CONSUMER (IN)JUSTICE: REFLECTIONS ON CANADIAN CONSUMER CLASS ACTIONS

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I. INTRODUCTION

Over 30 years ago, the Ontario Law Reform Commission (OLRC) recommended that class proceedings legislation be enacted in order to increase access to justice for consumers with small claims, and to deter wrongful corporate and government behaviour.[1] The OLRC's 1982 *Report on Class Actions* opened with a description of modern society as highly complex and interdependent, characterized by "mass manufacturing, mass promotion, and mass consumption"; the activities of major corporations, international conglomerates and big government can affect, and possibly injure, large numbers of people.[2] In the wake of such misconduct, "the individual is very often unable or unwilling to stand alone in meaningful opposition."[3] Class actions, the Report concluded, serve an important access function: "By affording 'an opportunity for voicing mass grievances in an orderly fashion within the framework of the existing [judicial] system', they may provide an antidote to the social frustration that exists where neither courts nor administrative agencies are able to protect the rights of citizens on an individual basis."[4]

Ten years later, Ontario became the first of the common law provinces to enact class action legislation,[5] and in the almost two

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1. Ontario Law Reform Commission, *Report on Class Actions* (Toronto, Ministry of the Attorney General, 1982).
2. *Ibid.*, at p. 3.
3. *Ibid.*
4. *Ibid.*, at p. 130, citing A. Homburger, "Private Suits in the Public Interest in the United States of America" (1973-74), 23 Buff. L. Rev. 343, at p. 376.
5. Class Proceedings Act, 1992, S.O. 1992, c. 6 (CPA). Québec was the first province to pass class proceedings legislation in 1978.

decades since, every other province in the country but one[6] has similarly blessed class proceedings as a tool of civil justice. Given their relatively recent pedigree, it is perhaps not surprising that few attempts have been made to assess the extent to which class actions have fulfilled their promise as a means by which to "improve consumer access to the court and guarantee the recognition of the right to effective access to justice."[7] In recognition of the 40th anniversary of the Annual Workshop on Commercial and Consumer Law and this collection of retrospective essays, it is appropriate to reflect, if only briefly, on the impact of collective action on consumer access to courts, and the promised guarantee of effective justice.

In the first part of the essay, I will provide some empirical context by reporting on the proportion of current class action litigation that could loosely be categorized as consumer protection litigation. I then identify two of the more significant successes in consumer rights litigation, namely, the development of the waiver of tort doctrine and the widespread rejection of mandatory arbitration clauses in consumer contracts. In part IV, I discuss two challenges to achieving substantive justice for consumers that have recently become more pronounced: increasing reliance on *cy près* distribution of settlements, and the effect of adverse costs awards on representative plaintiffs.

There are, no doubt, other successes and challenges in collective efforts to obtain redress, and the four identified here may not be those other legal commentators would emphasize in their own reflective pieces. It is hoped, however, that these observations contribute to a meaningful discussion of the capacity for collective action to produce substantive remedies for consumer harm.

II. CONSUMER CLASS ACTIONS IN NUMBERS

According to at least one American commentator, the *raison d'être* of the modern U.S. class actions regime was to facilitate civil rights litigation; in its early years, the class action was the vehicle by which school desegregation, welfare rights and prison reform were advanced.[8] By contrast, the Supreme Court of Canada's early

6. The sole remaining province without such legislation is Prince Edward Island.
7. Nicole L'Heureux, "Effective Consumer Access to Justice: Class Actions" (1992), 15 J. Cons. Pol. 445, at p. 459.
8. Deborah Hensler, "The New Social Policy Torts: Litigation as a Legislative Strategy" (2001-2002), 51 DePaul L. Rev. 493, at p. 499; Deborah Hensler, "The

pronouncements about the goals of class proceedings reflected less an aspiration toward a social mission than the need to make the prosecution of small consumer and environmental claims economical.[9] Specifically, the court referred to the "rise of mass production" and "the advent of the mega-corporation" as modern realities which make class actions necessary.[10] While certainly not limited to the consumer sectors, class actions clearly were perceived as a litigation tool by which to resolve consumer claims.

A survey distributed to plaintiff-side class action lawyers in 2009 set out, among other things, to measure just how frequently the class action device has been used in consumer disputes.[11] The survey, comprised of 17 questions, was sent to 29 leading plaintiffs' class counsel at 21 firms across the country. Fifteen completed surveys were returned, but several surveys incorporated the responses of more than one recipient of the survey. Thus, of the 29 lawyers who were sent the questionnaire, information was received from 21 of them, for an effective rate of return of 72%. In addition, several responding lawyers reported on the class action activity for their entire firm, including on behalf of lawyers to whom a survey had not been sent. Consequently, the survey data actually reflected the class action activity of approximately 77 class actions lawyers, working in 13 law firms.

The aim of the survey was to collect data on: the number and nature of class actions pending at each firm; the selection criteria employed by class action lawyers before initiating a claim; the impact of funding from the Class Proceedings Fund; and the take-up rates in settled actions. Most importantly for present purposes, the survey asked lawyers to categorize their pending class actions according to a list of choices, as follows:

Globalization of Class Actions: An Overview" (2009), 622 Annals Am. Acad. Pol. & Soc. Sci. 7, at p. 8.

9. *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 201 D.L.R. (4th) 385 *sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*, at para. 26.

10. *Ibid.*

11. The survey was part of an LL.M. thesis research project that utilized a contextualized approach to the evaluation of class proceedings. Using qualitative, quantitative and doctrinal sources, I analyzed various features of class actions with a view to better understanding how they improve access to justice. Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LL.M. Thesis, University of Toronto Faculty of Law, 2009) [unpublished].

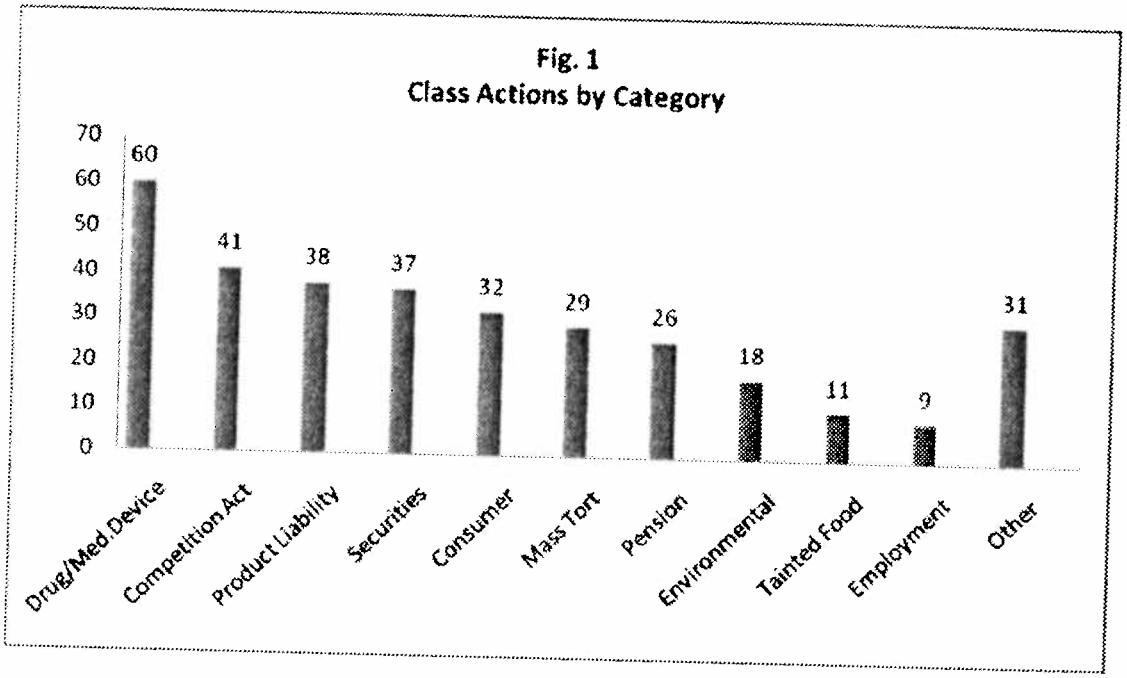
Category	# cases	Category	# cases
Securities		Product Liability (non-food)	
Pharmaceuticals/ Medical Devices		Tainted Food	
Employment and Pensions		Environmental	
Consumer (criminal interest, fees, currency)		Price-fixing and other Competition Law claims	
Mass Tort (personal injury)		Other _____	
Pension		Other _____	

Before turning to the results of the survey, a definitional pause is warranted. What is a "consumer" claim? I do not adopt any precise term of art but rather, refer generally to claims involving the sale or purchase of goods and services for personal use. Under this broad definition, consumer credit and lending transactions, product liability, medical devices, insurance policies, securities and anti-competition claims would all qualify as consumer actions. Described in the negative, consumer actions do not include claims arising out of an employment or business relationship, concerning pension rights, environmental damage, income-support entitlements, human rights or civil liberties violation. In the survey, the consumer category was more narrowly described as "actions involving criminal interest, fees and currency exchange rates." For the purposes of this article, however, all but the mass tort (which were described as personal injury cases), pensions, environmental and employment survey categories will be considered under the broader rubric of "consumer" actions.

Respondents reported a total of approximately 332 class actions pending as of the spring of 2009. As illustrated in Figure 1, in total numbers, defective drug and medical device cases (at 60 actions) accounted for the most actions in a single category, followed closely by price-fixing and other Competition Act claims (41). Product liability (38), securities actions (37), and consumer actions[12] (32) were the next most popular categories of cases. Mass tort (29),

12. As explained above, in the survey the consumer category was limited to actions involving criminal interest, fees and currency exchange rates.

pensions (26), environmental (18), tainted food (11) and employment (9) actions rounded out the survey. In addition, an "other" category option was given, and 31 cases were included in this category. Respondents specified that "other" included institutional abuse cases and breach of contract/fiduciary duty claims.[13]



The same survey asked respondents to identify the main reasons for rejecting a prospective class action, and to provide an estimate of the number of prospective claims rejected in the 2008 calendar year. In terms of case selection, the vast majority of respondents (80%) rejected over 60% of the cases considered in 2008, and several respondents stated that they rejected over 90% of the cases they considered.[14] The predominant reasons cited for rejecting a proposed class action were difficulty of certifying the claim or in succeeding on the legal issues at trial. For half of the respondents, the low monetary value of a claim was the second or third most important reason for choosing not to commence an action.[15]

While the survey results do not purport to be statistically significant,[16] they do provide some sense of the number and

13. Kalajdzic, *supra*, footnote 11, at p. 17.
14. *Ibid.*, at p. 21.
15. *Ibid.*, at p. 22.
16. The number of lawyers doing plaintiff-side class action work in Canada is unknown. Moreover, there may be duplications in the number of cases cited since more than one lawyer or firm may have reported the same action (as it is not uncommon for multiple firms to be co-counsel in a single class action). It is

nature of class actions currently being litigated. They also provide a basis for testing the commonly held view that class actions increase access to justice for consumers. So what insights can be gleaned from the summarized results?

First, consumer class actions, as that term has been defined in this paper, are the most numerous of class actions being litigated. Actions involving defective drugs, medical devices and other products, including tainted food; securities; and price-fixing comprise 219 of the 332 cases[17] reported by the survey recipients.[18] Class actions as alternatives to administrative law remedies and regulatory enforcement of public law are not as common.[19] That this is so is not surprising, given the business model on which class actions are based: class actions, financed almost exclusively by plaintiff-side lawyers who work on contingency fees,[20] can only viably be pursued if the damage recovery is potentially significant. Class actions on behalf of a large class of purchasers, shareholders or other consumers for economic losses tend to involve substantial monetary claims. True to class actions' entrepreneurial character, the survey results also confirm that class action lawyers are highly selective in which cases they take on, and that they reject cases — including legally viable ones — if the potential damage claim is too

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difficult to estimate, therefore, what proportion of the universe of class action lawyers and cases is represented in the survey, although 77 lawyers and 332 cases are likely a considerable number of them.

17. Classification is an imprecise art. I readily acknowledge that the categories excluded from this total number of 219 might also, by other standards, be considered "consumer" litigation. For example, a case categorized as "environmental" may be viewed as a consumer class action if it involves a claim for damages to personal property. Or, it could be argued that same-sex pension litigation is consumer litigation in that personal benefits are at issue. There is a risk, however, that the rubric of "consumer rights" becomes too unwieldy if any action by non-corporate entities is viewed as consumer in nature. The line drawn here focuses on commerce, and excludes cases involving public law causes of action (like environmental harm), employment and pension rights, and personal physical injury arising from a mass disaster.

18. In Québec, Pierre-Claude Lafond has reported that consumer rights litigation comprises approximately 40% of that province's class actions: "Le recours collectif québécois des années 2000 et les consommateurs: deux poids, quatre mesures" in Barreau du Québec, Service de la formation permanente, *Développements récents sur les recours collectives* (Cowansville, Éditions Yvon Blais, 2001), p. 39.

19. For a discussion of the utility of class proceedings in these areas and as a site of convergence between private law and public law spheres, see Lorne Sossin, "Class Actions Against the Crown: A Substitution for Judicial Review on Administrative Law Grounds?" (2007), 57 U.N.B.L.J. 9.

20. J. Kalajdzic, W.A. Bogart and I. Matthews, "The Globalization of Class Actions: Canada" (2009), 622 Annals Am. Acad. Pol. & Soc. Sci. 41, at p. 44.

small to justify the investment. The bigger the individual damages, or the more numerous the class members, the more likely it is that class counsel will pursue the litigation.[21]

Ultimately, this must mean that economic barriers to recovery for small consumer claims continue to exist, albeit on a different scale. Rather than it being economically unfeasible for the lone consumer to bring an action, there is a point at which it is economically unfeasible for a group of claimants to access the court system. Class action lawyers, the gatekeepers to the class proceeding mechanism, necessarily erect barriers which preclude some consumers, and certain kinds of actions, from being litigated. Data on which consumers continue to face such barriers to justice are simply not available, and perhaps unattainable. It is almost certainly true, however, that justice continues to elude some consumers with particularly small claims or difficult legal challenges.

Nevertheless, the 2009 survey results show that in the class action universe, consumers in large numbers are frequent users — and presumably beneficiaries — of the civil justice system.

III. ADVANCES IN CONSUMER JUSTICE

From the perspective of consumers, a number of positive developments have resulted from recent class actions. Two will be discussed briefly here. They illustrate the substantive impact that this procedural device may yield.

1. Waiver of Tort

A common barrier to certification, particularly in price-fixing actions and claims involving individual assessment of damages, has been the necessity of proving individual harm. Early decisions denying certification in such cases did not bode well for the future of consumer actions.[22] A 2004 decision of the Superior Court of Justice, however, represents a potential sea-change in the approach to cases where proof of individual loss may be impossible. In *Serhan*

21. Ward Branch and Won Kim, "The Wheat and the Chaff: Class Action Case Selection," paper presented for Canadian Institute Conference (Toronto, Canadian Institute Conference, September 2005), at p. 5, online: Branch McMaster LLP <http://www.branchmacmaster.com/storage/articles/wheat.pdf> (arguing that global damages should be at least $1 million or more in order to obtain a premium on usual hourly rates).

22. See, *e.g.*, *Chadha v. Bayer Inc.* (2000), 54 O.R. (3d) 520, 200 D.L.R. (4th) 309 (S.C.J. (Div. Ct.)), affd 63 O.R. (3d) 22, 223 D.L.R. (4th) 158 (C.A.), leave to appeal to S.C.C. refused 226 D.L.R. (4th) vi, [2003] 2 S.C.R. vi.

v. Johnson & Johnson, Maurice Cullity J. rejected a defence argument that class members could not prove any harm resulted from an allegedly faulty blood glucose monitor.[23] Although not specifically claimed by the plaintiff in his pleadings, the judge certified the case on the basis that it was not plain and obvious the little-used waiver of tort doctrine could not eliminate the necessity of proving damages. The doctrine theoretically permits a plaintiff who may have suffered little or no damage to seek restitution by way of disgorgement of all of the defendant's profits obtained via the sale of the product in question. The doctrine is premised on the principle that a tortfeasor may not keep its ill-gotten gains, and does not require that the plaintiff prove individual causation or damages.

Although the Divisional Court dismissed Johnson & Johnson's appeal, and the Supreme Court denied leave to appeal,[24] Cullity J.'s decision remains controversial.[25] It has been argued that waiver of tort "has only limited application in the context of consumer class actions" and that there is "no principled reason to create a restitutionary solution to the difficulties faced by consumer class actions."[26] *Serhan* has yet to go to trial, and the scope of the doctrine, therefore, has not been tested against anything higher than the low, summary judgment threshold. In the meantime, another medical device case, *Andersen v. St. Jude Medical, Inc.*, is being tried in Toronto.[27] Like so many other product liability cases launched or amended after *Serhan*,[28] waiver of tort is central to the class'

23. *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296, 49 C.P.C. (5th) 283 (S.C.J.), affd 85 O.R. (3d) 665, 269 D.L.R. (4th) 279 (Div. Ct.), leave to appeal to S.C.C. refused [2007] 1 S.C.R. x, 234 O.A.C. 398*n*.
24. *Ibid.*
25. See, *e.g.*, H. Michael Rosenberg, "Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings" (2010), 6 Can. Class Action Rev. 37; Charles Murray, "An Old Snail in a New Bottle? Waiver of Tort as an Independent Cause of Action" (2010), 6 Can. Class Action Rev. 5; David S. Morritt and Patricia McMahon, "Product Liability Class Proceedings: The Current Debate Over Waiver of Tort," paper presented at the 6th Annual Symposium on Class Actions (Toronto, Osgoode Hall Professional Development, April 2-3, 2009) [unpublished].
26. Rosenberg, *ibid.*, at pp. 39 and 84.
27. *Anderson Estate v. St. Jude Medical, Inc.* (Unreported, Ont. S.C.J., Court File No. 00-CV-195906CP).
28. Daryl-Lynn Carlson, "Tort ruling causes stir," *The Financial Post*, June 6, 2010, online: <http://www.financialpost.com/story.html?id=3160005> (stating that the *Serhan* ruling fuelled a growth in product liability class actions, particularly against medical device manufacturers). See, *e.g.*, *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2008] B.C.J. No. 831, 2008 BCSC 575, revd 312 D.L.R. (4th) 419, 2009 BCCA 503, supp. reasons 317 D.L.R. (4th) 122, 2010 BCCA 91, leave to appeal to S.C.C. refused 317 D.L.R. (4th) vii ; *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153, 154 A.C.W.S. (3d) 1020 (Ont. S.C.J.), leave to appeal to Div.

damages claim in *St. Jude*, and will be critical to the judge's ultimate disposition of the case. If sustained at trial, the waiver of tort doctrine will not only ensure cases involving nominal damages do not meet an early demise at the certification hearing; it will also vastly simplify the damages phase of many product liability actions. Such cases will focus on the misconduct of the defendant and the profits garnered in selling the faulty goods.

Moreover, if the measure of damages is the profit gained by the defendant in selling the defective product, then the economic incentive to class counsel to litigate such actions increases exponentially. Waiver of tort has the power to make defendants liable for massive amounts of money, and class counsels' contingency fees correspondingly staggering. One judge has also forecast that whole industries and the securities markets in which defendant corporations are traded will be impacted by a successful application of waiver of tort at trial.[29] The ramifications of this doctrine, both for class members, counsel, corporate defendants and Canadian consumer society, may yet prove to be enormous.

2. Mandatory Arbitration Clauses

A decade or so ago, consumer class actions involving contracts of adhesion were dealt a significant blow. In two separate decisions, Ontario courts agreed that mandatory arbitration clauses trumped class proceedings legislation and precluded the proposed representative plaintiffs from litigating their claims.[30] Not unexpectedly, legal commentators argued that the effect of the decisions would be to deny access to justice to consumers, who would be unlikely to pursue expensive and time-consuming individual arbitration hearings.[31] Rather than promote streamlined dispute resolution processes, mandatory arbitration clauses were described as bald attempts by corporate defendants to avoid resolution of consumer claims.

The latter view was shared by several judges in both British Columbia and Ontario in a series of payday loan actions where, once

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Ct. granted 45 C.P.C. (6th) 309, 159 A.C.W.S. (3d) 175, affd 295 D.L.R. (4th) 175, 91 O.R. (3d) 691 (Div. Ct.).

29. *Heward v. Eli Lilly & Co.*, *ibid.* (leave to appeal to Div. Ct.), at para. 33, Lederman J.

30. *Huras v. Primerica Financial Services Ltd.* (2001), 55 O.R. (3d) 449, 10 C.C.E.L. (3d) 239 (C.A.), affg 13 C.P.C. (5th) 114, 96 A.C.W.S. (3d) 728 (S.C.J.); *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299, 21 B.L.R. (3d) 104 (S.C.J.).

31. Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006), 51 McGill L.J. 693.

again, the defendants sought to stay class proceedings on the basis of mandatory arbitration provisions in consumer contracts. In *Smith v. National Money Mart Co.*,[32] the Superior Court of Justice denied the defendant's motion to stay the proposed class proceeding, stating that the certification judge is best-placed to determine whether arbitration is preferable to class litigation. In doing so, however, the judge made explicit her views about the defendant's motives in relying on the arbitration clause: "I see the arbitration provisions of the agreements with Money Mart as an attempt on the part of Money Mart to immunize itself from the *Class Proceedings Act* and more generally the jurisdiction of the Superior Court."[33] Similarly, in *MacKinnon v. National Money Mart Co.*, the British Columbia Superior Court and Court of Appeal accepted the plaintiffs' evidence that they would not be able to pursue their claims if they had to proceed with individual actions, and concluded "that individual actions or arbitrations would likely create an economic bar to the resolution of the individual claims, while a class proceeding would allow the claimants economic access to justice."[34]

The policy arguments in the mandatory arbitration clause litigation, however, are not monolithic. A number of commentators and courts have espoused the view that consumers should be held to their agreements to have their disputes arbitrated, and that arbitration, like other alternative dispute resolution, should be encouraged. A controversial 2007 decision of the Supreme Court of Canada reflects just such a view. The opening lines of the majority's decision in *Dell Computers* foreshadows the ultimate disposition of the appeal:

> Alternative dispute resolution mechanisms, including arbitration, are among the means the international community has adopted to increase efficiency in economic relationships. Concomitantly, in Quebec, recourse to arbitration has increased greatly owing this mechanism's flexibility when compared with the traditional justice system.[35]

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32. *Smith v. National Money Mart Co.* (2005), 18 C.P.C. (6th) 1, 140 A.C.W.S. (3d) 29 (Ont. S.C.J.), affd 266 D.L.R. (4th) 275, 80 O.R. (3d) 81 (C.A.), leave to appeal to S.C.C. refused 269 D.L.R. (4th) vii, [2006] 1 S.C.R. xii.
33. *Ibid.*, at para. 24.
34. *MacKinnon v. National Money Mart Co.* (2004), 50 B.L.R. (3d) 291, 2004 BCCA 473, at para. 47, revg on other grounds 26 B.C.L.R. (4th) 172, 2004 BCSC 136. The action was eventually certified in [2007] B.C.J. No. 520, 2007 BCSC 348, affd 304 D.L.R. (4th) 331, 2009 BCCA 103, and a $24.5 million settlement approved in [2010] B.C.J. No. 1436, 2010 BCSC 1008.
35. *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801, 284 D.L.R. (4th) 577, 2007 SCC 34, at para. 1.

Similar sentiments were echoed by the dissenting judges in that case:

> The agreement to arbitrate a consumer dispute is not inherently unfair and abusive for the consumer. On the contrary, it may well facilitate the consumer's access to justice.[36]

Dell was a proposed Québec class action on behalf of consumers who had tried to purchase a computer on the Internet during three days in 2003 when the defendant's order pages erroneously listed computer prices of $89 and $118 rather than $379 and $549 for two models of handheld computers. Dell applied unsuccessfully in the lower court and Québec Court of Appeal to stay the action on the basis of a mandatory arbitration clause in the online purchase agreement. The Supreme Court of Canada, however, allowed the appeal, referred the plaintiff's claim to arbitration, and dismissed the authorisation application. Arguments about the validity and scope of the clause, said the majority, were to be made to the arbitrator, not the courts.

The impact of *Dell* has not been uniform. Since Québec now has provisions in its Consumer Protection Act prohibiting both mandatory arbitration clauses in consumer contracts and those that ban consumer's participation in class proceedings,[37] it was initially suggested that the Supreme Court's decision would be confined to the particularities of the Québec Civil Code which were significant to the court's reasoning. Such was the view of Perell J. when he dismissed Money Mart's second application to dismiss the Ontario payday loans action by reason of a contractual arbitration clause.[38] He distinguished *Dell* as a case of statutory interpretation only, which neither altered the approach taken by the courts in the earlier *Money Mart* decisions in both British Columbia and Ontario,[39] nor overcame the clear legislative intent in the amended Ontario Consumer Protection Act, 2002[40] to invalidate mandatory arbitration clauses in consumer contracts. Similar approaches were taken by at least two other judges in 2008 and 2009.[41]

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36. *Ibid.*, at para. 229.
37. Act to amend the Consumer Protection Act and the Act respecting the collection of certain debts, S.Q. 2006, c. 56.
38. *Smith Estate v. National Money Mart Co.* (2008), 57 C.P.C. (6th) 99, 168 A.C.W.S. (3d) 763 (Ont. S.C.J.), affd 303 D.L.R. (4th) 175, 2008 ONCA 746, leave to appeal to S.C.C. refused 302 D.L.R. (4th) vii, [2009] 1 S.C.R. xi.
39. *Smith*, *supra*, footnote 32; *MacKinnon*, *supra*, footnote 34.
40. Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A. Alberta also has similar protections for consumers: Fair Trading Act, R.S.A. 2000, c. F-2.
41. *Griffin v. Dell Canada Inc.* (2009), 64 B.L.R. (4th) 186, 177 A.C.W.S. (3d) 314 (Ont. S.C.J.), affd 315 D.L.R. (4th) 723, 98 O.R. (3d) 481, 2010 ONCA 29, leave to

Starkly different interpretations of *Dell* were adopted by the B.C. Court of Appeal last year, however, and it now appears that, for at least some Canadian consumers, the arbitration clause versus class proceeding debate has been re-opened. Ironically, one of the B.C. cases in question was the very same *MacKinnon v. National Money Mart* case that was the first to reject the primacy of arbitration over class actions.[42] In the wake of *Dell*, the B.C. Court of Appeal twice determined that the Supreme Court had changed the law and that a stay of proceedings would be the appropriate relief if now sought by the corporate defendant.[43] The Court of Appeal reiterated, as did the Supreme Court in *Dell*, that class proceedings legislation is purely procedural in nature, and cannot oust the substantive law governing the proper jurisdiction of an arbitrator.

The Supreme Court of Canada heard the appeal in the other B.C. case, *Seidel v. Telus Communications Inc.*, on May 12, 2010 and at the time of writing, no decision had been released. It is hoped that the court will resolve the competing policy debates between class proceedings and arbitration — a debate that has significant implications for consumers in seven provinces. Only the legislatures of Ontario, Québec and Alberta have enacted consumer protection provisions nullifying mandatory arbitration clauses. For those consumers residing in these three provinces, the impact of a series of class action decisions in the early and mid-2000s cannot be underestimated. These cases reignited policy arguments favouring consumer class actions and arguably propelled the Ontario legislature to proclaim amendments to its Consumer Protection Act which had been dormant for years.

Should the Supreme Court of Canada agree with the B.C. Court of Appeal and give primacy to freedom of contract even in cases of consumer contracts of adhesion, however, then class actions arising from consumer agreements in seven of 10 provinces will be rendered almost impossible to prosecute. Moreover, class actions on behalf of consumers that do not fall within the narrow jurisdiction of consumer protection legislation will be jeopardized in all of

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appeal to S.C.C. refused [2010] S.C.C.A. No. 75, 316 D.L.R. (4th) vii; *Seidel v. Telus Communications Inc.* (2008), 295 D.L.R. (4th) 511, 2008 BCSC 933, revd 304 D.L.R. (4th) 564, 2009 BCCA 104, leave to appeal to S.C.C. granted 309 D.L.R. (4th) vi, [2009] 3 S.C.R. ix, judgment reserved May 12, 2010, Court File No. 33154.

42. *MacKinnon*, *supra*, footnote 34.

43. *Ibid.* (C.A.), and *Seidel v. Telus Communications Inc.*, *supra*, footnote 41 (C.A.). An appeal of *Seidel* was argued before the Supreme Court of Canada on May 12, 2010, *supra*, footnote 41.

Canada. What began as a story of success for consumer class actions, therefore, may well have a very different ending.

IV. CONTINUING BARRIERS TO CONSUMER JUSTICE

Despite the advances in consumer class actions, a number of challenges persist. In general terms, these challenges can be grouped into two categories: those involving inherent difficulties in proving either causation or damages *en masse*; and those related to cost barriers. In terms of the latter, it is trite to point out that costs are a significant barrier to the court system. While contingency fees overcome economic barriers for consumers who cannot afford to pay their own lawyer, there remains the disincentive of acting as a representative plaintiff if there is a risk that one will be ordered to pay the successful defendant's costs. The risk of adverse costs has risen of late, and will be discussed in section 2, below. But first, we turn to problems of individual causation and loss, with particular attention to one of the proposed solutions.

1. *Cy près* Provisions in Consumer Class Action Settlements

The challenges of class proceedings that arise by reason of their representative nature are not new. Arguments against certification focused on the requirement to prove reliance on an alleged misrepresentation by a purchaser are familiar.[44] So, too, is the objection that indirect purchasers must show that they overpaid for a product in a situation where defendants are alleged to have engaged in a price-fixing scheme.[45] In consumer actions involving everything from alleged Competition Act violations to prospectus misrepresentations to negligent manufacture and design, defendants have forcefully — and often successfully — argued that a class action is ill-suited to resolving any number of individual issues.

Class counsel have devised creative arguments in an attempt to overcome such challenges to collective redress, including failed attempts to import the fraud on the market concept from the United States, which would have created a rebuttal presumption of reliance on certain misrepresentations.[46] The waiver of tort doctrine

44. As was successfully argued in the vanishing premium insurance class actions: see, *e.g.*, *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, 100 A.C.W.S. (3d) 387 (S.C.J.) at paras. 20 and 38-40, affd 17 C.P.C. (5th) 103, 110 A.C.W.S. (3d) 427 (Div. Ct.), affd 226 D.L.R. (4th) 112, 31 C.P.C. (5th) 205 (C.A.), leave to appeal to S.C.C. refused 233 D.L.R. (4th) vi, [2004] 1 S.C.R. x.
45. *Chadha*, *supra*, footnote 22.
46. *Carom v. Bre-X* (1998), 41 O.R. (3d) 780, 83 A.C.W.S. (3d) 363 (S.C.J.).

discussed earlier is another example of innovation in consumer class actions aimed to reduce the barriers to certification. A third example is the application of the *cy près* principle from trust law to settlements involving very small individual damages. As will be discussed, while the use of *cy près* may in some instances be justified as in fact promoting consumer justice by preventing unclaimed funds from reverting to the alleged wrongdoer, the increasing and, at times, unprincipled reliance on *cy près* distributions presents its own problems for those consumers seeking substantive justice.

The nature of mass wrongs necessarily creates barriers in distributing judgments or settlement funds. Class members may not be known to either party, as in the case of purchasers of defective consumer products or indirect purchasers in price-fixing conspiracies. Or, it may be prohibitively expensive to administer a distribution of nominal damages to a large class.[47] *Cy près* awards are then relied upon in one of two ways: settlement agreements often include a *cy près* provision requiring any unclaimed settlement monies to be paid to charities, in order that those monies not revert to the defendant; or the distribution scheme envisions the whole or a significant portion of the settlement fund will go to charitable organizations in place of direct compensation to class members. It is the latter use of the trust device that is potentially problematic for consumers.[48]

Cy près clauses that prevent unclaimed funds from reverting to defendants arguably advance consumer justice by ensuring that defendants pay for their wrongdoing to the fullest extent. The deterrence function of class action settlements, therefore, is at least theoretically fulfilled, while at the same time the bulk of the settlement goes directly to compensating the class. However, when *cy près* awards are used as the predominant or only allocation of settlement funds — what I call fixed *cy près* because the quantum of the fund paid to the *cy près* recipients is fixed at the time of settlement approval — consumers receive no compensation for their losses. In lieu of making direct payments to the class, class counsel (with the approval of the court) pays the settlement funds to a charity chosen

47. *Tesluk v. Boots Pharmaceutical PLC* (2002), 21 C.P.C. (5th) 196, 113 A.C.W.S. (3d) 768 (Ont. S.C.J.) (case involving misrepresentation of benefits of drug; compensation per class member of $30-$70 deemed uneconomical to distribute to 520,000 class members).

48. For a more detailed explanation and critique of *cy près* distributions in class action settlements, see Jasminka Kalajdzic, "Access to a Just Result: Revisiting Settlement Standards and *Cy près* Distributions" (2010), 6 Can. Class Action Rev. 215, at pp. 237-250.

by class counsel and/or the defendants. Although not receiving any compensation, the class members nevertheless are bound by the result, and are therefore barred from re-litigating the dispute with the defendants. Put differently, consumers give up their litigation rights in exchange for nothing.[49]

Counsel and the judges who approve fixed *cy près* distributions argue that the charitable donations indirectly benefit the class. The difficulty with this argument is that there is, in practice, rarely a nexus between the class and the *cy près* recipient.[50] Such recipients have included law schools (in a settlement involving price-fixing of food additives),[51] the Boys and Girls Club of Canada (in three price-fixing cases),[52] two business schools (in settlement involving failure to disclose in a share prospectus),[53] and a foundation supporting families of autistic children (in a case involving foreign credit card transaction fees).[54] Although these charities promote worthy causes, they have no connection either to the nature of the wrongs committed by the defendants, or to the makeup of the respective classes. How, then, do the class members in question benefit from the class action, indirectly or otherwise?

The argument that fixed *cy près* awards still benefit consumers by serving a deterrence function is not wholly satisfying. Such awards convert what was supposed to be a tool for accessing justice into the imposition of a fine by a private attorney general. Moreover, the distribution of large sums to charitable organizations with little or no connection to the class action is inconsistent with class

49. In response, supporters of *cy près* schemes proclaim that the payments serve the deterrence objective of class actions. Whether corporate and governmental defendants actually modify future conduct as a direct consequence of settlement payments is simply unknown. Regardless, payments to class members themselves serve both the compensatory and deterrence functions, while *cy pres* distributions only theoretically achieve the latter. Fixed *cy pres* payments, therefore, should be used solely as a last resort, and not as a matter of convenience.

50. Jeff Berryman, "Class Actions (Representative Proceedings) and the Exercise of Cy-Pres Doctrine: Time for Improved Scrutiny" in J. Berryman and R. Bigwood, eds., *The Law of Remedies: New Directions in the Common Law* (Toronto, Irwin Law, 2010), pp. 727-762; Kalajdzic, *supra*, footnote 48, at pp. 246-247.

51. *Bona Foods v. Pfizer*, [2002] O.J. No. 5553, 2002 CarswellOnt 6221 (S.C.J.).

52. *Ibid.*; *Minnema v. Archer Daniels* (Unreported, February 28, 2003, Ont. S.C.J., Court File No. G23495-99CP), and *Ford v. F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758, 138 A.C.W.S. (3d) 19 (S.C.J.).

53. *Elliott v. Boliden Ltd.*, 2006 CanLII 34424, 34 C.P.C. (6th) 339 (Ont. S.C.J.).

54. *Georghiades v. Scotia Capital Inc.* (Unreported, Ont. S.C.J., January 23, 2009, Ont. S.C.J., Court File No. 03-CV-1982). Approximately 26% of the *cy près* award was distributed to Unity for Autism; the remaining funds were divided between Toronto Ronald MacDonald House, Pelletier Homes for Youth, Pro Bono Law Ontario, and the Law Society's Lawyers Feed the Hungry Program.

proceedings legislation, which requires that aggregate sums be distributed in any manner that "may reasonably be expected *to benefit the class members.*"[55]

The challenge for consumers, therefore, is to ensure that settlement proceeds are not distributed *cy près* improperly. *Cy près* awards should only be permitted in those cases where it is impossible to identify class members, even by way of a robust notice program, or where the costs of distribution far outweigh the amounts being compensated. Where the necessity of a fixed *cy près* is established, it is then incumbent on counsel for both parties, and the court from which settlement approval is sought, to direct the proceeds to charities or non-profit organizations whose works will *indirectly* benefit the class, in conformity with the spirit and the letter of class proceedings legislation.[56] This objective was achieved, for example, in a class action involving a drug prescribed for the treatment of hypothyroidism, where the *cy près* beneficiaries were various institutions conducting specific research projects, education and outreach related to thyroid disease.[57]

A more cautious approach to *cy près* distributions would improve the quality of justice being meted out in a sizeable number of consumer class actions.[58] Closer attention to notice campaigns may increase the identification of class members. Settlement administration programs should be designed to make payments directly to class members wherever possible, obviating the need for a cumbersome claims process. Failing a more principled determination of when fixed *cy près* awards are necessary and to whom they ought to be paid, a device that was intended to benefit

55. The Ontario Law Reform Commission adopted the same approach, stating that "all feasible efforts" must be made to compensate class members directly before making any *cy près* distribution: Ontario Law Reform Commission Report, *supra*, footnote 1, at p. 581.

56. CPA, *supra*, footnote 5, at s. 26(4), states that courts can direct the payment of aggregate amounts in any manner that "may reasonably be expected to benefit class members."

57. *Tesluk v. Boots Pharmaceutical PLC*, *supra*, footnote 47.

58. In the past decade, at least 35 settlements have been approved involving fixed *cy près* schemes, most of them in Ontario. See those listed in Berryman, *supra*, footnote 50 and Kalajdzic, *supra*, footnote 48, at p. 240. Since those two articles were written, an additional six such settlements have been approved: *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1006, 175 A.C.W.S. (3d) 333 (S.C.J.); *Bishay Estate v. Maple Leaf Foods Inc.*, [2009] S.J. No. 471, 2009 SKQB 326; *Melvin c. Maple Leaf Foods Inc.*, [2009] J.Q. No. 2790, 2009 QCCS 1378; *Ford v. Degussa-Hüls AG* (2010), 188 A.C.W.S. (3d) 998, 2010 ONSC 2787; *Speevak v. Canadian Imperial Bank of Commerce* (2010), 185 A.C.W.S. (3d) 833, 2010 ONSC 1128; and *Pichette v. Toronto Hydro* (2010), 191 A.C.W.S. (3d) 47, 2010 ONSC 4060.

consumers by ensuring defendants pay for their harmful conduct, will become a device that, in the words of one U.S. judge, "[sells] claimants down the river."[59]

2. Adverse Costs Awards

In the early years of class proceedings in provinces with a two-way costs rule, courts were somewhat restrained in their imposition of costs awards against unsuccessful representative plaintiffs.[60] In cases where certification was denied, costs, if ordered at all, were fairly modest.[61] The tide began to turn against plaintiffs in the early to mid-2000s, with *Gariepy v. Shell Oil*,[62] *Pearson v. Inco*,[63] and most importantly in terms of national impact, *Kerr v. Danier Leather Inc.*, a 2007 decision of the Supreme Court of Canada.[64]

In *Kerr*, the Supreme Court of Canada confirmed the appellate court's imposition of a significant costs order (estimated to be in the seven figures) against a representative plaintiff who was unsuccessful at trial. Binnie J. stated that "it should not be assumed that class proceedings invariably engage access to justice concerns to an extent sufficient to justify withholding costs from the successful party."[65]

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59. *Mirfasihi v. Fleet Mortage Corp.*, 356 F.3d 781 (7th Cir. 2004), at p. 785, Richard Posner J.
60. See, *e.g.*, *Williams v. Mutual Life Assurance Co. of Canada*, [2001] O.J. No. 445, 103 A.C.W.S. (3d) 19 *sub nom. Kumar v. Mutual Life Assurance Co. of Canada* (S.C.J.) (no costs awarded to defendants after plaintiff's failed certification motion); *Joanisse v. Barker*, [2003] O.J. No. 4081, 126 A.C.W.S. (3d) 201 (S.C.J.) (no costs awarded to defendants after plaintiff's failed certification motion). See also Jim Middlemiss, "Court gives defence sunny ruling," *Financial Post*, March 31, 2010 (quoting defence lawyer Paul Morrison who said that in "the early days, the courts seemed reluctant to make anything other than what would seem a minimal cost order.").
61. *Taub v. Manufacturers Life Insurance Co.*, [1998] O.J. No. 2694, 40 O.R. (3d) 379 (Ont. Ct. (Gen. Div.)), affd [1999] O.J. No. 5737, 42 O.R. (3d) 576 (Div.Ct.) (costs to the defendant fixed at $5,000); *Hollick v. Metropolitan Toronto (Municipality)*, [1999] O.J. No. 4747, 181 D.L.R. (4th) 426 (C.A.), affd 205 D.L.R. (4th) 19, [2001] 3 S.C.R. 158 (costs to defendant fixed at $10,000).
62. [2002] O.J. No. 3495, 116 A.C.W.S. (3d) 495 (S.C.J.).
63. [2002] O.J. No. 3532, 50 C.E.L.R. (N.S.) 88 (S.C.J.), affd 6 C.E.L.R. (3d) 117, 128 A.C.W.S. (3d) 875 (Div. Ct.), revd 261 D.L.R. (4th) 629, 78 O.R. (3d) 641 (C.A.), leave to appeal to S.C.C. refused 265 D.L.R. (4th) vii, [2006] 2 S.C.R. viii.
64. [2007] 3 S.C.R. 331, 286 D.L.R. (4th) 601.
65. *Ibid.*, at para. 69. For comments on the potential impact of the Court's pronouncements on future class action litigation, see Kirk M. Baert and Anthony Guindon, "Class Proceedings in Ontario: the Growing Risk of Adverse Costs Awards Against Representative Plaintiffs" (Paper presented at the 5th Annual Symposium on Class Actions, Toronto, April 10-11, 2008) [unpublished].

Echoes of this sentiment appeared in a number of recent cases, in which costs of $525,000,[66] $400,000,[67] $351,000,[68] $260,000,[69] $215,000[70] and $160,000[71] were ordered against the representative plaintiffs. These courts reiterated similar themes, including the ordinary rule that costs follow the event, and that an action, particularly one that was denied certification, does not invariably amount to test case litigation. The courts agreed that such considerations are to be balanced against the objectives of class proceedings, including the goal of increasing access to justice, but held that "justice is a two-way street in class proceedings."[72]

The extent to which representative plaintiffs personally pay adverse costs awards is not known with any precision. Anecdotally, it appears that class counsel often indemnify their clients against adverse costs. Some judges believe, perhaps erroneously, that indemnification agreements are universal.[73] Even if it is true that representative plaintiffs themselves do not have to pay adverse costs awards (as a result of an indemnity from their lawyer or the Class Proceedings Fund), barriers to justice for consumers remain, for two reasons.

First, class counsel will be forced to be increasingly selective about the cases they assume. They will require a greater degree of certainty in the ultimate success of the litigation, thereby rejecting the less lucrative, more novel causes of action that may nevertheless implicate matters of great public interest. Second, faced with greater personal exposure, counsel may be pressured into accepting a settlement prematurely, for less than the class might otherwise be

66. *Fresco v. Canadian Imperial Bank of Commerce*, [2010] O.J. No. 746, 2010 ONSC 1036, affd 2010 ONSC 4724 (Div. Ct.)).
67. *Singer v. Schering-Plough Canada Inc.* (2010), 186 A.C.W.S. (3d) 923, 2010 ONSC 1737.
68. *Sutherland v. Hudson's Bay Co.*, 2008 CanLII 5967, 51 C.P.C. (6th) 127, 164 A.C.W.S. (3d) 940 (Ont. S.C.J.). Costs were ordered after unsuccessful trial to be paid out of class members' pension plan, not by representative plaintiffs personally.
69. *Healey v. Lakeridge Health Corp.* (2010), 186 A.C.W.S. (3d) 924, 2010 ONSC 1884 (Ont. S.C.J.).
70. *Ruffolo v. Sun Life Assurance Co. of Canada*, 2008 CanLII 5962, 90 O.R. (3d) 59 (S.C.J.). Note that the representative plaintiffs were indemnified as against these costs by the Class Proceedings Fund.
71. *McLaine v. London Life Insurance Co.*, 2008 CanLII 28442, 239 O.A.C. 293, 168 A.C.W.S. (3d) 41 (S.C.J. (Div. Ct.)).
72. *Fresco*, *supra*, footnote 66, at para. 18.
73. In *Drady v. Canada (Attorney General)*, [2008] O.J. No. 238, 164 A.C.W.S. (3d) 32 (S.C.J.), at para. 57, Cullity J. commented that "it is almost unheard of . . . for there to be no agreement, or understanding, between plaintiffs and class counsel in respect of the payment of costs if the action is unsuccessful."

able to obtain.[74] Substantive justice for consumers, therefore, might be undermined.

In those circumstances, however few in number, where a representative plaintiff is not indemnified against adverse costs, then the implications of such orders are obvious, and they are devastating.[75] Representative plaintiffs litigating for modest damage claims would be forced either to pay a costs order wholly out of proportion to the amounts they might have gained had the case been resolved successfully, or they will be forced to barter away the rights of the class in exchange for a waiver of the costs award. In either scenario, access to justice is thwarted.

V. CONCLUSION

The vindication of consumer rights remains problematic, here and abroad. As Professor Lafond has argued, ordinary legal proceedings are poorly adapted to settling consumer-related disputes and access to consumer justice, therefore, remains illusory for many.[76] Class actions were welcomed to Québec over three decades ago, and to the rest of Canada more recently, accompanied by a vision that they would provide redress for mass harm that had previously been unremedied due to the high costs of litigation and the absence of regulatory compensation schemes. To some extent, that vision has been fulfilled. In terms of sheer number, consumers are using the class action mechanism, and often. The data collected from class action lawyers in 2009 confirms that consumer actions comprise a majority of class proceedings currently underway.

The same survey also confirms that class counsel are highly selective in their choice of actions. Given the economics of entrepreneurial litigation of this kind, lawyers will choose those cases that involve large numbers of class members and/or extremely large global damage assessments. These criteria are understandable, but they may necessarily exclude consumer actions involving less widely marketed goods, or claims that are more difficult to prove.

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74. Others have made the same observations. See, *e.g.*, John Chapman and Adam Stephens, "Class Action Defendants Strike Back With Costs," *The Lawyers Weekly*, Vol. 28, No. 16, Aug. 29, 2008.

75. In the absence of an indemnity, failure of class counsel to disclose the risks of an adverse costs award prior to signing the retainer agreement may entitle the representative plaintiffs to an order compelling class counsel to bear the defendant's costs personally: *Attis v. Ontario (Minister of Health)*, 2010 ONSC 4508.

76. Pierre-Claude Lafond, "Le consommateur et le procès: rapport général" (2008), 49 C. de D. 131.

Other challenges continue to stem the advancement of consumer justice. Two were surveyed briefly in this paper: the unprincipled use of *cy près* distribution of settlement funds, and the less restrained approach to awarding costs against unsuccessful plaintiffs. Both trends threaten the viability of consumer class actions as vehicles for meaningful access to justice. Failure to direct settlement funds to class members where possible, either individually or to charitable efforts that will benefit them, does not fulfill the compensatory objectives of litigation. Increased risks of adverse costs, be they borne by the representative plaintiff or her counsel, deter future class actions, and thereby limit access to the court system.

That said, there are hopeful developments in the jurisprudence for consumer protection advocates, and two were discussed in this paper. The use of mandatory arbitration clauses to avoid consumer litigation has been foreclosed by, first, a series of class action decisions which attracted considerable attention to the use of such clauses, and second by amendments to consumer protection legislation in three provinces. Waiver of tort, a restitutionary principle largely unknown to most civil litigators a decade ago, has now become a staple in class action pleadings, and has been used successfully to defeat arguments against certification in a number of cases. Whether the Supreme Court of Canada will promote class actions over arbitration, or entrench waiver of tort as a cause of action that avoids the pitfalls of individual causation and proof, remains to be seen.

Despite its continuing challenges and inevitable imperfections, the consumer class action persists. It remains as one of the few, some say only,[77] realistic options to vindicate small claims on behalf of many consumers.

77. Jacob Ziegel, "Class Actions - the Consumer's Best Protection?" *The Lawyers Weekly*, Vol. 28, No. 38, February 20, 2009; Pierre-Claude Lafond, "Consumer Class Actions in Quebec to the Year 2000: New Trends, New Incentives" (2000), 8 Consumer L.J. 329, at p. 330.