THE SCOPE OF THE CLASS ACTION IN CANADA

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> For this is not the liberty which we can hope, that no grievance ever should arise in the Commonwealth — that let no man in this world expect; but when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for.[1]
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> The history of American freedom is, in no small measure, the history of procedure.[2]

The origins of the class action may be traced to 17th century Chancery practice designed to prevent multiplicity of actions.[3] In principle, the differences between class actions and other, less controversial modes of action[4] devised for the same purpose are purely procedural. Nevertheless, class actions are controversial beyond procedural bounds because, as Frankfurter, J. observed,[5] procedure is seen as profoundly affecting substantive rights.

While English and, to nearly the same extent, Canadian law governing the scope of the class action have not changed greatly in the past century, in the United States class actions have taken on a new and dynamic dimension. The activating vehicle there has been primarily, not common law development by the courts in their adjudicative role, but promulgation of new rules by the courts in their frankly legislative role.[6] The resulting, widely-perceived differences between the United States and Canada in terms of access to the courts through class actions have fuelled public as well as legal debate, particularly in relation to environmental and consumer litigation.

The principal focus of the present work is to evaluate the prospects for expanding the scope of the class action in Canada, insofar as these may be projected from the relatively sparse case law. That is, in what circumstances, not squarely governed by authority, may it be feasible to test where the courts will draw the line? The foundation for this otherwise speculative exercise is a consideration of the origins and development of class action procedure and the key issues as they have been viewed judicially.

Certain basic perspectives should be identified at the outset. Class representation has never been viewed by the common law courts as a procedure specially adapted for plaintiffs. Correspondingly, there is no overt indication that either American development or English and Canadian restraint by courts in both adjudicative and legislative roles has been conceived as a response to rising expectations and litigious interest of environmental and consumer 'classes'. The paramount considerations have been, and are likely to continue to be, on the one hand, the concern of courts of equitable jurisdiction to avoid multiplicity of actions not only for administrative convenience but also as an element of substantial justice to plaintiff and defendent alike, and on the other hand, the concern of courts, of both equity and law, that the rights of persons should not be decided

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1. Milton, "Aeropagitica".
2. *Malinski* v. *New York* (1944), 324 U.S. 401, at 414 (per Frankfurter, J.).
3. *See infra.*
4. *E.g.*, joinder of actions.
5. *Supra* n.2.
6. The earliest development was the revision by the Supreme Court in 1842 of Rule 48 of the United States federal rules of equity: *see* W. Rose, *Code of Federal Procedure* vol. 2, (1907) 1796.

without effective opportunity for their claims or defences to be heard. The differences in class action law between Canada and the United States, which provide a practical as well as topical framework for the present evaluation, arise by reason not that their courts have proceeded from different considerations but that they have given the same considerations different weight.

Common Origins in Equity

It may be that the Chancellors were always prepared to recognize parties in a representative capacity, and that, indeed, in the need for this procedure could be found a basis for their jurisdiction.[7] Certainly, by the time from which a substantial body of Chancery reports survive,[8] The procedure had been embodied in a specific petition in equity, the bill of peace. The essence of this remedy was that:

> If there was a dispute as to some right involving a multiplicity of persons . . . a bill of peace could be brought in equity to establish the right and so secure repose from the prospect of incessant or multifarious litigation.[9]

The converse of this proposition was that a bill in equity was demurrable for want of equity on the ground that common law provided an adequate remedy.

In 1676, the issue was raised in *Brown* v. *Vermuden* whether the bill of peace ought to bind all represented persons. Vermuden came within the scope of a class against whom an action for tithes had succeeded, and a decree issued. He claimed that he was not bound by the degree ". . . for that he was not party or privy." He argued in support that, not being a named party, he could not resort to a Bill of Review to test the validity of the decree, which would be unjust.[10] His plea, if successful, would have rendered nugatory the entire purpose of the bill of peace. Lord Nottingham, L.C. decided, without reference to authority, that the decree was binding:

> If the Defendant should not be bound, Suits of this Nature . . . would be infinite, and impossible to be ended. And declared, that the *Defendant,* though no party nor privy, yet he may have a Bill of Review, because he is grieved by the Decree.[11]

Thus from this early case may be seen that the Chancellor would adapt procedure, but not avoid *res judicata,*[12] to ensure justice to a represented party.

Indeed, no other response was to be contemplated, for the power to bind those represented was the foundation of the Chancellor's claim to jurisdiction, as was made clear in *How* v. *Tenants of Bromsgrove*:

> Upon motion for a new trial, *the Lord Chancellor* (Lord Nottingham) said, these matters were properly triable at common law; and he did not see, what jurisdiction the chancery had of this cause: but it was urged, the bill was brought to prevent multiplicity of suits, and was in its nature a bill of peace: and a new trial was granted . . . .[13]

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7. *See* Maitland, *Equity: A Course of Lectures* (rev. 1947) 7.
8. *I.e.*, from the Restoration in 1660.
9. *Snell's Principles of Equity* (26th ed. 1966) 636-7.
10. (1676), 1 Chan. Cas. 272, at 272; 22 E.R. 796, at 797.
11. *Ibid.*
12. The point was firmly established by the time of *Brown* v. *Howard* (1701), 1 Eq. Ca. Abr. 163, pl. 4; 21 E.R. 960.
13. (1681), 1 Vern 22; 23 E.R. 277. *See also Mayor of York* v. *Pilkington* (1737), 1 Atk. 282, 26 E.R. 180; and *Lord Tenham* v. *Herbert* (1742), 2 Atk. 483, 26 E.R. 692.

Brown v. *Booth* extended the ambit of class representation to those who, after a decree of continuing force, fall within the class. In that case it had previously been decreed in a class action ". . . that all the Miners within the said Parish, as well for the Time being, as to come . . ."[14] should pay a tithe. The defendants claimed that since their mines had been discovered or opened after the decree, they should not be bound by it. They were held to be bound as long as the decree was in force.

A further extension was established by *Mayor of York* v. *Pilkington,* where the plaintiffs sought to establish their right of fishery against the defendents as a class who "claimed several rights, either as lords of manors, or occupiers of the adjacent lands."[15] Lord Hardwicke, L.C., at first argument, allowed a demurrer on the grounds that the defendants might claim rights of various kinds and that "other persons, not parties to this bill, may likewise claim a right of fishing."[16] On re-argument, the demurrer was denied. Both the variety of possible defences and the incompleteness of the class were recognized to be complicating factors "but because a great number of actions may [otherwise] be brought, the court suffers such bills, though the defendants might make distinct defences."[17] It appears from the report that the named defendants were considered to represent sufficiently the various defences which might be raised:

> [I]t is no objection that they have separate defences; but the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants; for notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, or distinct rights.[18]

Here may be seen the origin of the notion, later to become a basic criterion for class actions under United States court rules, that common questions should predominate over individual issues.

The question, what parties are sufficient to represent the class, was authoritatively answered by Lord Eldon, L.C. in *Adair* v. *New River Co.*:

> [I]t is not necessary to bring all the individuals: why? Not, that it is inexpedient, but, that it is impracticable, to bring them all. The Court therefore has required so many, that it can be justly said, they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff . . . .
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> . . . .
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> [I]t would be competent to the Court in such a state of circumstances to say, if the Plaintiff brings so many of those . . . as can be taken duly and honestly to enter into that contest, in which all the others are concerned, that ought in equity to bind those, who are present, representing those, who are absent . . . .[19]

Notwithstanding the dictates of practicality, it may be supposed that it did not rest easily with equity that its action *in personam* should become so notional, and that there was ever a readiness to find procedural devices that would give substance to representation.

Consistent with the parity of plaintiff and defendant in access to the

14. (1690), 1 Eq. Ca. Abr. 164, pl. 5; 21 E.R. 960.
15. (1737), 1 Atk. 282, 26 E.R. 180.
16. *Id.*, at 283; 26 E.R. at 181.
17. *Id.*, at 284; 26 E.R. at 181.
18. *Ibid.*
19. (1805), 11 Ves. Jun. 429, at 445; 32 E.R. 1153, at 1159.

class action, defendants sued individually might in a proper case insist upon defending in a representative capacity.[20]

EFFECT OF JUDICATURE IN ENGLAND

Following judicature, rules of procedure were enacted which, by reason of fusion of the courts of law and equity, applied to all divisions of the High Court. One of these rules [hereinafter referred to as Rule 9] provided for representative actions:

> 9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.[21]

Another rule [hereinafter referred to as Rule 1] provided for joinder of actions:

> 1. All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise.[22]

These rules define distinct procedures referable to different circumstances.[23] Nevertheless, it will now be necessary to consider in some detail a line of English cases which have in common a marked tendency to confuse the two rules.

Beeching v. *Lloyd*[24] was decided before judicature but already contained the seeds of confusion. Two intended shareholders sued on behalf of themselves and all other depositors, for a return of deposits paid, on grounds of fraud. A defendant demurred on the ground that "the rights, as well of the Plaintiffs named as of those appearing only by representation, were entirely separate, and that they could not sue together."[25] The argument for the demurrer rested upon grounds applicable to joinder of separate actions, though counsel for the defendant endeavoured to deny (because the issue was representative capacity not joinder) that this was so.[26] Kindersley, V.-C. discerned (with respect, rightly) that the argument was indeed one of misjoinder and, therefore, had nothing to do with the authorities on representative capacity.[27] The case was decided on the basis of potential common interest:

> [I]f . . . these facts were established, there might be a common fund which might be applicable towards satisfaction of the Plaintiffs' demand. That alone is a ground on which it is impossible for me to come to the conclusion that there could be no possible decree for the Plaintiffs in which they could have a common interest.[28]

The *ratio* was then that representation founded on a sufficient common interest is not susceptible to further objection on the ground of misjoinder,

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20. *Rudge* v. *Hopkins*, 2 Eq. Ca. Abr. 170, pl. 27; 22 E.R. 145. The date of the case is uncertain, but likely (from context in the reports) *circa* 1730.
21. Supreme Court Rules, r. 9.
22. Supreme Court Rules, r. 1.
23. *Infra*, n. 46.
24. (1855), 3 Drew. 227, 61 E.R. 890.
25. *Id.*, at 240; 61 E.R., at 895.
26. *Id.*, at 241; 61 E.R., at 895.
27. *Id.*, at 242 - 243; 61 E.R., at 896.
28. *Id.*, at 243; 61 E.R., at 896.

or, in terms of the rules later promulgated, that Rule 9 is not subservient to Rule 1. The case also establishes that claims against a common fund may be appropriately brought by one or more plaintiffs on behalf of all interested in the fund, but this was clearly a sufficient rather than necessary criterion to show a common interest. The case is notable, too, for the learned Vice-Chancellor's clarity in specifying that the qualifying common interest related to the possible decree, not to the fund, nor to the questions of fact or law which might arise. Such clarity is not to be found in many of the more recent cases but was, it is submitted, consistent with the remedial foundations of his jurisdiction.

In the same case, the defendant also demurred "for want of equity."[29] It will be recalled that this demurrer alleged want of jurisdiction in Chancery by reason that the common law provided an adequate remedy. Over time it came to refer more broadly to those principles developed in Chancery which delineated the circumstances recognized by precedent as grounding jurisdiction. In overruling this demurrer, the learned Vice-Chancellor found it necessary to distinguish *Jones* v. *Garcia Del Rio,*[30] which decided that persons aggrieved of separate and distinct frauds may not join in suing the common perpretator:

> There the object was, on the part of the representatives of the Peruvian Government, to raise a loan and to get for that purpose as much money lent as possible. Now the lending of money by one person has no sort of connection with the lending by another. There is a common purpose, it is true, so far as concerns the borrower, but there is no common purpose as concerns the lenders . . . In (the present) case there is not only a common object in the persons borrowing, but a common object in those lending.[31]

This last observation ought not be construed as a new rule; rather it was merely a factor by reason of which the frauds were to be viewed as, in substance, a common fraud, not separate and distinct frauds. In any event, *Jones* v. *Garcia Del Rio* was concerned with joinder, as was the demurrer by which it was raised. Having already ruled that the criteria for joinder were distinct, the learned Vice-Chancellor re-introduced that same element of confusion by unnecessarily distinguishing the case on the facts.

The next case of significance was *Duke of Bedford* v. *Ellis,*[32] in which the plaintiffs sued on behalf of themselves and all other growers of produce using a certain market seeking an injunction to enforce alleged statutory rights and an account of excess charges alleged to have been levied against them. The pertinent grounds for appeal argued before the House of Lords were that the plaintiffs could not represent the purported class and that there was "a joinder of several plaintiffs for several distinct causes of action"[33] In answer, it was argued that there was a common interest created by statutory provision for preferential rights and that joinder was permitted by Rule 1.

Lord Macnaughten, concurring with the majority, observed that:

> The Duke has applied by summons to stay the action on two grounds, which were

29. *Id.*, at 240; 61 E.R., at 895.
30. [1823] Tur. & R. 297, 37 E.R. 1113.
31. *Supra*, n. 32, at 243 - 244; 61 E.R., at 896.
32. [1901] A.C. 1 (H.L.).
33. *Id.*, at 4.

> mixed up in the argument, but which ought, I think, to be kept separate and distinct. The principal ground is that the plaintiffs are not entitled to sue in a representative character in defence of their alleged statutory rights. The other ground, which is a matter of very slight moment, is that they cannot join as co-plaintiffs in respect of their several grievances. The whole difficulty in the present case has arisen from confusing these two matters. they have really nothing to do with each other. If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives if they had never been near the Duke; they are not incompetent because they may have been turned out of the market. In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the class of individual members.[34]

The learned Lord Justice then dealt with the argument that a common beneficial proprietary interest was a necessary attribute of a represented class, denying that this was a requirement in a since oft-cited passage:

> Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent, and not, I think, in accordance with common sense.[35]

Two observations flow from this passage which will severally take on significance below. One is that the purpose of the former of its two sentences was manifestly to expand, not limit, the ambit of representative action. The other is that the latter reference to "the rule" is a reference to Rule 9, which Lord Macnaughten evidently considered to be governed by precedent and, indeed, went on to illustrate in terms of precedent pre-dating judicature.[36]

The following year, in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,* Lord Macnaughten had occasion to further express his views, in *obiter dictum,* of criteria for representative actions:

> [I]t seems to me that there would be no difficulty in suing a trade union in a proper case if it be sued in a representative action by [sic] persons who fairly and properly represent it.[37]

In 1910, the English Court of Appeal decided what has come to be a highly limiting case, as it has been taken to apply to the scope of class actions. *Markt & Co.* v. *Knight Steamship Co.,*[38] concerned an action for damages for breach of contract brought by two shippers of goods on behalf of themselves and other owners of cargo allegedly lost by the fault of defendant shipowners.

At the outset it should be observed of this case that the plaintiffs were compelled to twist procedure to avoid the *Statute of Limitations*; the number of shippers was not such as to prevent individual suits,[39] which might have been timely joined pursuant to Rule 1. The pleadings sought to be supported fell hopelessly short of alleging facts sufficient to establish the existence of any class with a common interest represented by the plaintiffs,

34. *Id.*, at 7.
35. *Id.*, at 8.
36. *Id.*, at 9.
37. [1901] A.C. 426 (H.L.), at 439.
38. [1910] 2 K.B. 1021 (C.A.).
39. There were 45; *id.*, at 1042, per Buckley, L.J.

but the exigencies determined that they must be supported, or at least found to be capable of amendment within the bounds of a representative action.

Notwithstanding the trenchant observations of Lord Macnaghten in *Duke of Bedford* v. *Ellis,*[40] the argument in *Markt & Co.* v. *Knight Steamship Co.* dealt principally with the question whether Rule 1 governed actions brought under Rule 9. A further ground of appeal was that the ambit of representative actions was limited by and not to be extended beyond that which was approved in *Duke of Bedford* v. *Ellis.* The essence of the case was, however, that it was one which ought to have been brought by joinder under Rule 1 in one or more[41] actions but could not, by reason of the *Statute of Limitations,* be re-cast.

It was held that there was no common interest[42] as required by Rule 9 to permit a representative action. But as Fletcher Moulton, L.J. pointed out, the substantive issue was that:

> It is to my mind a confusion between these two modes of procedure [joinder and representative action], (which have nothing to do with each other,) that has led to the issue of the two writs which we have here to consider.[43]

Thus, it is submitted, the *ratio* of the case ought to be taken to be the narrow point expressed by the same learned Lord Justice:

> To hold that a representative action can be brought in a case where the causes are mere independent actions for damages *arising out of one and the same set of circumstances* would be to confound r. 1 with r. 9, and, as I have said, the language of these two rules shews that they are intended to have wholly different applications.[44]

That had already been authoritatively established by necessary implication from Lord Macnaghten's judgment in *Duke of Bedford* v. *Ellis.* If the decision had stopped at that, the confusion between the two rules might have been allayed rather than aggravated. But it did not. The court was divided on the question of how Rule 9 should be interpreted — on the face of its language or in the light of Chancery precedent. Vaughan Williams, L.J. said:

> . . . I must observe that the practice regarding representative actions was limited to the Court of Chancery, and was not adopted by the Common Law Courts. What we have to do is to construe the Rules under the Judicature Act which define the application of the practice as to representative actions for the Common Law Division and the Chancery Division alike, and which properly construed will, I suppose, govern the present practice, notwithstanding any prior practice in the Court of Chancery.[45]

Fletcher Moulton, L.J., was no less explicit:

> There is no doubt that by Order XVI., r.9, the procedure by representative action is extended to the Common Law side of the Supreme Court. But here a word of caution is necessary. In extending it the rule also formulates it. It may or may not accurately express the practice of the Court of Chancery at that date, but that is im-

40. *Supra,* n. 34.

41. Likely two — the interests of those shippers whose cargo did not include contraband were potentially adverse to the interests of those who did ship contraband, by reason of which the ship was sunk in war.

42. *Supra* n. 38, at 1027, per Vaughan Williams, L.J.; at 1032, per Fletcher Moulton, L.J.; *contra,* at 1047, per Buckley, L.J. dissenting.

43. *Supra* n. 38, at 1036.

44. *Id.,* at 1041 (emphasis added). *See also id.,* at 1030, per Vaughan Williams, L.J.

45. *Id.,* at 1028 - 1029. But in *Walker* v. *Sur* ((1914) 2 K.B. 930, at 933), the learned Lord Justice said ". . . I do not feel that I have thoroughly understood what the rule-makers meant by Order XVI., r. 9."

> material. It is the language of the rule that must govern us now, and even if it could be shewn that before the Judicature Act the Court of Chancery would have applied the procedure in cases not within the language of the rule, that would not affect the present practice in any branch of the Supreme Court . . . . We are bound to take the rule as a statutory formulation of the practice and thus as a new point of departure.[46]

A different view was expressed by Buckley, L.J., who felt that "the purpose and intention of r. 9 was to apply to all Divisions of the High Court the practice which had prevailed in the Court of Chancery".[47] He cited, in support, Lord Macnaghten's dictum in *Duke of Bedford* v. *Ellis*[48] and Lord Lindley's observation in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*:

> The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old and ought to be applied to the exigencies of modern life as occasion requires.[49]

Both of those cases were decided after judicature and there can be no doubt that both of the learned Law Lords cited by Buckley, L.J. considered the meaning and intent of the rule to be governed by Chancery precedent. Furthermore, the Rule is in terms permissive; the only basis, then, for interpreting it as restrictive is if, as Fletcher Moulton, L.J. reasoned, the Rule conferred jurisdiction on the Common Law side of the High Court and must be interpreted to leave no more to the Equity side than it granted to the other by its terms. But that reasoning is not only contrary to the authority cited by Buckley, L.J.; it is, with respect, not tenable. Jurisdiction was conferred by the *Judicature Acts,* not the rules. Indeed the rule-makers had no authority either to expand or to limit that jurisdiction. It should not be presumed that they intended to do so, nor that the rule could have that effect even if intended. It is submitted, therefore, that the dissenting view expressed by Buckley, L.J. on this matter was correct (which is not to suggest that the result in the case would thereby be different). It must be doubted that the Court of Appeal could, especially by *obiter dictum* (as it might be argued to be), divest the High Court of that part of its inherent jurisdiction.

Here it may be noted that the source of the confusion is that the Chancellors had turned form into substance. The necessity for the representative procedure, and then the procedure itself, was the ground for and then the content of their jurisdiction. Modern procedural overlays such as Rule 9 surely ought to be approached with the presumption that they are not intended to modify that jurisdiction, at least until their express terms compel a different view, which would occasion a further enquiry as to whether such intent had been effected.

Two further dicta from the judgments *Markt & Co.* v. *Knight Steamship Co.* have found their way into subsequent cases. Fletcher Moulton,

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46. *Id.*, at 1038.

47. *Id.*, at 1043-4.

48. *Supra* n. 32. He might also have cited Lord Macnaghten's express opinion that "the rule . . . was only meant to apply the practice of the Court of Chancery to all divisions of the High Court." *Supra* n. 32, at 8. Later he said: "It is, of course, not necessary nowadays to go to a Court of Law in order to establish legal rights. But in all other respects I think the rule as to representative suits remains very much as it was a hundred years ago." *Supra* n. 32, at 10.

49. *Supra* n. 37, at 443.

L.J. interpreted the judgment of Kindersley, V.-C. in *Beeching* v. *Lloyd*[50] as emphasizing "the necessity that there should be a common fund against which the parties represented have claims if the procedure of a representative action is to be used."[51] But, in fact, the learned Vice-Chancellor had found only that "there *might* be a common fund",[52] and clearly regarded the possibility of a common fund as an additional, not a necessary, foundation: "That [possibility] alone is a ground on which it is impossible for me to [uphold the demurrer]."[53]

The second dictum which has coloured later cases is found in the same judgment. Fletcher Moulton, L.J., cited Lord Macnaghten's statement in *Duke of Bedford* v. *Ellis*[54] and concluded that:

> These words shew that where the claim of the plaintiff is for damages the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action.[55]

This conclusion does appear to follow from Lord Macnaghten's comment that "a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."[56] Fletcher Moulton described this comment as "the most authoritative statement as to the cases in which representative actions can be brought."[57] As observed above, that statement was expansive rather than definitive in intent.[58]

Only when the formulations of Kindersley, V.-C. and of Lord Macnaghten are given expansive rather than restrictive purpose is it possible to reconcile them with Chancery precedent. A common fund, then, is a sufficient[59] but not necessary foundation for a representative action. In the words of Rule 9 it should be regarded as constituting "the same interest in one cause or matter", the issue of the proportionate interests of the represented persons constituting separate causes or matters. That is not the same as to say that a "common question of law or fact", which may give rise to joinder under Rule 1, may also found a representative action. Not only does this construction avoid unnecessary confusion between the rules, unambiguous statement that "There are plenty of other cases which shew that, in order to justify a person suing in a representative character, it is quite in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent."[61] That statement alone should be sufficient to show that the question

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50. *Supra* n. 24.
51. *Supra* n. 38, at 1042-3.
52. *Supra* n. 24, at 242; 61 E.R., at 896 (emphasis added).
53. *Ibid.*
54. *Supra* n. 35.
55. *Supra* n. 38, at 1035.
56. *Supra* n. 35.
57. *Supra*, n. 38, at 1035. Vaughan Williams, L.J. said that the same sentence "describes the old practice before the Judicature Act of the Court of Chancery", a juxtaposition which conflicts with the view expressed by both Lord Justices that the old practice and the new rule were distinct. *Supra* n. 38, at 1028.
58. Ironically, in the same case Lord Macnaghten had occasion to lament that sometimes "what was only meant for an illustration is taken for a definitive and exhaustive statement of law." *Supra n. 32, at 10.*
59. "Sufficient" was the designation applied by Kindersley, V.-C. *Supra* n. 24, at 243; 61 E.R., at 896.
60. As Lord Macnaghten said: "The old rule in the Court of Chancery was very simple and perfectly well understood." *Supra* n. 32, at 8.
61. *Supra* n. 32, at 9.

whether "the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent"[62] was not an additional restriction dealing with the requirement for a common interest. Rather, it was merely a careful qualification to prohibit a plaintiff from importing into the "cause or matter" a prayer for relief with respect to which some of the represented persons might be adverse in interest. Such relief should be deferred for subsequent actions once the common interest had been settled.

On this view, circumstances may readily be devised in which an action for damages would properly be brought in a representative capacity. An example would be where the total damages may be assessed without reference to the particular claims of represented persons. Indeed, that was precisely the decision of the English Court of Appeal in *Walker* v. *Murphy*.[63] In that case plaintiffs sued for damages, on behalf of themselves and all persons having rights of pasturage on a Town Moor, caused by the defendant amusement caterers having destroyed herbage. The defendant's appeal was denied and the measure of damages was held to be the amount of injury to the herbage. That case can hardly be reconciled with the dictum of Fletcher Moulton, L.J. in *Markt & Co.* v. *Knight Steamship Co.*[64] but, it is submitted, it may be reconciled with almost everything else.

The United States Rules

While the English Rule 9, by its requirement for a "common interest", continued Chancery practice, in the United States an earlier rule set a different direction:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.[65]

The same interest was not required by this rule. Indeed, it is impliedly rejected by the requirement that representation cover "all the adverse interest".

In 1912, the rule was simplified:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impossible to bring them all before the court, one or more may sue or defend for the whole.[66]

The "same interest" test was here touched upon but indefinitely broadened to "common or general interest." A primary concern was the consequence of allowing a class action to render the cause *res judicata* as against the represented persons. Notwithstanding the second sentence in Rule 48 of 1842, decrees under the Rule were held to be binding on all.[67] The same effect was given to decrees under Rule 38 of 1912.[68] Constitutional due process requirements were a factor, not present in English law, conducing to a

62. *Supra* n. 35.
63. [1915] 1 Ch. 71.
64. *Supra* n. 55.
65. Fed. R. Equity 48 (1842).
66. Fed. R. Equity 38 (1912).
67. *Smith* v. *Swormstedt* (1853), 57 U.S. 288.
68. *Supreme Tribe of Ben-Hur* v. *Cauble* (1921), 255 U.S. 356.

different result,[69] but contrary decisions would have vacated the purpose of class actions.

Upon federal judicature, the rule was wholly recast. The new rule provided expressly for representative actions to enforce several as well as joint or common rights and on grounds which in England permitted only joinder (i.e., where "there is a common question of law or fact affecting the several rights and a common relief is sought."[70]) Specific provision was made for the various kinds of classes mandated by the rule to be bound by the result in various degrees.[71]

> The courts experienced difficulty working with these categories, and the decisions contained hyper-technical discussions completely obfuscating the original considerations of expediency and necessity upon which the class action devices were founded.[72]

Accordingly, in 1966, the Rule was replaced. The new rule (hereinafter referred to as "Rule 23") set out even more detailed prerequisites and procedures. The necessary conditions for a class action are that:

> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defences of the representative parties are typical of the claims or defences of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.[73]

Thus the "same interest" concept of English law had by successive rules been attenuated to "typical" claims or defences. Common questions of law or fact are now required but no longer sufficient. A further requirement is that any of four conditions be met; one is, *inter alia,* that the common questions "predominate over any questions affecting only individual members",[74] but, if any of the three alternatives is met, this need not be.

By contrast with English developments, then, in the United States, enactment of rules[75] almost wholly severed the class action from its origins in Chancery. Correspondingly, a large body of procedure, peculiar to United States jurisprudence, has developed in relation to class actions to ensure substantial justice.[76]

Canadian Developments

Among the common law provinces, a distinction must be drawn, at least on the view expressed by the majority in *Markt & Co.* v. *Knight Steamship Co.*[77], as to the legislative effect of Rule 9 in England between pro-

69. American Bar Association, *Class Actions: In the Wake of Eisen III and IV* (1977) 1.
70. Fed. R. Civ. P. 23 (1927).
71. *See* J.W. Moore & M. Cohen, "Federal Class Actions — Jurisdiction and Effect of Judgment" (1938), 32 Illinois L.Rev. 555.
72. *Supra* n. 69, at 2.
73. Fed. R. Civ. P. 23 (a) (as am. 1966).
74. Fed. R. Civ. P. 23 (b).
75. Similar rules were developed in all states.
76. *See* L. Freeman, Jr., "Procedural Problems in the Conduct of Class Actions" in *Class Actions 1976: The Basics* (1976) 51.
77. *Supra* n. 38.

vinces in which that rule has been adopted verbatim[78] and those in which a modified version of that rule is in effect.[79] In the latter provinces, the rule provides:

> Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend, on behalf of, or for the benefit of, all.[80]

Aside from those differences which, consistent with amendments in other rules of the same provinces, may be attributed to economy of words where the necessary intendment is clear, one substantive difference (on the above-mentioned view) may be found in the modified rule: that is the omission of all reference to one or the same "cause or matter".

The significance of this omission is to be found in the assertion by Fletcher Moulton, L.J. in *Markt & Co.* v. *Knight Steamship Co.*, that:

> The essential condition of a representative action is that the persons who are to be represented have the same interests as the plaintiff in *one and the same cause or matter*. There must *therefore* be a common interest alike in the sense that its subject and its relation to that subject must be the same.[81]

That is, the learned Lord Justice relied upon the legislative effect[82] of, *inter alia,* the words "one cause or matter" in Rule 9 in deriving the latter formulation. But if those words are taken as modifying Chancery precedent (and it has been submitted, with respect, they should not), the majority judgments in *Markt & Co.* v. *Knight Steamship Co.* must be held inapplicable, insofar as they depended upon that modification (and they appear to be so dependent), in any jurisdiction where these words do not appear in the corresponding rule. The same result obtains in any jurisdiction where the rule is held to continue Chancery precedent.

With this distinction in mind, what is the law in Canada respecting the scope of class actions, particularly actions sounding in damages such as typically arise in environmental and consumer law?

Ontario

The majority of cases have arisen in Ontario. An early case was *Preston* v. *Hilton*[83] in which one issue was whether, by a representative action on behalf of certain property owners, the plaintiff might seek an injunction prohibiting the defendant from building stables contrary to a city by-law. It was held that an action for damages for nuisance or to restrain a nuisance cannot be brought in a representative capacity.[84] It might be observed (but was not) that *Lord Cairns' Act,* and its equivalent in each province,[85] necessarily puts damages in issue upon an injunction being sought.

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78. *I.e.:* Newfoundland, *Rules of the Supreme Court,* r. 9; New Brunswick, *Rules of the Supreme Court,* r. 9; Saskatchewan, *The Queen's Bench Rules,* r. 45; formerly, in British Columbia, *Rules of Court* (1961), r. 9.

79. *I.e.:* Ontario, *Rules of the Supreme Court,* r. 75; Manitoba, *Queen's Bench Rules,* r. 58; Alberta, *The Supreme Court Rules,* r. 42; Nova Scotia, *Civil Procedure Rules,* r. 5.09(1); P.E.I., *Rules of Court,* r. 5.09(1); latterly in British Columbia, *Rules of Court,* r. 5(11).

80. *Ibid.;* in some provinces there are variations but these are, for present purposes, cosmetic only.

81. *Supra* n. 38, at 1039 (emphasis added).

82. *See Supra* n. 46 and text.

83. (1920), 55 D.L.R. 647 (Ont. S.C.); *see also Turtle* v. *City of Toronto* (1924), 25 O.W.N. 689, affd. 56 O.L.R. 252 (C.A.).

84. The learned judge did not advert to a decision of the Ontario Court of Appeal, *infra* n. 129, to the contrary.

85. *E.g.,* in Ontario, *The Judicature Act,* R.S.O. 1970, c. 228, s. 21.

In the following year, Ferguson, J.A. without adverting to the above-mentioned decision, allowed members of a trade union to seek, in a representative capacity for all members, damages for "wrongs alleged to have been done to the class as a class."[86] The right to seek, in a representative capacity, injunctive relief was not contested.

In *A.E. Osler & Co.* v. *Solman,*[87] members of an underwriting syndicate were permitted to bring a representative action on behalf of all members but the defendants for breach of contract. The procedure was held to be appropriate, whether the syndicate was a partnership or a joint adventure, where the contract alleged was with all members of the syndicate. Orde, J.A. referred to his interpretation in *Preston* v. *Hilton*[88] of "same interest" as meaning "that the plaintiff and all those he claims to represent will gain some relief by his success, though possibly in different proportions and perhaps in different degrees."[89] He found that there was "clearly a common fund in which all members of the syndicate have a common interest."[90] The joint contract was of the essence in defining the common fund.[91]

By contrast, in *Shields* v. *Mayor*[92] the plaintiff could not recover excess rent on behalf of ten tenants as each had a separate contract with the landlord.

Farnham v. *Fingold*[93] was a class action on behalf of shareholders of a corporation. Delivering judgment for the Court, Jessup, J.A., noted the dictum of Fletcher Moulton, L.J. in *Markt & Co.* v. *Knight Steamship Co.,* that "no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff."[94] He observed: "The subsequent authorities and authors who have stated such a rule as the law have simply quoted Fletcher Moulton, L.J."[95] After approving the dictum of Lord Lindley in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*[96] and the decision in *Bowen* v. *MacMillan,*[97] he held that "on the facts of this case I would not dismiss the action simply because it sounds in damages."[98]

In *Northdown Drywall & Construction Ltd. and Simone* v. *Austin Co.,*[99] a class action on behalf of union members for damages for conspiracy, Weatherston, J., delivering judgment for the Divisional Court on appeal from dismissal of a motion, distinguished the case at bar from ac-

86. *Bowen* v. *MacMillan* (1921), 21 O.W.N. 23 (S.C.).
87. (1926), 4 D.L.R. 345 (Ont. S.C.).
88. *Supra* n. 83, at 653.
89. *Supra* n. 87, at 349.
90. *Ibid.*
91. *See also Janson* v. *Property Insurance Co.* (1913), 30 T.L.R. 49.
92. (1952) O.W.N. 5. (C.A.).
93. (1973), 33 D.L.R. (3d) 156 (Ont. C.A.).
94. *Supra* n. 38, at 1040.
95. *Supra* n. 93, at 160.
96. *Supra* n. 49 and text.
97. *Supra* n. 86.
98. *Supra* n. 93, at 161.
99. (1975), 59 D.L.R. (3d) 55 (Ont. H.C.).

tions "for an accumulation of claims for personal relief."[100] He cited *Farnham* v. *Fingold* as authority that "there is no objection to [a claim for general damages to the class] being the subject of a class action, even though it sounds in damages."[101]

Cobbold v. *Time Canada Ltd.*,[102] an action on behalf of subscribers for the continued supply of magazines or for damages for breach of subscription contracts, continued the trend. Stark, J. said:

> [T]he claims made by the plaintiff are basically not claims for damages, but simply claims for the continued supply of the magazine as called for under the contract. The question is not concluded therefore by the words of Fletcher Moulton, L.J., in the oft-quoted case of *Markt & Co., Ltd.* v. *Knight Steamship Co., Ltd.*, [1910] 2 K.B. 1021, in which he said at p. 1041: "The claims here are necessarily claims for damages only, and therefore no representative action can be brought."
>
> I hold that the mere fact that damages are claimed by way of alternate relief, does not dispose of the matter. Here, as in the case of *Shaw et al.* v. *Real Estate Board of Greater Vancouver* (1973), 36 D.L.R. (3d) 250, [1973] 4 W.W.R. 391, a class action is appropriate if it can be shown that success for the plaintiff means success for the other members of the class, especially where the same measure of success applies equally to all.[103]

In *Naken* v. *General Motors of Canada Ltd.*,[104] the plaintiffs attempted to expand the application of the representation rule to an extent found only in cases from the United States. The plaintiff sought, as representative of all buyers of a certain type of motor vehicle, damages for breach of warranty "in that unusually large numbers of vehicles sold" did not meet advertised or statutory standards. The potentially disparate nature of the claims of represented buyers was avoided (as to quantum) by the ingenious if transparent device of claiming for each the average diminution in resale value attributable to these defects.

Delivering judgment for the Court, Griffiths, J. noted that the reason for the "same interest" test was that any decision in the cause would bind even a member of the class who had no notice of the action. He observed that:

> Cases which are properly the subject-matter of class actions were determined by two early 20th century English cases: *Duke of Bedford* v. *Ellis et al,* and *Markt & Co. Ltd.* v. *Knight Steamship Co. Ltd.* which were decided when the English class action rule was virtually identical to the present Ontario Rule 75. The *Markt* case, considered less liberal in its construction of the Rule, is nevertheless generally regarded as the leading case, and has been consistently followed in our jurisdiction . . . .[105]

These observations may, with respect, be faulted on two grounds (neither being pertinent to the result). The English rule differed in a crucial degree,[106] and the *Markt* case was distinguished in one and disapproved in another of the four cases cited as authority for the latter of his observations, and could hardly be said to have been followed in several earlier Ontario cases, not cited, which have been considered above.

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100. *Id.*, at 57.
101. *Id.*, at 58.
102. (1976), 13 O.R. (2d) 567 (H.C.).
103. *Id.*, at 569.
104. (1977), 17 O.R. 193 (H.C.).
105. *Id.*, at 195.
106. *Supra* n. 77-79 and text.

The learned judge summarized the circumstances in which class actions for damages may be proper:

> Representative actions for damages have been authorized in those cases where damages are sought for the class as a class, or where the plaintiffs seek recovery from a fund in which all members of the class have a common interest. In the former case, if the plaintiff is successful, the Court is required only to determine the damages suffered by the class as a whole; in the latter case, the Court would be required only to assess the *pro rata* share in the common fund to which each member of the class was entitled.[107]

With the notable exception of *Cobbold* v. *Time Canada Ltd.*,[108] the Ontario cases appear to fall within this characterization.

In the result, the statement of claim was struck out on the ground that "the plaintiffs cannot, by the expedient of accumulating or lumping the individual claims together, transform them into a claim for damages suffered by the class as an entity distinct from its members."[109] It is submitted that this case should be regarded not as restricting but as refusing to extend greatly the application of class actions in Canada.

All of the Ontario cases were decided under a rule differing from the English rule in omitting reference to one or to the same "cause or matter". No case adverts to this difference; indeed in *Naken* v. *General Motors of Canada Ltd.* the two rules are described as "virtually identical."[110]

British Columbia

Cases from British Columbia were all decided when the rule there was identical with the English rule. None were actions for damages. *Alden* v. *Gagliardi*[111] was an action on behalf of the plaintiff and all other persons in the Province who were unemployed as a result of strikes or lock-outs for a declaration that a policy which denied them social assistance was *ultra vires*. The class represented was further limited to those who had been refused assistance pursuant to the policy, which would appear to be a proper qualification in order to ensure a common interest. On the question whether the action was properly brought as a class or representative action, Dohm, J., said: "Whether Alden had the necessary 'special interest' to bring the class action troubles me."[112] But 'special interest', as distinct from 'common interest', is a criterion applicable to questions of standing. The only authority referred to, *Cowan* v. *Canadian Broadcasting Corp.*,[113] involved a question of standing, not representative action.

The question was resolved in favour of the plaintiff on the grounds that this course best served the public interest and that "there is a common relief sought which would, if granted, be beneficial to all in the group, namely, the requested injunction."[114] If, however, this criterion is seen as necessary rather than sufficient, the decision must be taken as resting only on the

107. *Supra* n. 104, at 198.
108. *Supra* n. 102.
109. *Supra* n. 104, at 201.
110. *Supra* n. 104, at 195.
111. (1970), 15 D.L.R. (3d) 380 (B.C.S.C.).
112. *Id.*, at 381.
113. (1966), 56 D.L.R. (2d) 578 (Ont. C.A.).
114. *Supra* n. 111, at 381.

broad and unprecedented ground that a class action would dispose expeditiously of the substantive issues.

In *Chastain* v. *B.C. Hydro & Power Authority,*[115] the plaintiffs sued, on behalf of all occupiers of residential premises who had been required by the defendant to pay security deposits, for a declaration that the defendant had no authority to require such payments and an injunction restraining the requiring of further deposits. As further deposits would have been required of persons other than those represented and would not have been required from many of those represented, it might have been (but was not) questioned whether the remedy of injunction was beneficial to all persons represented. Both the declaration and the injunction were ordered. McIntyre, J. relying upon *Alden* v. *Gagliardi*[116] in dismissing the objection to representative action, said: "In my view, the plaintiffs and the people they seek to represent form a group having the same interest in the cause and the action is well founded in accordance with 0.16, r.9 of the Rules of the Supreme Court."[117]

Shaw v. *Real Estate Board of Greater Vancouver*[118] was an appeal from an order allowing the plaintiffs to sue on behalf of all other real estate salesmen whose commissions had been subjected to assessment by the defendant. The appeal was dismissed. Bull, J.A. and Nemetz, J.A., in separate reasons, relied upon *Duke of Bedford* v. *Ellis*[119] as the governing authority. Both cited Lord Macnaghten's statement.[120] Bull, J.A. continued:

> I should add that the "common interest" must be in the sense that the plaintiff and those he purports to represent gain some relief by his success, although, if pecuniary, the proportions and degrees may be very different indeed . . . .
>
> My consideration of the authorities satisfies me that whether or not the necessary "common interest" has existed depended on the analysis of the facts in each case.[121]

He distinguished *Markt & Co.* v. *Knight Steamship Co.* on the basis that:

> The class required to be represented by the respondents were all alleged to be salesmen in exactly the same position. That position was simply that they were all "listing" salesmen, as the respondents, *entitled to commissions* which the appellant had illegally detained (or extracted) and used in a fund for an invalid purpose, notwithstanding [sic] that those entitlements would obviously be in unquestionably different amounts. . . . [I]t was alternatively claimed that those salesmen forming this class were entitled to the fund on a *pari passu* basis . . . . I find it difficult to conceive of many cases where a "common interest" is more apparent.[122]

It appears, then, that in British Columbia the courts have taken a wider view of the class action and have not regarded *Markt & Co.* v. *Knight Steamship Co.* as cutting down the breadth of the decision in *Duke of Bedford* v. *Ellis.*

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115. (1972), 32 D.L.R. (3d) 443 (B.C.S.C.).
116. *Supra* n. 111.
117. *Supra* n. 115, at 452.
118. (1973), 36 D.L.R. (3d) 250 (B.C.C.A.); leave to appeal refused [1973] S.C.R. xiii.
119. *Supra* n. 32.
120. *Supra* n. 35.
121. *Supra* n. 118, at 253 - 4.
122. *Id.*, at 254.

Saskatchewan

In Saskatchewan, where the English version of the rule has been retained,[123] *Smart* v. *Livett*[124] was a case where both plaintiffs and defendants were named in a representative capacity. Both were members, and represented all other members, of unions. The plaintiffs alleged that the defendants had by obstruction and intimidation prevented them from working, and they "claimed an inquiry to ascertain the losses suffered by the natural plaintiffs and other members of the plaintiff union and judgment therefor, also an injunction restraining the defendants from continuing such acts."[125]

The judgment of the Court of Appeal upheld the procedure in all respects. The headnote summarized:

> The natural plaintiffs were justified under Rule 39 in suing together and, under Rule 45, in suing in a representative capacity as having a common interest with those they claim to represent, and under the last-mentioned Rule were justified in suing the natural defendants who from their position may be fairly taken to represent the unions that it is proposed they should represent.[126]

On the question whether a representative action might sound in damages, Gordon, J.A., delivering judgment for the Court, had regard to the Ontario cases on the basis that the Ontario rule was "similar".[127] He rejected the view of Middleton, J. in *Barrett* v. *Harris,*[128] that a representative action could not be brought in tort for damages unless the defendant was alleged to possess a trust fund against which the plaintiffs might have resort. He noted an early Ontario case[129] allowing a representative action for damages in tort, and said:

> With every deference I do not think that Middleton, J. satisfactorily deals with [that] case in his judgment . . . He speaks . . . of the difficulty of enforcing such a judgment for damages. I do not think that we need to worry about that at this stage of the action.[130]

In the only comments to be found in any Canadian case squarely addressing the conflicts in the English authorities, he continued:

> Middleton, J. seems to be of the opinion that the more recent judgments of *Markt & Co.* v. *Knight SS. So. Ltd.* [1910] 2 KB 1021, 79 LKJB 939, and *Walker* v. *Sur* [1914] 2 KB 930, 83 LJKB 1188 overrule the *Taff Vale* case, and *Bedford (Duke)* v. *Ellis.* With every deference I do not think that these cases in any way affect them.[131]

And, later:

> Surely these cases cannot possibly be held to have overriden or qualified a single thing stated in *Bedford (Duke)* v. *Ellis* and *Taff Vale* cases.[132]

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123. *Supra* n. 78.

124. (1950), 1 W.W.R. (N.S.) 49 (Sask. C.A.).

125. *Id.*, at 51. Strictly, the union was not a plaintiff, having been struck out by the master, whose decision was upheld on appeal to a judge in chambers, whose decision was not in this respect appealed.

126. *Id.*, at 50.

127. *Id.*, at 56.

128. (1921), 51 O.L.R. 484 (H.C.).

129. *Metallic Roofing Co.* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Association* (1905), 9 O.L.R. 171 (C.A.).

130. *Supra* n. 124, at 61.

131. *Id.*, at 61 (citations omitted).

132. *Id.*, at 63.

With respect, it is submitted that that is the correct view of the cases referred to, and that no other view may be supported upon a close examination of the authorities. *A fortiori,* it is the correct view in any province in which (unlike Saskatchewan) the English rule has been modified so as to omit the reference to a single "cause or matter".

Conclusions

Throughout this review of the cases, it has been apparent how the remedy has become tangled with the issue of whether a class action will lie. Notwithstanding the ready deferral by Gordon, J.A. of any difficulty inherent in the remedy,[133] the tangle cannot merely be dismissed. Its origins go back at least as far as Lord Macnaghten's dictum in *Duke of Bedford* v. *Ellis,*[134] and judicial concern clearly proceeds from something more than a misunderstanding of the purpose of that dictum (though misunderstanding, too, is to be found).

To resolve the tangle it is necessary first to observe that the class action has never been conceived as a final dispotition of all matters which might arise as to the particular interests of the persons represented.[135] What is necessary is that such an action should finally dispose of some matter common to the interests of all represented. Confusion has arisen where there are other causes or matters which may be individual and, indeed, more substantial; their presence is irrelevant.[136] Obviously, there is no interest at all in common where the class is defined by mere joinder of numerous personal causes of action, notwithstanding that common questions of law or fact may be involved. In such cases, the appropriate procedure is the entirely distinct one of joinder. That conclusion is not modified merely because the parties may be numerous; there is a fundamental difference between a common interest and a common question: a common question does not become a common interest by reason only that all wish it to be answered.

It is usually the case that actions for damages, while they may involve common questions, do not involve common interests. That is not definitively so. The circumstance where damages may be ascertainable by reference to the class as a whole is an example.[137] The analogy to an action respecting a common fund (differing only in that the claim is not for damages) is clear. If there is dispute as to the individual entitlements to the damages (as to a fund) further actions may be forthcoming, but they will relate only to the apportionment, the common entitlement having been decided, and the original defendant being no longer a party.[138]

It follows that two inter-related factors carry significant import for the successful application of a class action. One is that the class should be defined with precision and care. If there is a factual basis for divergence of interests, as distinct from difference of extent of interests, joinder of separate representative actions should be employed, or those with conflicting in-

133. *Supra* n. 130.

134. *Supra* n. 35.

135. *E.g. supra* n. 124, at 61.

136. *Supra* n. 34.

137. *Walker* v. *Murphy, supra* n. 63.

138. Except perhaps by interpleader.

terests should be excluded. The facts showing commonality of interest should be alleged in full. While a motion to strike or dismiss for want of representative capacity must be argued on the basis of the facts as alleged in the pleading, it may hardly be rejected on the basis of facts not alleged. Failure to make the common interest clear can only conduce to the confusion evident in many cases.

The other factor is that the relief sought must be so characterized as to be determinable without reference to the individual interests represented. To simply structure claims so as to be identical in terms of quantum is to miss the point, as *Naken* v. *General Motors of Canada Ltd.*[139] graphically illustrated. That is to turn the addition of separate claims, rejected in *Markt & Co.* v. *Knight Steamship Co.*,[140] into a multiplication of separate claims, with the added obscurity that the multiplication is by an unknown number. If the common interest alleged is that the defendant is liable in damages to the class, the action must be so cast as to dispose of, not only the question whether the defendant is liable (the common question), but also in what amount the defendant is liable (the common interest).

The case which has perhaps gone furthest in allowing representative action in Canada is *Cobbold* v. *Time Canada Ltd.*[142] The case provides a useful example to review in the light of the above considerations. There, the relief claimed was:

> (a) a declaration that he and all other persons resident in Ontario who hold unexpired contracts of subscription with the defendant on March 1, 1976 are entitled to the continued supply of TIME, during the full unexpired term of their contracts of subscription on the basis of the same terms and conditions as set out in the contracts of the subscription in force on March 1, 1976;
>
> (b) In the alternative, a declaration that if the defendant fails to supply TIME during the full unexpired term of the contracts of subscription in force on March 1, 1976, the plaintiff and all other persons on whose behalf he claims are entitled to recover damages in such a measure as is stated in the declaration;
>
> (c) an interim injunction.

The Court noted that "the subscription contracts are identical, except in one particular, the length of term of the subscription. Under the contracts, the magazine to be delivered is the same, and the annual price is also the same."[142] Now these facts, without reference to the relief sought, may give rise to questions of law or fact common to the represented persons, but do not immediately show a common interest. The defendent's argument was "that a class action cannot be used for the enforcement of separate contracts."[143] But the prayer for a declaration of entitlement stopped short of enforcement.[144] The common interest is more readily apparent if the effect of such declaration is restated in converse form: that the defendant was not entitled, by reason of all such contracts, to do what it threatened — to suspend publication and unilaterally substitute for its obligations another publication or a refund for the unexpired portion of subscriptions.

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139. *Supra* n. 104.

140. *Supra* n. 38.

141. *Supra* n. 102.

142. *Id.*, at 568-9.

143. *Ibid.*

144. *Id.*, at 570. The Court observed that "it is proper to assume that if such a declaration were made, it would be honoured."

Similarly, the class, having a common interest in continued publication in order that the defendant might be able to perform its obligations under the individual contracts, might as a class seek an injunction prohibiting suspension of publication.[145] Indeed, it was in the defendant's interest that any injunction issue at the suit of the class, rather than an individual subscriber,[146] for otherwise it could settle with one and be faced with another. A class settlement would not only be expeditious and avoid multiplicity of suits, it could undoubtedly (on this scenario) be less expensive. On the authority of the early cases in which the purpose of the bill of peace was established, the defendant might have been entitled to require that any individual action for an injunction be brought in a representative capacity.

The question of damages remains. Again, the prayer was not for damages but for a declaration of entitlement to damages upon the contingency of failure to supply the magazine. The contingent form could hardly have affected the result. The judgment notes that publication had been suspended 5 months before the date of the decision. Nor is the present enquiry answered by the reasons for judgment on the objection to the claim in damages: that it was but a secondary claim by way of alternative relief[147] and that success for the plaintiff meant success for all.

The latter ground was supported by reference to *Shaw* v. *Real Estate Board of Greater Vancouver*. The relevant passage appears in the judgment of Bull, J.A., wherein, notwithstanding that that case was treated as one involving a common fund, he said:

> [A] class action is appropriate where if the plaintiff wins the other persons he purports to represent win too, and if he, because of that success, becomes entitled to relief *whether or not in a fund or property,* the others also become likewise entitled to that relief, having regard, always, for different quantitative participations.[148]

Except the emphasized phrase, that formulation, in turn, would appear to derive from the words of Orde, J.A. in *A.E. Osler & Co.* v. *Solman*[149] which also was a case involving a common fund. How then is the above passage to be understood to apply to the claim for a declaration of entitlement to damages?

The answer is not clear from the judgment, but may be found in the requirement set out by Bull, J.A. that "the others also become likewise entitled to *that* relief.[150] Where the relief comprised damages, the others must (in order to have a common interest) become entitled to those same damages, albeit, as the passage continues, with "different quantitative participations". In the case under consideration, paragraph (b) of the prayer for relief is at least consistent with the notion that damages to the

145. As presumably was intended; neither the pleading nor the report states expressly the terms of the injunction contemplated.

146. Presuming for present purposes that an individual might be entitled to injunctive relief. Interestingly, it could be argued that any individual interest, being readily compensable in damages, could not support an injunction, but the common interest, not being readily so compensable, might entitle the class to an injunction nevertheless.

147. On the facts it was the only relief likely to be given effect upon a decision in the cause, but this ground was used to distinguish the dictum of Fletcher Moulton, L.J., *supra* n. 38, at 1041. With respect, it must be suggested that the distinction is no sounder than the dictum.

148. *Supra* n. 118, at 254 (emphasis added).

149. *Supra* n. 89.

150. *Supra* n. 118, at 254 (emphasis added).

class as a whole were contemplated, and it may be supposed that the facts alleged, or shown on affidavit for the motion, disclosed a basis for ascertaining defendant's liability in damages to the class as a whole other than by summation of the represented claims.

On this analysis then, it is the case of *Walker* v. *Murphy*[151] (a case which has not been pointed out in Canadian decisions) which appears to offer the key to restoring clarity and vitality to the class action in Canada. That is not to suggest that there is any prospect of expanding the scope of this form of action (within the common law) to the dimensions it has assumed legislatively in the United States. But, in cases where the facts allow, careful pleading so as to disclose the common interest, together with precise selection of remedies which do not go beyond the common interest, provide opportunity to invoke the responsive instrument perceived by Lord Lindley:

> The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires.[152]

151. *Supra* n. 63.

152. *Supra* n. 37, at 443.