sup>176</sup> See, for e.g., Mulheron, *supra* note 168.

<sup>177</sup> In England, granting the GLO must be consistent with the overriding objective of the CPR, *supra* note 33, which is “enabling the court to deal with cases justly and at proportionate cost”: CPR 1.1. This is similar to Ontario’s proportionality principle in the Rules, *supra* note 10, Rule 1.04(1.1).

<sup>178</sup> CPR, *supra* note 33, CPR 19.11(1); *Austin and others v Miller Argent (South Wales) Ltd*, [2011] EWCA Civ 928.

<sup>179</sup> CPA, *supra* note 3, s 5(1)(b).

- ii. Commonality. The GLO framework requires that the claims in the group raise “common or related issues of fact or law”,<sup>180</sup> while the *CPA* requires that “the claims or defences of the class members raise common issues”.<sup>181</sup>
- iii. Class definition. While the *CPA* explicitly requires “an identifiable class”,<sup>182</sup> the GLO is a little less explicit and simply requires that the class be defined by the number of issued and potential claims.<sup>183</sup>
- iv. Preferability. Applicants for a GLO are required to consider whether any order other than a GLO would be appropriate.<sup>184</sup> If alternative procedures would lead to a more timely and cost-effective resolution of the litigation, then a GLO will not be made.<sup>185</sup> A GLO will also be refused if the individual issues overwhelm the common issues.<sup>186</sup> These are similar to the recent amendments to the *CPA* regarding predominance and superiority,<sup>187</sup> discussed above, although the courts in Ontario have yet to grapple with the interpretation of these amendments.

Formal procedural rules for the litigation of mass claims would essentially create a quasi-certification process outside of the *CPA*, and this would remove many of the advantages of proceeding less formally under the rules for joinder, consolidation, or hearing together.

The formal GLO structure in England works well in circumstances where a class action would probably be certified in Canada: where claims involve numerous common questions, claimant groups are diffuse and less well-defined, and there is likely to be a carriage battle for control of the litigation. For cases with fewer common questions, numerous and significant individual issues, and a well-defined constituency represented by only one or a few law firms, English litigants tend to proceed under the rules for joinder or consolidation without applying for formal GLO status. Similarly, in Ontario, certain cases would continue to be more suitable for a class proceeding, whereas those with a well-defined constituency would proceed informally under the Rules. Cases involving diffuse and large groups where there are significant individual issues may not be suitable for either process, and may require additional guidance that is beyond the scope of this article.

The following guidance on the litigation of mass claims therefore draws lessons from English cases that have proceeded informally (and the GLO structure, without establishing such a structure), as well as the US MDL experience.

An additional complication arises in the Canadian context, one that does not exist in either the US or England. According to Canada’s constitutional structure, civil procedure is a provincial matter.<sup>188</sup> As a result, there can be no federal rules of multi-district litigation as exist in the US (because this would be *ultra vires* the federal power), and no central GLO mechanism as exists in England. Rules of civil

<sup>180</sup> CPR, *supra* note 33, CPR 19.10.

<sup>181</sup> *CPA*, *supra* note 3, s 5(1)(c). Similarly, the rules governing the transfer of multidistrict litigation in the US pertain to “civil actions involving one or more common questions of fact”: *MDL Act*, *supra* note 33.

<sup>182</sup> *CPA*, *supra* note 3, s 5(1)(b).

<sup>183</sup> CPR, *supra* note 33, Practice Direction 19B, para 3.2(2) and (3).

<sup>184</sup> CPR, *supra* note 33, Practice Direction 19B, para 2.3.

<sup>185</sup> *Hobson v Ashton Morton Slack Solicitors*, [2006] EWHC 1134 (Admin) at paras 2 and 32.

<sup>186</sup> *Various v Barking, Havering and Redbridge University Hospitals NHS Trust*, unreported 21 May 2014 HC (QB) (claimants alleged their injuries arose from systemic negligence, but Court held that the injuries could each have arisen from a completely different systemic failure).

<sup>187</sup> *CPA*, *supra* note 3, s 5(1.1).

<sup>188</sup> *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 92.

procedure in Canada must be developed province-by-province; yet mass claims are increasingly national in scope, and this necessarily leads to some duplication. Efforts to overcome this phenomenon in the class action context have met with limited success,<sup>189</sup> and a formal mechanism for the litigation of mass claims would encounter the same limitations. Informal guidance, however, can be used by Ontario litigators as well as their counterparts in other provinces. The following section therefore provides guidelines for the litigation of mass claims; while the focus is on Ontario, these guidelines should also prove useful elsewhere.

## 2. Claims to be Managed under the Guidelines

As noted above, mass claims in Ontario outside of the class actions context are currently litigated under the rules for joinder, consolidation, or hearing together. The claims to be managed under these guidelines must therefore satisfy the requirements for joinder of parties under Rule 5.02(1) (including representation by the same lawyer of record) or for the consolidation or hearing together of proceedings under Rule 6.01. The criteria, all of them disjunctive, include the following:

- The persons or proceedings must assert claims to relief that arise out of the same transaction or occurrence, or series of transactions or occurrences;<sup>190</sup>
- The proceedings have question(s) of law or fact in common,<sup>191</sup> or such question(s) may arise in the proceeding;<sup>192</sup> or
- The joinder may promote the convenient administration of justice,<sup>193</sup> or an order for consolidation or hearing together ought to be made for any reason.<sup>194</sup>

In addition, the joinder, consolidation, or hearing together must promote the objectives of civil justice generally: that is, “to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits”<sup>195</sup> in accordance with the principle of proportionality.<sup>196</sup>

While joinder (the addition of parties and/or claims to an action) and consolidation (the combining of two or more separate actions into one action) result in one proceeding with many plaintiffs,<sup>197</sup> hearing together maintains the separate existence of the actions involved.<sup>198</sup> When actions are ordered to be tried together, they may be subject to common steps in the proceedings, including common styles of cause,<sup>199</sup>

<sup>189</sup> These include: providing criteria for courts to follow in the various class proceedings acts (e.g. the *CPA*, *supra* note 3, ss 5(6), 5.1(1)); the requirement in *CPA* s 2(1.1) that all class proceedings be registered; and protocols such as the Canadian Bar Association’s *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice* (Ottawa: Canadian Bar Association, 2018).

<sup>190</sup> Rules, *supra* note 10, Rules 5.02(1)(a); 6.01(1)(b).

<sup>191</sup> *Ibid*, Rule 6.01(1)(a).

<sup>192</sup> *Ibid*, Rule 5.02(1)(b).

<sup>193</sup> *Ibid*, Rule 5.02(1)(c).

<sup>194</sup> *Ibid*, Rule 6.01(1)(c).

<sup>195</sup> *Ibid*, Rule 1.04(1).

<sup>196</sup> *Ibid*, Rule 1.04(1.1).

<sup>197</sup> The exception is the joinder of claims to an action where there is only one plaintiff: Rules, *supra* note 10, Rule 5.01(1).

<sup>198</sup> This is explained with commendable clarity in *Wood v Farr Ford Ltd*, 2008 CanLII 53848 (ONSC) at paras 19-27 [*Wood*].

<sup>199</sup> *Whiteoak Lincoln Mercury Sales Ltd v Canadian Pacific Ltd*, [1982] OJ No 940 at para 18 [*Whiteoak*]; *Vacation Brokers Inc v Espinoza*, [1995] OJ No 3201 at paras 4, 10 [*Vacation Brokers*].

discoveries,<sup>200</sup> and motions;<sup>201</sup> often the evidence in one action will be taken as evidence in the other action(s).<sup>202</sup>

The requirements under Rules 5 and 6 are somewhat similar to the criteria for the granting of an MDL: there must be one or more common questions, the procedure may serve the convenient administration of justice, and the procedure will promote the just and efficient litigation of the actions. Joinder, consolidation, or hearing together may be refused if there is very little overlap between the actions or if the actions do not arise from the same transactions or occurrences.<sup>203</sup>

Rules 5 and 6 also refer to “two or more persons” (joinder of parties) or “two or more proceedings” (consolidation or hearing together), articulating the minimum number of plaintiffs that is required for proceeding under these Rules. The maximum number of plaintiffs will depend on practicality. For example, the case law in Ontario indicates that joinder has been held to be impractical where it involves 165 parties,<sup>204</sup> and in Alberta, 50-85 named plaintiffs was held to be “very cumbersome.”<sup>205</sup> However, Ontario lawyers currently litigating mass claims have cases involving 260<sup>206</sup> or even more than 1200 plaintiffs.<sup>207</sup>

### 3. Starting the Process

In a US MDL, the judge may permit or require primary pleadings.<sup>208</sup> They may also require plaintiff fact sheets or even conduct a ‘census’ of MDL cases.<sup>209</sup> A similar practice occurs in the GLO context, where questionnaires and/or particulars of claim are prepared for each plaintiff, incorporating by cross-reference a ‘Group Particulars of Claim’.<sup>210</sup> The defendants may also prepare primary defences as well as defences to the individual plaintiff pleadings.<sup>211</sup> This avoids unnecessary repetition of common issues, while also providing defendants with the information needed to prepare their defences.

For actions in Ontario involving multiple plaintiffs (whether the multiple plaintiffs are part of the action at its commencement, joined later, or are the result of a consolidation of actions), a Primary Statement of Claim may therefore be used, containing the issues of fact and/or law common to the claims. This would contain a schedule with entries “relating to each individual claim specifying which of the general allegations are relied on and any specific facts relevant to the plaintiff.”<sup>212</sup> These entries could be based on plaintiff questionnaires or fact sheets, as have frequently been used in MDLs and in Canadian class

<sup>200</sup> *Whiteoak*, *supra* note 199 at para 18; *Indian Residential Schools 1*, *supra* note 68 at para 7.

<sup>201</sup> *Vacation Brokers*, *supra* note 199 at para 10.

<sup>202</sup> *Wood*, *supra* note 198 at para 25.

<sup>203</sup> *Drabinsky v KPMG*, [1999] OJ No 3630 (SCJ) [*Drabinsky*].

<sup>204</sup> *Oakley v Levinter & Levinter*, 2011 ONSC 6326.

<sup>205</sup> *Metera*, *supra* note 67 at para 94. However, see *Alexander*, *supra* note 69, which involved more than 300 plaintiffs.

<sup>206</sup> This is the number of the various transvaginal mesh cases being litigated by a group of law firms: Waddell & Miller, *supra* note 96 at slide 22.

<sup>207</sup> This is the number of cases being pursued against the Federal Government for the administration of the antimalarial drug Mefloquine: *ibid.*

<sup>208</sup> These are known as ‘master pleadings’ or ‘master complaints’ in the US. I use the word ‘primary’ because of problematic associations with the word ‘master’.

<sup>209</sup> Lahav, “MDL Procedure”, *supra* note 164 at 539.

<sup>210</sup> CPR, *supra* note 33, CPR 19.13(d); CPR, *supra* note 33, Practice Direction 19B, paras 14.1-14.4. In the US, these may be required as part of a *Lone Pine* order, whereby each plaintiff is required to provide *prima facie* evidence of injury by a certain date, on threat of dismissal: *Lore v Lone Pine Corp*, 1986 WL 637507 (NJ Super Ct Law Div, Monmouth Co, 1986).

<sup>211</sup> *Walker v Eli Lilly & Co*, [1986] ECC 550 HC (QB).

<sup>212</sup> CPR, *supra* note 33, Practice Direction 19B, para 14.1(2).

action litigation. This abbreviated process would ensure that each claim is considered individually, while reducing the administrative barriers to commencing a claim. Reducing administrative barriers would reduce costs and would also help to overcome the social and psychological barriers that plaintiffs may face in pursuing their individual claims.<sup>213</sup>

#### 4. Case Management

As soon as possible after starting the process, counsel for the plaintiff group should write to the court and request that a case management judge be appointed. This is the current practice in Ontario upon commencing a class proceeding, although it is not required by statute.<sup>214</sup> Proceedings that are not joined or consolidated, but are simply heard together, would also be case managed together.<sup>215</sup> If the proceedings involved different counsel,<sup>216</sup> this would require some coordination between them.<sup>217</sup> In the US<sup>218</sup> and in some Ontario cases<sup>219</sup> involving numerous law firms, case management judges have appointed a steering committee to lead the litigation, communicate with the other firms,<sup>220</sup> and apportion work between firms.<sup>221</sup> These firms may also oversee settlement discussions<sup>222</sup> although, as discussed below, the ultimate decision to settle individual cases will be the decision of the plaintiffs themselves. An ‘executive committee’ of plaintiffs may also be formed to communicate with the group of plaintiffs and discuss issues such as settlement.

The case management of separate proceedings heard together has occurred in several instances,<sup>223</sup> some of them involving class proceedings.<sup>224</sup> In *Abdulrahim v Air France*, for example, numerous actions were case managed together, including a class proceeding and more than half a dozen individual actions.<sup>225</sup> Under Rule 37.15, a single case management judge may also hear all motions in “two or more proceedings that involve similar issues.”<sup>226</sup> Case management orders have included deadlines for the exchange of pleadings and completion of discoveries,<sup>227</sup> as well as the transfer of proceedings to one judicial district if they have been ordered to be heard together.<sup>228</sup>

<sup>213</sup> OLRC Report, *supra* note 46 at 127-129.

<sup>214</sup> See also CPR, *supra* note 33, Practice Direction 19B, para 12.

<sup>215</sup> This was the process in *Indian Residential Schools 2*, *supra* note 68 at para 21.

<sup>216</sup> This would not necessarily be the case. See, for example, *Hotz v Toronto (City)*, 2008 CanLII 3428 (ONSC).

<sup>217</sup> This is entirely possible, as evidenced by *Green v The Hospital for Sick Children*, 2021 ONSC 8237 at para 4, which referred to more than a hundred cases involving different counsel which were being case managed together and shared common discoveries.

<sup>218</sup> *Manual for Complex Litigation*, 4th ed (Washington, DC: Federal Judicial Center, 2004) at 24-28 [*Manual for Complex Litigation*].

<sup>219</sup> *Whiteoak*, *supra* note 199 at para 18.

<sup>220</sup> A similar process takes place as part of a GLO: CPR, *supra* note 33, Practice Direction 19B, para 2.2.

<sup>221</sup> See *Jaikaran v Austin*, 2011 ONSC 6336 at paras 14 and 27 [*Jaikaran*].

<sup>222</sup> Elizabeth Chamblee Burch has critiqued this process in “Monopolies in Multidistrict Litigation” (2017) 70:1 Vand L Rev 67.

<sup>223</sup> See e.g. *PMM v YWM*, 2019 ONSC 866; *1623242 Ontario Inc v Great Lakes Copper Inc*, 2013 ONSC 2548.

<sup>224</sup> *Abdulrahim v Air France*, 2010 ONSC 5542 [*Abdulrahim*].

<sup>225</sup> *Ibid* at para 6.

<sup>226</sup> Rules, *supra* note 10, Rule 37.15(1), cited in *Dumoulin*, *supra* note 94 at para 4. See also *Jaikaran*, *supra* note 221 at para 12.

<sup>227</sup> *Whiteoak*, *supra* note 199 at para 18.

<sup>228</sup> *Vacation Brokers*, *supra* note 199 at para 11.



## 5. Preliminary Issues Trials and Hearings Together of Common Issues

Preliminary issues trials or hearings together of common issues are available outside the mass claims context, but they are of particular significance for mass claims because of the efficiencies they can present in terms of judicial economy. In English group litigation, courts have ordered the preliminary trial of certain issues that are a central feature of the dispute between the parties. This was ordered in the Volkswagen diesel emissions litigation, which involved the preliminary determination of whether the defendants' software amounted to a 'defeat device',<sup>229</sup> and in the metal-on-metal hip litigation, which involved the preliminary determination of whether the potential for damage associated with a product could be a 'defect' for the purposes of the relevant legislation.<sup>230</sup> The hearing of preliminary or threshold issues has also occurred in the MDL context.<sup>231</sup>

Preliminary issues hearings are part of the rules of procedure in many tribunals in Ontario,<sup>232</sup> and partial summary judgment of "all or part of the claim" under Rule 20.04(2) has been permitted in restricted circumstances.<sup>233</sup> In *Butera v Chown, Cairns LLP*,<sup>234</sup> the Court of Appeal for Ontario held that, "[a] motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner."<sup>235</sup> Preliminary issues hearings, then, will generally be reserved for those issues that can be readily extricated from the issues in the main action and the determination of which will promote "proportionality, efficiency and cost effectiveness."<sup>236</sup>

Also available is the bifurcation of hearings on the issues of liability and damages.<sup>237</sup> This may take place where the parties consent and where such an order will secure the "just, most expeditious and least expensive determination" of a civil proceeding on the merits.<sup>238</sup> In *Barker v Barker*, for example, the litigation had been proceeding for 20 years and the trial would be further delayed if it was not bifurcated.<sup>239</sup>

Issues that are common between proceedings can also be heard together. *Bayer Inc v Apotex Inc*<sup>240</sup> involved two separate actions against two separate defendants, both of which had patent invalidity issues in common.<sup>241</sup> The Federal Court ordered that the common invalidity issues be tried together, on the grounds that this "would eliminate duplications, constitute sound use of judicial resources and achieve the just, most expeditious and least expensive determination of the issues in both actions."<sup>242</sup> Liability issues

<sup>229</sup> *Crossley v Volkswagen AG*, [2019] EWHC 783 (QB).

<sup>230</sup> *Gee v DePuy International*, [2018] EWHC 1208 (QB).

<sup>231</sup> *In re MasterCard Int'l Inc, Internet Gambling Litig*, 132 F Supp 2d 468 (ED La 2001).

<sup>232</sup> For example, the Licence Appeal Tribunal: *Millar v The Cooperators General Insurance Company*, 2021 ONSC 6643.

<sup>233</sup> Under Rules, *supra* note 10, Rule 20.04(2)(b), the consent of the parties is required. A determination of a question of law may also take place under Rule 21.01(1)(a).

<sup>234</sup> *Butera v Chown, Cairns LLP*, 2017 ONCA 783.

<sup>235</sup> *Ibid* at para 34.

<sup>236</sup> *Ibid* at para 38.

<sup>237</sup> Rules, *supra* note 10, Rule 6.1.01. See also *Whiteoak*, *supra* note 199 at para 18.

<sup>238</sup> *Bondy-Rafael v Potrebic*, 2015 ONSC 3655 at para 82.

<sup>239</sup> *Barker v Barker*, 2020 ONSC 3746 (liability) and *Barker v Barker*, 2021 ONSC 158 (damages). Both decisions were affirmed in part at *Barker v Barker*, 2022 ONCA 567.

<sup>240</sup> *Bayer Inc v Apotex Inc*, 2019 FC 191 [*Bayer*].

<sup>241</sup> Under the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, a generic drug manufacturer must assert that its proposed products would not infringe any valid claims of a brand manufacturer's patent, and this raises issues of the validity of those claims.

<sup>242</sup> *Bayer*, *supra* note 240 at paras 6, 20-25. The Court came to the same conclusion in similar circumstances in *Biogen Canada Inc v Taro Pharmaceuticals Inc*, 2018 FC 1034.

that are common across separate actions may also be tried together.<sup>243</sup> However, the court may refuse to order the trial together of common liability issues if those issues are only a small part of the liability picture,<sup>244</sup> if the separate actions are at different stages in the litigation process, the effect would be to force settling defendants to actively participate in the litigation, it would increase delay and cause prejudice to certain parties, and it would undermine the objectives of the Rules,<sup>245</sup> the *CPA*,<sup>246</sup> or any other relevant legislation.

## 6. Test Cases

Currently, group litigation cases in Ontario with counterparts in the US are generally settled according to the progress of the litigation south of the border. In the MDL system, test cases are also known as bellwether trials. A certain number of cases will be selected as typical of a larger pool of plaintiffs. Cases are selected in various ways: plaintiff and defence counsel will take turns selecting cases; they will be required to choose at random; they will be required to agree on the cases selected; or the cases will be selected by the court to which the MDL cases have been transferred.<sup>247</sup> While some courts have held that the results of test cases bind the remaining cases in the MDL, appellate courts have been sceptical of this approach, and have preferred the ‘informational’ view of test cases.<sup>248</sup> In other words, the verdicts and settlements (as well as the discovery)<sup>249</sup> generated by those cases will provide information on the nature and strength of individual claims, whether they can be suitably litigated as part of the MDL, and the settlement value of the cases.<sup>250</sup>

Given the differences in procedural and substantive law between the US and Canada, it would be more just and lead to more accurate outcomes to determine Canadian settlements on the basis of Canadian test cases. A process for the litigation of mass claims in Ontario, then, should involve the use of test cases to determine common or related issues of fact or law,<sup>251</sup> as is currently permitted under CPR 19.13(b) in England.<sup>252</sup> This could include the division of claims into categories, with a test case for each category.<sup>253</sup> For example, if *Carcillo* continues as numerous individual actions that are grouped by team and league, then one test case can proceed on behalf of each group.<sup>254</sup> In *Adam v Canada*, which utilized the ‘Alberta model’ discussed above, the court grouped plaintiffs according to the residential school each of them had

<sup>243</sup> See, for example, *Vacation Brokers*, *supra* note 199.

<sup>244</sup> *Drabinsky*, *supra* note 203.

<sup>245</sup> Rules, *supra* note 10. This includes Rule 6, the underlying policy of which is “to avoid a multiplicity of proceedings, to promote expeditious and inexpensive determination of disputes and to avoid inconsistent judicial findings”: *Logtenberg v ING Insurance Company*, 2008 CanLII 43573 (ONSC) at para 7. See also Rule 1.04(1), which states that “[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits” (cited in *McKee v Thistlethwaite*, 2003 CanLII 36439 (ONSC) at para 13 as a reason for refusing to order the proceedings tried together).

<sup>246</sup> *Abdulrahim*, *supra* note 224 at paras 68-73.

<sup>247</sup> Eldon E Fallon, Jeremy T Grabill & Robert Pitard Wynne, “Bellwether Trials in Multidistrict Litigation” (2008) 82 *Tulane L Rev* 2323 at 2346-2359 [Fallon].

<sup>248</sup> *Ibid* at 2331-2332.

<sup>249</sup> *Manual for Complex Litigation*, *supra* note 218 at 436-437.

<sup>250</sup> *Ibid* at 360. The common discovery approach was used in the diet drug and silicone gel breast implant MDLs: *Manual for Complex Litigation*, *ibid* at 235. In the Canadian context, common discovery has been used in cases that are case managed together, for example *Green v The Hospital for Sick Children*, 2021 ONSC 8237 at para 4.

<sup>251</sup> See *Indian Residential Schools I*, *supra* note 68 at para 7, for an example from the ‘Alberta model’.

<sup>252</sup> CPR, *supra* note 33, CPR 19.15 and Practice Direction 19B, para 12.3.

<sup>253</sup> *Whiteoak*, *supra* note 199 at para 18; *Vacation Brokers*, *supra* note 199 at para 9; *Adam*, *supra* note 69 at paras 32-33.

<sup>254</sup> *Supra* note 11 at para 452.

attended.<sup>255</sup> In the *Indian Residential Schools* case, also in Alberta, the plaintiffs were directed to identify up to 30 individual plaintiffs, and the defendants to identify up to 20 individual plaintiffs, as sample cases.<sup>256</sup> The selection was ordered to contain a “cross-section of causes of actions, schools and time periods”, with each of the defendant religious organizations represented in at least one case.<sup>257</sup> After the discovery stage, a smaller representative group would be selected from the pool of 50 cases to serve as test trials.<sup>258</sup>

The evidence and discovery that arises in test cases can also be used to inform the other cases in the group. In *Jaikaran*, a group of ‘pioneering cases’ was used to create litigation plans for the prosecution of the other claims, and to obtain a collection of expert reports that “were reviewed to identify patterns of practice and larger systemic issues related to [the defendant’s] surgeries ... and an analysis of the type, frequency and cause of post-operative complications.”<sup>259</sup> This approach can increase judicial economy and reduce litigation costs for both plaintiffs and defendants.<sup>260</sup>

The findings in test cases will only be binding on the remaining claims in the group if those parties consent.<sup>261</sup> Nevertheless, on the informational approach described above, test cases will still be valuable in assessing the strengths, weaknesses, and potential settlement value of the remaining cases.<sup>262</sup> This was noted in *Indian Residential Schools*, where Justice McMahon stated that, “[t]he results of the sample cases will have precedential value and I trust will promote settlement or dispositions of the other cases.”<sup>263</sup> The US literature on the bellwether phenomenon also notes that, “the knowledge and experience gained during the bellwether process can precipitate global settlement negotiations and ensure that such negotiations do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries.”<sup>264</sup> There is a downside, in that counsel who are not part of the team litigating the test cases, but who do have claims pertaining to the same subject-matter, will gain information for the purposes of settlement and may therefore get a ‘free ride’. Nevertheless, this risk also exists in class proceedings (where numerous counsel are usually involved) and in situations where test cases are binding on a certain group, and it can also be addressed in the apportionment of costs, discussed below. It should not be a reason for shying away from the use of the test case approach altogether.

While the test cases are being decided, the remaining cases can either be stayed or managed on a separate track, according to the discretion of the court.<sup>265</sup> Following the determination of the test cases, the remaining cases will either settle according to the informational approach, or will proceed to trial (with the results of the test cases likely to lead to some narrowing of the issues to be tried).

Another disadvantage to this approach is that plaintiffs whose cases are not selected as test cases may not have an opportunity to tell their stories. In proceedings involving historical abuse or other trauma,

<sup>255</sup> *Adam*, *supra* note 69 at paras 32-33. The test case approach was also proposed in *Metera*, *supra* note 67 at para 93.

<sup>256</sup> *Indian Residential Schools 2*, *supra* note 68 at para 19.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> *Jaikaran*, *supra* note 221 at para 44.

<sup>260</sup> *Ibid* at paras 64-66.

<sup>261</sup> *Metera*, *supra* note 67 at para 94; *North York Branson Hospital v Praxair Canada Inc*, [2001] OJ No 2763 at para 14. The parties consented in *Whiteoak*, *supra* note 199 at paras 12-13.

<sup>262</sup> Of course, this depends on how the test cases are selected: if they are chosen at random, they will not be representative, and their informational value will be much lower.

<sup>263</sup> *Indian Residential Schools 2*, *supra* note 68 at para 22.

<sup>264</sup> Fallon, *supra* note 247 at 2325; see also 2337 and 2366.

<sup>265</sup> See Rules, *supra* note 10, Rule 6.01(1)(e)(i); *Indian Residential Schools 2*, *supra* note 68 at para 22.

therefore, a process may need to be established to enable plaintiffs to voice their experiences and feel heard.

## 7. Costs-Sharing

The issue of costs raises numerous difficulties in mass claims.<sup>266</sup> The division of costs between common and individual issues is provided for in the *CPA*,<sup>267</sup> but there is minimal guidance for non-*CPA* proceedings. Rule 57 of the *Rules of Civil Procedure* provides no guidance for mass claims specifically, other than stating that the court may consider, in making a costs award, whether a party “commenced separate proceedings for claims that should have been made in one proceeding” or “in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer”.<sup>268</sup> The MDL rules and jurisprudence are also of little assistance in addressing this question, because parties in US litigation generally bear their own costs.

In England, costs in GLOs are divided into two categories: individual costs and common costs. Individual costs relate to costs incurred in the prosecution of an individual claim, while common costs relate to costs incurred in relation to the common issues, in administering the group litigation, and in an individual claim where it is prosecuted as a test case.<sup>269</sup> The general rule is that each claimant in the group is liable for an equal proportion of the common costs as well as her individual costs.<sup>270</sup> Claimants’ liability for their share of the defendants’ costs is several, rather than joint,<sup>271</sup> and there are provisions for early leavers and late joiners.<sup>272</sup> Such orders have been made in several English group litigation proceedings.<sup>273</sup> Because of the staggering costs that can be incurred in English group litigation,<sup>274</sup> and because the costs-sharing orders only deal with the proportion of costs payable by each party and not the actual amount, such orders tend to be made early on in the proceedings.<sup>275</sup>

<sup>266</sup> This section deals with the issue of costs (whereby, in a “loser-pays” costs system, the losing party has to pay some or all of the winning party’s legal costs), which is separate from the issue of fees (which is the amount a client pays her lawyer for their services).

<sup>267</sup> Under *CPA*, *supra* note 3, s 31(2), only representative plaintiffs are liable for costs at the common issues stage, while class members are liable for costs with respect to the determination of their own individual claims.

<sup>268</sup> Rules, *supra* note 10, Rule 57.01(1)(h).

<sup>269</sup> CPR, *supra* note 33, CPR 46.6(2) and (5).

<sup>270</sup> CPR, *supra* note 33, CPR 46.6(3), (4), (6) and (7), Practice Direction 19B, para 16.2. See also *Davies v Eli Lilly & Co*, [1987] 1 WLR 1136.

<sup>271</sup> CPR, *supra* note 33, CPR 46.6(3) and (4). See also Law Society Civil Litigation Committee, *Group Actions Made Easier: A Report* (London: Law Society 1995) at 44, and *Ward v Guinness Mahon Plc*, [1996] 1 WLR 894. While this is the default rule, in the RBS Rights Issue Litigation, the High Court decided that adverse costs should be shared on a several basis in proportion to the size of the individual’s subscription cost in the rights issue, relative to the total subscription cost for all the claimants on the group register: *Greenwood v Goodwin Trustees of the Mineworkers Scheme Ltd v Royal Bank of Scotland Group*, [2014] EWHC 227 (Ch).

<sup>272</sup> CPR, *supra* note 33, CPR 46.6(6) and (7); *Foster v Roussel Laboratories* (unreported, 29 October 1997), cited in *Afrika & Ors v Cape Plc*, [2001] EWCA Civ 2017 at para 11 [*Afrika*]. Of course, if a claimant is settling, then the apportionment of any costs will be negotiated as part of the settlement.

<sup>273</sup> *Afrika*, *supra* note 272 at para 4. This was an appeal of costs orders in three group litigation proceedings: the MMR litigation (alleging that children were injured as a result of certain vaccines), oral contraceptive litigation, and litigation by workers in a South African mine against an English parent company for injuries sustained as a result of exposure to asbestos.

<sup>274</sup> An extreme example is *In re RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch) at paras 129, 131, where the defendants’ costs incurred since the commencement of the litigation in 2014 totalled \$250 million Canadian (at current-day exchange rates and adjusted for inflation).

<sup>275</sup> *Ibid*; *Afrika*, *supra* note 272.

In Ontario, such orders tend to be made at the end of the litigation. Costs orders in class proceedings will be made at the end of the common issues trial, to ensure that the slate is ‘wiped clean’ and the costs exposure for claimants at the individual issues stage is made clearer.<sup>276</sup> Individual claimants are exposed to costs consequences at the individual issues stage,<sup>277</sup> and the judge overseeing that stage cannot abrogate this absent the consent of the parties.<sup>278</sup> In non-CPA litigation, however, “the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.”<sup>279</sup>

In mass claims litigation, if the issues are tried by means of test cases, then plaintiffs whose claims are not selected to proceed in that manner may be ordered to contribute to the costs of litigating the test cases.<sup>280</sup> While costs orders are generally made within the discretion of the trial judge,<sup>281</sup> case management judges should also be able to give directions regarding the sharing of common costs, as is the practice in England.<sup>282</sup> Successful plaintiffs may also be divided into groups for the purposes of claiming their costs against the defendants, depending on their roles in the proceeding and the amount of work that has gone into their claims.<sup>283</sup> Such apportionment will recognize that the common litigation of certain issues that are applicable across the group reduces costs for both plaintiffs and defendants.<sup>284</sup>

Plaintiffs in mass claims litigation are exposed to the risks of an adverse costs award in a way that class members at the common issues stage of a class action are not. Nevertheless, litigation funders that have supported class proceedings have also provided protection against adverse costs, and they could do the same in the mass claims context.<sup>285</sup> Alternatively, adverse costs or ‘after the event’ (ATE) insurance can protect against that risk (or lawyers may provide their clients with an indemnity). Such insurance products are widely used in England, although they can be expensive.

## 8. Settlement

The settlement of group litigation raises numerous ethical issues, very few of which have been addressed in the US,<sup>286</sup> let alone in England or Canada. In England, the GLO framework does not address the aggregate settlement of claims, because they are generally settled on an individual basis.<sup>287</sup> In the US outside the class actions context, the *Model Rules of Professional Conduct* require disclosure to clients of

<sup>276</sup> *Lundy v VIA Rail Canada Inc*, 2015 ONSC 1879 at paras 58 and 61 [*Lundy*].

<sup>277</sup> *CPA*, *supra* note 3, s 31(2).

<sup>278</sup> *Lundy*, *supra* note 276 at para 50.

<sup>279</sup> *Courts of Justice Act*, RSO 1990, c C.43, s 131(1).

<sup>280</sup> *Whiteoak*, *supra* note 199 at para 16.

<sup>281</sup> *Ibid*.

<sup>282</sup> CPR, *supra* note 33, Practice Direction 19B, para 12.4.

<sup>283</sup> This was the approach in *Jaikaran*, *supra* note 221 at paras 5 and 26. For the purposes of that costs motion, the plaintiffs divided themselves into four subclasses: ‘standard class’ members (in which the defence filed no medical witness affidavits), ‘medical witness class’ members (in which the defence had filed medical witness affidavits), ‘trial ready class’ members (whose actions had been set down for trial), and ‘pioneering class’ members (in which different expert opinions were sought to ensure that individual physician bias was not affecting the validity of the opinions – these cases were used to create generalized approaches for the other cases).

<sup>284</sup> *Ibid* at paras 64-66.

<sup>285</sup> Litigation funders do not yet appear to be funding mass claims on any kind of widespread basis, although this is likely to change as such claims become more prolific.

<sup>286</sup> Nancy J Moore, “Ethical Issues in Mass Tort Plaintiffs’ Representation: Beyond the Aggregate Settlement Rule” (2013) 81 *Fordham L Rev* 3233 at 3236.

<sup>287</sup> Herbert Smith Freehills, “Settlement of Group Actions” (16 October 2019), online: *HSF* <<https://hsfnotes.com/litigation/settlement-of-group-actions/>>.

all terms of an aggregate settlement, and unanimous consent by all clients to all settlement terms.<sup>288</sup> In Ontario, there is no provision in the relevant *Rules of Professional Conduct* regarding aggregate settlement;<sup>289</sup> while section 27.1(1) of the *CPA* requires court approval of a class action settlement, there are no equivalent requirements for the aggregate settlement of mass claims.

Safeguards are required because, in both mass claims litigation and class actions, a conflict can arise between securing a global settlement for all the cases, thereby keeping the settlement amount higher even for the weaker cases (but potentially watering down the amount for the stronger cases), and settling the stronger cases while leaving the weaker cases for a much lower global settlement.<sup>290</sup> The danger that the interests of some members will be traded off against the interests of others<sup>291</sup> is particularly strong in settlements which are resolved according to a matrix whereby plaintiffs will get a certain amount according to the category of damages into which they fall.<sup>292</sup> However, settlements where each case is settled on its own merits and for its own amount are much less risky than entire inventories that are settled for a lump sum. Where the plaintiff lawyers have the discretion to divide up that sum amongst their inventory, the temptation is to give some plaintiffs a greater share of the settlement amount in order to ‘buy’ their consent to the settlement.<sup>293</sup> Lump-sum settlements where the defendants can buy finality will generally attract a premium as the price for that finality, and therefore be more attractive to plaintiffs’ counsel.<sup>294</sup>

However, requiring court approval for the aggregate settlement of mass claims will, in the same way as the formal certification-style process discussed above, create another *CPA*-type procedure in the context of mass claims. This would remove much of the flexibility and efficiency of the inventory approach, and would also require expensive and time-consuming requirements for notice, opt-outs, and objections (which are arguably unnecessary where all the class members are identified at the outset of the litigation, as in many Type A claims). The Law Society of Ontario should therefore amend the *Rules of Professional Conduct* to mirror the requirement in the US *Model Rules* that individual clients be informed of all terms of an aggregate settlement, and individually consent to those terms.<sup>295</sup> With regard to fees, clients will be protected by the current requirements of the *Rules of Professional Conduct*,<sup>296</sup> as well as the relevant provisions of the *Solicitors Act*.<sup>297</sup>

‘Buying global peace’, i.e. the final settlement of all existing claims, is highly valued by defendants but is typically much more difficult in mass claims litigation than in class actions.<sup>298</sup> This is a major

<sup>288</sup> American Bar Association, *Model Rules of Professional Conduct* (Washington, DC: ABA 2020) Rule 1.8(g) [*Model Rules*].

<sup>289</sup> Law Society of Ontario, *Rules of Professional Conduct* (Toronto: LSO 2014) [*Rules of PC*]. Rule 3.2-4 governs compromise or settlement, but does not mention aggregate litigation.

<sup>290</sup> Lahav, “Continuum”, *supra* note 157 at 1407.

<sup>291</sup> *Ibid* at 1405.

<sup>292</sup> This was the approach used to settle individual claims in Ontario’s trans-vaginal mesh litigation: Lord, Nov 2020, *supra* note 125.

<sup>293</sup> Charles Silver & Lynn A Baker, “I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds” (1998) 84 Va L Rev 1465.

<sup>294</sup> Lynn A Baker, “Mass Torts and the Pursuit of Ethical Finality” (2017) 85 Fordham L Rev 1943 at 1946.

<sup>295</sup> However, it seems unlikely that this recommendation will be acted upon, given that the LSO has never amended its *Rules of Professional Conduct* to address the ethical issues unique to class proceedings: Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act* (Toronto: Irwin Law, 2018) at 163-164.

<sup>296</sup> *Rules of PC*, *supra* note 289, Rules 3.6-2 to 3.6-2.3.

<sup>297</sup> *Solicitors Act*, RSO 1990, c S.15, ss 15-19.

<sup>298</sup> Charles Silver and Lynn A Baker, “Mass Lawsuits and the Aggregate Settlement Rule” (1997) 32 Wake Forest L Rev 733 at 760-763.

disadvantage of the mass claims approach. Nevertheless, buying global peace in Canada is exceptionally difficult even in class proceedings, because of the multiplication of such proceedings across provinces<sup>299</sup> and the ability to opt out<sup>300</sup> (which is often exercised by class members with Type A claims).

### C. Conclusion

As noted throughout this part, there are some difficulties with the use of joinder, consolidation, or hearing together for the litigation of mass claims. However, case law and practice from the US and England, as well as from Canada, provide guidance that should serve to reduce the uncertainty in this approach. This will help to facilitate agreement between parties and thereby reduce delays.

## V. CONCLUSION

Guidelines for the litigation of mass claims in Ontario would fill a lacuna currently left by the *CPA*, and would help to alleviate many of the tensions “between the day-in-court ideal and the realities of the mass market.”<sup>301</sup> Given the risk that the changes to the preferable procedure test will be interpreted restrictively, such guidance will facilitate the litigation of certain Type A claims that may not be certified as class actions. This would promote access to justice. It would also promote judicial economy because, where class sizes are small and individual claims are large, it is contrary to that goal (and to the goal of proportionality generally) “to contemplate unleashing the full panoply of procedural requirements which arise in a class proceeding”.<sup>302</sup> While behaviour modification (the third objective of the *CPA*)<sup>303</sup> would not be achieved in the same way as in an opt-out class proceeding,<sup>304</sup> the efficiencies facilitated by guidance for mass claims would nevertheless allow litigants to band together and exert pressure against the defendants as a larger group. This approach is also a more proportionate way of litigating Type A claims. Plaintiffs with individually strong claims can escape the burdens of a class action, while receiving the many benefits of collective litigation. That would provide another tool in the procedural toolbox for the accessible, proportionate, and just litigation of civil claims in Ontario.

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<sup>299</sup> See *supra* note 189 and accompanying text.

<sup>300</sup> *CPA*, *supra* note 3, s 9.

<sup>301</sup> Lahav, “Continuum”, *supra* note 157 at 1408.

<sup>302</sup> *Ward-Price v Mariners Haven Inc*, 2002 CanLII 38058 (ONSC) at para 39.

<sup>303</sup> *Dutton*, *supra* note 16 at para 29.

<sup>304</sup> Classes where claimants are automatically included (the opt-out approach) are usually much bigger than a process where claimants are required to take active steps, simply because of “the natural human tendency to do nothing when faced with a choice which requires positive action” (*Lloyd v Google LLC*, [2021] UKSC 50 at para 27). A bigger group is likely to exert more pressure on the defendant to change its behaviour.