LOCAL REPRESENTATION AND LITIGANT VOICE: THE STORY OF CLASS ACTIONS IN NEWFOUNDLAND AND LABRADOR

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Introduction

Three provinces have dominated the development of class actions in Canada. Québec was the first province to adopt the procedure in 1978, followed more than a decade later by Ontario. In 1996, British Columbia became the third province to enact class actions legislation. The influence of these three provinces on the genesis of class action case law and policy in Canada is widely accepted both in this country and in other jurisdictions.[1] All the Canadian provinces, with the exception of Prince Edward Island, have now enacted generic opt-out class actions legislation.[2] Because Ontario, British Columbia, and Québec were the first to enact class actions legislation and have dominated the field since, the presumption is that the other provinces simply followed their lead. The historical record shows this presumption to be false.

Around the turn of the millennium, between the introduction of class actions in British Columbia in 1996 and the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc v Dutton*[3] in 2001, several provinces engaged in lively debates as to whether they should introduce class actions. These debates were influenced by developments elsewhere in Canada, but also arose from developments within and unique to the provinces themselves.[4] This phenomenon is clearly seen in

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[1] For example, in her book *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004), Rachael Mulheron looks only at Ontario and British Columbia, even though three other common-law provinces had enacted class actions legislation at that time: Manitoba, Saskatchewan, and Newfoundland and Labrador.

[2] I define a class action or class proceeding as a procedural mechanism that is opt-out (i.e. people meeting the class definition are included in the class, and are bound by any judgment affecting the class, unless they take steps to exclude themselves) and generic (i.e. applicable across areas of the substantive law). See also Rachael Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (London, UK: Civil Justice Council, 2007).

[3] *Western Canadian Shopping Centres Inc v Dutton,* 2001 SCC 46 [*Dutton*].

[4] See e.g. the lengthy and considered treatment of class action procedures and their alternatives in Alberta Law Reform Institute, *Report on Class Actions* (2000), online: (pdf) *University of Alberta* <www.alri.ualberta.ca/wp-content/uploads/2020/05/fr085.pdf> [*Alberta Report*].

the fourth Canadian province to enact class actions legislation: Newfoundland and Labrador.[5]

This article demonstrates that, while the debate on class actions in Newfoundland and Labrador was partly the manifestation of a national phenomenon, the province did not enact legislation simply because Ontario, British Columbia, and Québec had. The historical record shows that class actions in the province arose from grass roots activism that reflected the needs of its people. To a large extent, that remains true in the practice of class actions there today. This unique aspect of the province's procedural story has never been told.

The movement for class actions in Newfoundland was led by two key figures in the province's recent history: Bill Kelly and Chesley Crosbie. The impetus for change arose from the Hiland Insurance bankruptcy, an insurance scandal that affected tens of thousands of people in the province and led to calls for a public inquiry into the government's failure to protect policyholders. In November 2001, Bill 34, "An Act To Permit An Action By One Person On Behalf Of A Class Of Persons" was introduced and, after less than a month of debate in the legislature, the Newfoundland *Class Actions Act*[6] received Royal Assent on December 13, 2001 and came into force on April 1, 2002.

In July 2001, with the Supreme Court of Canada's decision in *Dutton*,[7] class actions became available at common-law and, within a few years, most provinces had enacted legislation. Since then, class action activity in Newfoundland has been dwarfed by that of Ontario, British Columbia, and Québec. This is not simply because of the population difference, but also because national opt-out classes (commenced largely in Ontario) have proven far more lucrative than local actions. Nevertheless, despite the prevalence of national opt-out class actions, local class actions have continued and are, in many ways, more representative of provincial concerns. An investigation of the history of class actions in these provinces illustrates the importance of local representation and litigant voice, two crucial considerations that need to be borne in mind as class actions in Canada become increasingly national in scope.

The history of class actions in Canada has, until recently, only been investigated at a fairly superficial level. My book on class actions in Ontario was the

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[5] *Class Actions Act*, SNL 2001, c C-18.1. Throughout this article, references to Newfoundland will include Newfoundland and Labrador. Since its passage, the only amendment to the *Class Actions Act* has been on 16 December 2004, when the wording of section 2(ii) was changed from 'common but not necessarily identical issues of law that arise' to 'common but not necessarily identical issues of law that arise from common but not necessarily identical facts'. This appears to be more of a clarification than a substantial amendment.

[6] *Ibid*.

[7] *Dutton, supra* note 3.

first serious historical treatment of this area of the law,[8] and my research has now turned towards the history of all the Canadian provinces and territories. This includes Newfoundland, where the history of class actions has not been investigated at all.[9]

This article will proceed in three parts. Part I looks at the representative action, which forms the roots of class actions in Canada. The limitations of the representative action gave rise to concerns in Canada that significant claims, especially consumer claims, were going uncompensated. Part II investigates this phenomenon in Newfoundland, where the Hiland Insurance bankruptcy and the inability of consumers to obtain redress in the courts led to calls for class action reform. Part III looks at the evolution of class actions in Newfoundland since the passage of the legislation, and the nature and effect of the class actions that have been litigated in the province in the past two decades.

Part I—The Representative Action

The representative action is a creature of equity with its roots deep in English history. Following the fusion of the courts of law and equity, representative actions could be brought at common law in England and in the Canadian jurisdictions that had inherited the English system: that is, all the provinces except Québec.[10] However, the restrictive interpretation of the "same interest" test that the English courts applied after *Markt*[11] was also applied by the courts of the Canadian provinces. Few representative actions could satisfy the three-part test articulated in *Ellis*:[12] common interest; common grievance; and relief beneficial to all. In particular, actions that were based on separate contracts, or where damages were individual to each class member, were generally not allowed to proceed as representative actions.[13]

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[8] Suzanne Chiodo, *The Class Actions Controversy: The Origins and Development of the Ontario Class Proceedings Act* (Toronto: Irwin Law, 2018).

[9] There is a rich vein of legal historical writing about the province, although the historiography of Newfoundland's legal history has, until recently, been non-existent: Christopher English, "The Legal Historiography of Newfoundland" in Christopher English, ed, *Essays in the History of Canadian Law: Two Islands, Newfoundland and Prince Edward Island* (Toronto: Osgoode Society for Canadian Legal History, 2005).

[10] When the courts of common law and equity were fused, the representative action rule was enacted in the Rules of Procedure Schedule to the *Supreme Court of Judicature Act*s of 1873 and 1875: *The Supreme Court of Judicature Act*, 1873 (UK), 36 & 37 Vict 8, c 66, Sch Rule of Procedure, s 10 and *The Supreme Court of Judicature Act*, 1875 (UK), 38 & 39 Vict 10, c 77, Order XVI, First Sch, s 9.

[11] *Markt & Co Ltd v Knight Steamship Co Ltd*, [1910] 2 KB 1021, 7 WLUK 25 (CA).

[12] *Duke of Bedford v Ellis* (1900), [1901] AC 1 (HL), [1900] 12 WLUK 42 (HL).

[13] See e.g. *Walker v Billingsley*, [1952] 4 DLR 490 at 493–500, 5 WWR (ns) 363 (BCSC) where the BC Supreme Court held that a representative action by members of a trade union for damages could not be brought because each group member had individual and differing damages claims. The claim for an accounting, however, was allowed to proceed.

This remained the same throughout Canada until the 1970s, when the courts in British Columbia[14] and Ontario began to be more receptive to group litigation following the introduction of class actions south of the border and in Québec, and as the need for a mechanism to provide legal redress for groups became more apparent. The more expansive interpretation of the representative action rule took two forms. First, the bifurcated approach whereby a declaration of liability was obtained that could then form the basis for subsequent actions for monetary damages; and second, the liberal interpretation of the "same interest" test.[15]

In *Chastain v British Columbia Hydro and Power Authority*,[16] the plaintiff sought a declaration that the defendant had no authority to request a security deposit from new customers with low incomes, as well as an injunction forbidding the defendant from keeping deposits already collected. The Court found that the group members all had the "same interest" in the success of the action even though different amounts of money would be returned to each customer.[17] In *Shaw v Real Estate Board of Greater Vancouver*,[18] the group members' common interest in the success of the action was found to meet the "same interest" requirement (even though calculating their individual entitlements by way of an accounting would be "long, detailed and difficult"),[19] and the Court of Appeal held that the money owed to class members could be calculated following a finding of liability.[20]

This approach influenced the limited case law in Newfoundland, where Rule 7.11, the Newfoundland rule that permitted representative actions, was worded in a similar way to its Ontario and BC equivalents, with the same requirement that "numerous persons have the same interest" in a proceeding.[21] One of the few

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[14] Representative actions in BC were governed by Ordinance 16, Rule 9 of the Rules of the Supreme Court (1961), which was very similarly worded to its counterparts in other provinces: "[w]here 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." In 1976, this rule became Rule 5(11) of the Supreme Court Rules, but the substance of the rule remained the same.

[15] Chiodo, *supra* note 8 at 27–28.

[16] *Chastain v British Columbia Hydro and Power Authority* (1973), 32 DLR (3d) 443, [1973] 2 WWR 481 (BCSC) [*Chastain* cited to DLR].

[17] *Chastain, supra* note 16 at 443.

[18] *Shaw v Real Estate Board of Greater Vancouver* (1973), 36 DLR (3d) 250, [1973] 4 WWR 391 (BCCA) [*Shaw* cited to DLR].

[19] *Ibid* at 254–55.

[20] *Ibid* at 255.

[21] Newfoundland, *Rules of the Supreme Court 1986*, Rule 7.11(1). Until 1986, the Newfoundland rule was identical to the English rule that required "numerous persons having the same interest in one cause or matter": see *Hillyard v St John's (City)* (1982), 30 CPC 176, 1982 CarswellNfld 31 (TD) [*Hillyard* cited to CPC]. Rule 7.11(1) was slightly different in that it provided for the discontinuation of a representative action: "[w]here numerous persons have the same interest in a proceeding … the proceeding may be begun,

representative actions to be brought around this time was allowed to proceed, based on the test of the British Columbia Court of Appeal in *Shaw*. In *Hillyard v St John's (City)*,[22] the plaintiff purported to represent 775 taxpayers in an area of St. John's, who had formed themselves into a group called "The Anspach Neighbourhood Citizens' Committee". He sought an injunction against the Municipal Council of St. John's to restrain it from issuing a permit for the construction of town houses and other buildings in the area.[23] The Newfoundland Supreme Court (Trial Division) applied the reasoning in *Shaw* and found that, "the intended plaintiffs have a common interest and a common grievance, [so that] a representative suit is in order because the relief being sought is in its nature beneficial to all whom the plaintiff proposes to represent."[24] Because the group did not claim monetary damages, and success for the plaintiff meant success for the rest of the group, a representative action was found to be appropriate in this case.[25]

This reasoning also influenced the evolution of the case law in Ontario,[26] where representative actions were available under Rule 75. *GM (Canada) v Naken*[27] similarly attempted to circumvent the barriers of individual contracts and individual damages. The representative action was brought on behalf of nearly 5,000 purchasers of the 1971 and 1972 models of the General Motors Firenza, which were notoriously unreliable. The plaintiffs sought damages for the reduced resale value of each vehicle on a pro-rata basis in the amount of $1,000 per class member. The defendants moved to strike the action on the basis that reliance on the manufacturer's representations was an individual issue, and that damages would have to be individually assessed. The Court of Appeal allowed the case to proceed as a representative action, holding that aggregate damages could be awarded because each class member's monetary claim was the same, and that individual issues regarding reliance could be determined in subsequent individual trials.[28]

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and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

[22] *Hillyard*, *supra* note 21.

[23] The plaintiff's claims for a declaration against the Council that its actions in issuing the permit were null and void, as well as for damages, had previously been struck out by the Court: *ibid* at 179–80.

[24] *Ibid* at 182–83.

[25] *Ibid* at 180–83.

[26] Chiodo, *supra* note 8. See also *Cobbold v Time Canada Ltd*, (1976), 71 DLR (3d) 629, 13 OR (2d) 567 (HCJ).

[27] *Naken et al v General Motors of Canada Ltd et al* (1975), 66 DLR (3d) 205, 11 OR (2d) 389 (HCJ), rev'd (1977) 79 DLR (3d) 718, 17 OR (2d) 193 (Div Ct), rev'd (1979) 92 DLR (3d) 100, 21 OR (2d) 780 (CA) [*Naken* OCA], rev'd [1983] 1 SCR 72, 144 DLR (3d) 385 [*Naken* cited to SCR]. See also Chiodo, *supra* note 8 at 29–31.

[28] *Naken* OCA, *supra* note 27. However, two subsequent decisions from the Court of Appeal called into question Arnup JA's analysis of the aggregate damages issue: *Seafarers International Union of Canada v Lawrence* (1979), 97 DLR (3d) 324, 24 OR (2d) 257 (CA); and *Stephenson v Air Canada* (1979), 103 DLR (3d) 148, 26 OR (2d) 369 (HCJ). The Court of Appeal for Ontario gave its decision in *Stephenson* on 10 February 1981 without reasons. Its decision is cited in Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) at 24 [*OLRC Report*].

Naken proceeded to the Supreme Court of Canada,[29] where those expecting the Court to reform the law on class actions were sorely disappointed. Justice Estey held, as prior case law had, that representative actions under Rule 75 could not proceed where, as here, they involved separate contracts and individualized damages[30] because they did not meet the "same interest" test.[31] He concluded that Rule 75, "consisting as it does of one sentence of some 30 words, is totally inadequate for employment as the base from which to launch an action of the complexity and uncertainty of this one."[32] The creation of this "new and distinct method of proceeding" was a job not for the Court, but for the legislature.[33]

The *Naken* decision effectively stymied class actions not only under Rule 75, but also under the representative action rules of other Canadian jurisdictions. Just as in Ontario and BC, pressure for class action reform in Newfoundland arose from the perception that the representative action rule was being interpreted far too restrictively, so that claims were going uncompensated and defendants were not being held accountable for their actions. There was a general perception in Canada, both among law reformers[34] and the general public,[35] that the Supreme Court of Canada had let an opportunity pass by and that the onus was now on the provincial legislatures to enact class actions legislation.[36] While the Ontario and BC legislatures answered this call in 1993 and 1996 respectively, Newfoundland and Labrador did not pass class proceedings legislation until December 13, 2001—just six months after the Supreme

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[29] *Naken*, *supra* note 27.

[30] *Ibid* at 78.

[31] *Ibid* at 99, 103–04.

[32] *Ibid* at 105.

[33] *Ibid* at 102.

[34] WA Bogart, "*Naken*, the Supreme Court and What Are Our Courts For?" (1984) 9:3 Can Bus LJ 280; Jennifer K Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984) 4 Windsor Yearbook of Access to Justice 229; J Robert S Prichard, "Class Action Reform: Some General Comments" (1984) 9:3 Can Bus LJ 309. Bogart, Bankier, and Prichard were all involved in the *OLRC Report*, *supra* note 28.

[35] Steve Thorne, "Court decision undermines use of class action suits", *Halifax Mail Star* (25 February 1983) at 14; Marina Strauss, "Supreme Court bars Firenza buyers from launching a class-action suit", *Globe and Mail* (9 February 1983) at 2; Jacob Ziegel, "Class action dealt a legal blow", *Globe and Mail* (29 March 1983) at 7; Editorial, "We need class-action suits", *Toronto Star* (10 February 1983); all these articles can be found in Ontario Law Reform Commission files: *Class Actions* (November 1976–December 1982), Toronto, Archives of Ontario (RG 4-66, BA77, Box No B380537). See also Editorial, "Make class actions easier", *Toronto Star* (12 July 1984) in Ontario Law Reform Commission files, *Class Actions* (November 1976–December 1982), Toronto, Archives of Ontario (RG 4-66, BA77, Box No B380543).

[36] Ontario, Legislative Assembly, Standing Committee on Administration of Justice, Estimates, Ministry of the Attorney General, *Official Report of Debates (Hansard),* 32-1 (17 June 1983), J-173 in Ontario Law Reform Commission files, *Class Actions* (November 1976–December 1982), Toronto, Archives of Ontario (RG 4-66, BA77, Box No B380537).

Court of Canada overturned *Naken* and allowed class actions at common law to proceed.[37]

Following *Naken*, there were very few attempts to use Rule 7.11 in Newfoundland, and most of the representative actions that were brought in the province or on behalf of Newfoundlanders were dismissed on the basis of the Supreme Court of Canada's decision.[38] In *West End Electronics Ltd v St John's (City)*, the Newfoundland Supreme Court (Trial Division) refused to permit an action by the plaintiff and 22 of its customers for flood damage allegedly caused by the defendant.[39] The Court held the following:

> The practical problems which can spring up on all sides of a proceeding like this were considered in *G.M. (Canada) v Nakin* [sic] and found to be insurmountable. While a class action sounding in damages is not, for that reason alone, inappropriate, nevertheless, in many cases it is. In this proceeding, apart from the inconvenience of trying twenty–two claims for distinct damages by twenty–two claimants, other problems exist. These include liability, if any, in respect of mitigation of damages, discovery and costs.[40]

Courts in Atlantic Canada continued to interpret the representative action rule very narrowly. In 1988, the New Brunswick Court of Queen's Bench interpreted *Naken* and held that an action would have to meet the following requirements in order to proceed:[41]

1) the class must be properly defined;
2) all members must have a common interest;
3) there must be a wrong common to all;
4) damages suffered must be the same to all except in amount;
5) the relief sought must be beneficial to all;
6) none of the members of the class may have an interest antagonistic to the other members; and

[37] *Dutton*, *supra* note 3. However, as noted below, the government of Newfoundland and Labrador announced its intention to pursue class action reform one week before the Supreme Court of Canada released its reasons in *Dutton*.

[38] *West End Electronics Ltd v St John's (City)* (1992), 100 Nfld & PEIR 76, 9 CPC (3d) 393 (NL SC) [*West End Electronics* cited to Nfld & PEIR]; *Inshore Fishermen's Bonafide Defense Fund v Canada (AG)* (1994), 117 DLR (4th) 56, 132 NSR (2d) 370 (CA).

[39] The Court instead allowed the 22 customers to be joined as plaintiffs: *West End Electronics*, *supra* note 38 at para 18.

[40] *Ibid* at para 14.

[41] *Guarantee Co v Caisse Populaire de Shippagan et al* (1988), 86 NBR (2d) 342 at 349, [1988] NBJ No 42.

7) there must be created in the course of the action or as a result thereof a fund or a pool of assets which is isolated and subject to pro rata distribution should the need arise.

This test is much more stringent than the *Ellis* test, but the additional requirements—proper class definition, same damages, no conflicts of interest among the class, and a common fund—all relate to the modern practice of bringing class actions for damages and in the absence of a pre-existing group. As I have argued elsewhere, these factors make the modern opt-out class action an entirely different creature from its predecessor in equity, which involved groups that pre-existed the litigation (such as trade union members, residents of a parish, or tenants of the same landlord) that sued for declarations of rights and other equitable remedies.[42]

In addition to the narrow interpretation of the representative action rule, plaintiffs in several high-profile actions were ordered to pay significant costs when their actions failed, giving rise to arguments that the system was unfairly stacked against them.[43] In Newfoundland, this phenomenon manifested itself in the form of the Hiland Insurance bankruptcy and the litigation that followed.

Part II—Bill Kelly and the Kelly Bill

Just as in Ontario, Alberta, and other provinces, the catalyst for class action reform in Newfoundland took the form of a high-profile event that affected a large number of people, and for which they were denied legal recourse. In Ontario, it was *Naken*;[44] in Alberta, it was the pine-shakes litigation;[45] and in Newfoundland, it was an insurance scandal that affected tens of thousands of people and led to calls for a public inquiry into the government's failure to protect policyholders.[46] It was the grass-roots campaign for class action reform that arose from this scandal, however, that marked out Newfoundland's story from that of the other provinces.

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[42] Chiodo, *supra* note 8, at 17–19.

[43] *Palmer v Nova Scotia Forest Industries* (1983), 2 DLR (4th) 397, 60 NSR (2d) 271 (SCTD); in that case, approximately $250,000 in costs was awarded against the 15 plaintiffs: "Ruling Shakes Spray Plaintiffs", *Halifax Mail-Star* (16 September 1983) at 1.

[44] *Naken*, *supra* note 27.

[45] *Holtslag v Alberta*, 2000 ABQB 351. The case involved homeowners whose homes were installed with pine shakes, a roofing material that grew fungus and deteriorated quickly. The Court struck out the representative action because it would require individual damages assessments; there were also issues regarding the class definition and the existence of common issues. In the month following this decision, approximately 2,000 individual actions were commenced, to be case managed by the court and litigated by way of test cases. In December 2000, the *Alberta Report* noted the "costly, complex and cumbersome" nature of the pine shakes litigation: see *Alberta Report*, *supra* note 4 at xx.

[46] Newfoundland and Labrador, House of Assembly, 42-2, vol XLII, No 61 (15 November 1994) (Scott Simms). Mr. Simms referred to hundreds of policyholders who were demonstrating outside the provincial legislature and raised a Parliamentary petition asking for a public enquiry.

In October 1994, Hiland Insurance Limited, a provider of automobile and fire insurance, had its licence cancelled and went into provisional liquidation. The following month, Newfoundland's Superintendent of Insurance informed Hiland's approximately 22,000 policyholders in the province that their policies were cancelled effective December 6, 1994. Their unrefunded premiums totalled approximately $20 million. JJ Lacey, the agent and broker that had sold the Hiland policies, subsequently went into bankruptcy.[47]

One of the policyholders was Bill Kelly, a recently-retired journalist who had until the previous year hosted the Newfoundland-based television show *Land & Sea*, a staple of popular culture in the province. Kelly was no stranger to campaigning for change; when *Land & Sea* was taken off the air in 1990 due to funding cuts in regional broadcasting, Kelly organized rallies and petitions to get the show back on the air, even though he was in hospital recovering from quadruple-bypass surgery.[48]

In the wake of the Hiland bankruptcy, Kelly did not remain retired for long. He formed the Hiland Consumers' Association in an attempt to obtain redress on behalf of the policyholders,[49] and sought out another high-profile Newfoundlander, lawyer Chesley Crosbie.[50]

The Crosbie family was prominent in provincial politics.[51] Chesley's great-grandfather, Sir John Chalker Crosbie, was the third Prime Minister of the Dominion of Newfoundland.[52] His grandfather, Chesley A Crosbie, was a delegate to the Newfoundland National Convention and was opposed to confederation with Canada.[53] Chesley's father, John Carnell Crosbie, was a provincial and federal cabinet minister who also served as Lieutenant-Governor.[54] Chesley Crosbie himself was a Rhodes Scholar who, upon his return from Oxford University, was admitted to the bar and in

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[47] *Kelly et al v Lacey (JJ) Insurance Ltd (Trustee of)* (1997), 154 Nfld & PEIR 1 at paras 4–11, 15 CPC (4th) 114 (NL SC) [*Lacey*].

[48] CBC NL - Newfoundland and Labrador, "Remembering Bill Kelly: Land & Sea" (2012), online (video): *YouTube* <www.youtu.be/007pNA0Prl8>; Daniel MacEachern, "Bill Kelly, former host of CBC's Land & Sea, dies at 71", *CBC News* (15 February 2017), online: <www.cbc.ca/news/canada/newfoundland-labrador/bill-kelly-obit-1.3984008>. Bill Kelly was also in hospital when Bill 34 (later the *Class Actions Act*, *supra* note 5) was being debated in the Newfoundland Legislature: Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 36 (22 November 2001) (John Ottenheimer).

[49] Newfoundland and Labrador, House of Assembly, 44-2, vol XLIV, No 32 (13 December 2000).

[50] Interview with Chesley Crosbie (6 December 2019) [*Interview with C Crosbie*].

[51] Aaron Wherry, "Of Georges, Johns and Chesley", *Maclean's* (20 July 2015).

[52] Michael Harris, *Rare Ambition: The Crosbies of Newfoundland* (New York: Viking, 1992).

[53] Raymond B Blake, "Canada, Newfoundland, and Term 29: The Failure of Intergovernmentalism" (2012) 41:1 Acadiensis 49 at 56.

[54] John C Crosbie, *No Holds Barred: My Life in Politics* (Toronto: McClelland & Stewart, 1998).

1991 established his own law firm.[55] He was later to become leader of the Progressive Conservative Party in Newfoundland.[56]

As a personal injury lawyer, Chesley Crosbie was a member of the American Trial Lawyers Association,[57] and became aware of class actions through reading ATLA material and attending conventions in the US.[58] In November 1995, he represented Bill Kelly in the latter's efforts to obtain leave from the Bankruptcy Court to commence a representative action against JJ Lacey's insurer. That action was commenced in March 1996, for damages equivalent to the amount of unrefunded premiums for each policyholder.

The representative action was dismissed in July 1997.[59] The Newfoundland Supreme Court (Trial Division) held that the claims did not involve the "same interest" because they would each necessitate individual enquiries into when Lacey and the policyholders knew or ought to have known of Hiland's precarious financial situation, as well as the manner in which Lacey handled each class member's premium payments.[60] In addition, the Court held that many class members might have damages exceeding the amount of unrefunded premiums, and that the *res judicata* effect of the representative action would effectively bar those claims, leading to injustice.[61] As a result, the representative aspects of the plaintiff's claim were struck out.[62]

Costs were ordered against Bill Kelly in the amount of $15,000.[63] The costs were taxed on the higher scale because the action was taken in a representative

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[55] Aaron Wherry, "Why the Tories said no to a star candidate in Newfoundland", *Maclean's* (9 July 2015), online: <www.macleans.ca/news/canada/why-the-tories-said-no-to-a-star-candidate-in-newfoundland/>; Eddy Kennedy, "The new leader of the Progressive Conservative party in NL has a familiar last name", *CBC News* (28 April 2018), online: <www.cbc.ca/news/canada/newfoundland-labrador/pc-leadership-convention-1.4639739>.

[56] Kennedy, *supra* note 55.

[57] Now the American Association for Justice.

[58] Interview with C Crosbie, *supra* note 50.

[59] *Lacey*, *supra* note 47.

[60] *Ibid* at paras 61–64.

[61] *Ibid* at paras 67–69.

[62] *Ibid* at paras 89–93. The Court held that, even if the representative action had been allowed to proceed, the deductible of $10,000 in the insurance policy would have applied to each class member's damages (averaging around $1,000 each), effectively wiping out those damages (at para 90). Ironically then, given the reliance on this case by those later introducing class actions legislation, the class members would not have received their premiums back even if the action had been commenced under a class actions statute.

[63] *Kelly v Lacey (JJ) Insurance Ltd* (2000), 197 Nfld & PEIR 16, 591 APR 16 (NL SC) [*Kelly* costs judgment, cited to Nfld & PEIR]; the Hansard record refers to a costs judgment in the amount of $18,000: Newfoundland and Labrador, House of Assembly, 44-2, vol XLIV, No 32 (13 December 2000) (John Ottenheimer).

capacity, and the costs therefore reflected the total amount in issue for all the class members—not just Kelly—as well as the total exposure to the defendants.[64]

The defendants pursued Kelly for the recovery of those costs, to the point where he undertook a campaign as determined as his efforts to save *Land & Sea*. Kelly took to the streets to ask people to contribute to his costs and sign a petition calling for class actions legislation in the province.[65] As acknowledged by the politicians who later introduced the *Class Actions Act*, he almost single-handedly "embarked on a crusade … he took to the streets and the malls, and the villages and the towns all over Newfoundland and Labrador to persuade the government to bring in appropriate legislation so that this would never happen again."[66]

Kelly's public notoriety and determination earned him a meeting with Liberal Premier Roger Grimes, where he made the case for class action reform.[67] In December 2000, Kelly petitioned the provincial Parliament for the enactment of class actions legislation.[68] The petition was signed by "thousands and thousands of people"[69] and referred to the class actions legislation that was available in Québec, Ontario, and British Columbia. Bill Kelly's personal exposure to costs was also a motivating factor, as the preamble to the petition demonstrates:

> Whereas class action proceedings contain a "no cost" or minimum cost clause which enables ordinary citizens to initiate court action without facing the prospect of tens of thousands of dollars in legal costs, thereby putting them on a "more or less" equal footing with large corporations, government agencies

[64] *Kelly* costs judgment, *supra* note 63 at paras 11, 15, 20.

[65] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Jack Harris); Interview with C Crosbie, *supra* note 50. See also "Supreme Court says no to class action", *CBC News* (7 June 1999), online: <www.cbc.ca/news/canada/supreme-court-says-no-to-class-action-1.181718>.

[66] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Tom Rideout). See also Jack Harris ("[t]his law is here before us today, Mr. Speaker, because of Mr. Bill Kelly" at *ibid*).

[67] Interview with C Crosbie, *supra* note 50.

[68] Newfoundland and Labrador, House of Assembly, 44-2, vol XLIV, No 32 (13 December 2000) (John Ottenheimer). Notably, this is one of the few instances of a Conservative politician advocating for class actions reform.

[69] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 44 (6 December 2001) (third reading: Jack Harris).

and other organizations with virtually unlimited funding.[70]

On July 6, 2001, Grimes announced his government's plans to draft a class actions statute, acknowledging that, "it is Mr. Kelly's efforts in this area that prompted government to consider this legislation."[71] The Hiland Insurance case was cited as evidence of the need for such legislation,[72] with supporters stating that, "may it never happen again what had happened to approximately 20,000 of our residents in the ordeal that they had to go through."[73]

Importantly, the announcement pre-empted the Supreme Court of Canada's reasons in *Dutton*,[74] which were released one week later. The government of Newfoundland and Labrador therefore pursued class action reform on its own initiative, and before the Supreme Court gave the green light to class actions at common law.

The government rushed to draft the statute, basing it on the Uniform Law Conference of Canada's *Uniform Class Proceedings Act*.[75] The statute therefore included a provision that Newfoundland residents would be included in class actions unless they opted out, whereas non-residents would have to opt-in to a Newfoundland class action.[76] As detailed further below, this would put Newfoundland at a

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[70] See *Class Proceedings Act*, RSBC 1996, c 50 [*BC CPA*], which contains what is effectively a "no-costs" provision (s 37). The Québec provisions (CCP, CQLR c C-25.01, Book VI, Title III) contain a provision that dictates the losing party pay costs, but its tariff of costs payable in a class action is vastly reduced—this may be the "minimum cost" clause to which the petition refers. However, the Ontario *Class Proceedings Act, 1992*, SO 1992, c 6, applies the normal "loser-pays" costs rules, with some exceptions (s 31) [Ontario *CPA*]. The Uniform Law Conference of Canada's model *Class Proceedings Act* (1995) [ULCC Act] contained two alternative clauses at s 37(1), one stating that the normal "loser-pays" costs rules apply with some exceptions, and the other stating that costs may not be awarded to any party to a class action (again, with some exceptions). The petition's statement that class actions proceedings are "no-cost" as a matter of course is therefore incorrect.

[71] Newfoundland and Labrador Executive Council (Justice), News Release, "Government to draft new class action legislation" (6 July 2001), online: <www.releases.gov.nl.ca/releases/2001/exec/0706n07.htm>.

[72] *Ibid*; Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Kelvin Parsons, Tom Rideout, Jack Harris).

[73] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 35 (22 November 2001) (second reading: Roland Butler). Ironically, even with class proceedings legislation, the 20,000 Hiland policyholders would have suffered the same fate: see *Lacey*, *supra* note 47 at paras 89–93.

[74] *Dutton, supra* note 3.

[75] ULCC Act, *supra* note 70; Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Kelvin Parsons); WK Branch, *The New Class Action Act* (St. John's: Newfoundland and Labrador Continuing Legal Education, 2002). The ULCC Act was a model Act that was drafted in order to provide guidance to provinces wishing to enact class actions legislation, and was heavily influenced by the *BC CPA*, *supra* note 70: it did not, in itself, have the effect of legislation.

[76] *Class Actions Act*, *supra* note 5, s 17. The justification for requiring non-residents to opt-in is to provide for certainty in class definition: Ruth Rogers, "A Uniform Class Actions Statute" (Proceedings of the Seventy-Seventh Annual Meeting of the Uniform Law Conference of Canada, 1995). The ULCC later changed its model statute to include an opt-out provision, on the basis that this would enable more national opt-out classes and remove some of the problems associated with overlapping multijurisdictional class

disadvantage compared to provinces in which national opt-out class actions would be permitted. Importantly, the statute also stated that costs could not be awarded in class actions, barring exceptional circumstances.[77] The adverse costs award against Bill Kelly, and the desire not to deter representative plaintiffs in future, had a significant influence upon this provision.[78] On November 19, 2001, Bill 34, "An Act To Permit An Action By One Person On Behalf Of A Class Of Persons" was introduced.[79] It was nicknamed the "Kelly Bill".[80]

The focus was primarily on providing access to justice for the people of Newfoundland and Labrador,[81] and it was recognized that class actions would make justice more affordable.[82] Unlike class actions reform in other jurisdictions, the Newfoundland bill appeared to have almost unanimous support,[83] including that of the Conservative opposition party (although Conservative politicians warned of the increased litigation against public authorities that had resulted from the Ontario legislation).[84] The consultation process included favourable submissions from the Canadian Bar Association, the Atlantic Trial Lawyers' Association, the Law Society, and the Federation of Municipalities.[85]

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actions: Uniform Law Conference of Canada, *Class Proceedings Act* (Consolidated 2006), s 16; *Uniform Class Proceedings Act (Amendment) 2006*.

[77] *Class Actions Act*, *supra* note 5, s 37; Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 44 (6 December 2001) (third reading: Jack Harris).

[78] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Yvonne Jones, Jack Harris).

[79] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 32 (19 November 2001) (introduction and first reading: Kelvin Parsons). See also Newfoundland and Labrador Executive Council (Justice), News Release, "Class Actions Act*"* (21 November 2001), online: <www.releases.gov.nl.ca/releases//2001/just/1121n01.htm>.

[80] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 35 (22 November 2001) (second reading: Kelvin Parsons); Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 44 (6 December 2001) (third reading: Jack Harris).

[81] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Kelvin Parsons, Yvonne Jones, Jack Harris).

[82] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Yvonne Jones).

[83] Interview with C Crosbie, *supra* note 50. The Ontario *CPA*, *supra* note 70, had unanimous support, but this was only after more than a decade of rigorous debate, and a mediation process by which Attorney General Ian Scott gathered the various stakeholders and gave them an ultimatum: class actions would be introduced, and it was up to them to produce a report to decide its shape: see Chiodo, *supra* note 8, chapter 4.

[84] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Tom Rideout).

[85] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Kelvin Parsons); Law Society of Newfoundland and Labrador, *Benchers' Notes* (October 2001) at 3, 7, online (pdf): <lsnl.ca/wp-content/uploads/2013/05/Benchers_Notes_Oct_2001.pdf>.

Supporters distanced the class actions statute from its American counterpart, stating clearly that, "We are not adopting the American model … we are adopting a well tried and tested Canadian model which will ensure the access to justice for thousands while protecting potential defendants from frivolous and vexatious lawsuits."[86] Class actions were seen as a much-needed replacement for an outdated, inflexible, and nebulous representative action rule.[87] The class action in Ontario against the Inco nickel refinery and various provincial and municipal government bodies was held up as an example of when it would be appropriate to bring a class action.[88]

The fact that the three largest provinces already had class actions was also mentioned, with the implication that Newfoundland was missing out on the benefits of such legislation.[89] The experience of other jurisdictions was also relied upon to show that class actions were not a risky proposition, but had been effective elsewhere, and that Newfoundland could learn from their experiences in tailoring its own statute.[90] The debate on class actions reform in Alberta, Manitoba, and the Federal Court was referred to, as well as the fact that Saskatchewan was on the verge of introducing its own legislation.[91]

However, the debate was not always as well-informed as it could have been. Supporters of reform referred to the experience in England[92] and Lord Woolf's wide-ranging review of the civil litigation system there. As part of this review, Lord Woolf recommended that opt-out (and opt-in) class actions legislation be enacted.[93] However, the Newfoundland debaters were incorrect in stating that those recommendations led to the "adopt[ion of] a class action regime along the lines of those of British Columbia and Ontario."[94] At the time of Lord Woolf's Report, there were in fact very few voices calling for generic opt-out class actions in England.[95] Lord Woolf focused on the case

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[86] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 34 (20 November 2001) (second reading: Yvonne Jones).

[87] *Ibid*.

[88] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 36 (22 November 2001) (second reading: John Ottenheimer) [Ottenheimer]. Ironically, this particular class action failed on a trial of the common issues because the court held that the plaintiffs suffered no actionable damage: *Smith v Inco Limited*, 2011 ONCA 628.

[89] Ottenheimer, *supra* note 88.

[90] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 35 (22 November 2001) (second reading: Roland Butler) [Butler].

[91] *Ibid.*

[92] By "England", I mean the jurisdiction of England and Wales.

[93] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Her Majesty's Stationery Office, 1996), Chapter 17, paragraph 87, recommendation 9.

[94] Butler, *supra* note 90.

[95] Either opt-out class actions were recommended for certain sectors (as in the National Consumer Council's 1988 *Group Actions: Learning from Opren* report) or generic reform was recommended on an opt-in basis

management of multiple individual claims (the opt-in approach), and this was the approach that England adopted, in the form of the Group Litigation Order (GLO) framework.[96] To this day, England has not adopted an opt-out class action regime, except in the area of competition law.[97] The incorrect perception that England had enacted class actions legislation was not limited to Newfoundland, but was also reflected in the Supreme Court of Canada's *Dutton* decision that made class actions available at common-law across Canada.[98] As far as reform in Canada relied on the English experience, then, it relied on a misperception.

The Kelly Bill received first reading on November 20, 2001, passed second reading two days later and then went to a Committee of the Whole House on December 6, 2001. The Bill passed a week later without amendment.[99]

The whole process took place just a few months after the Supreme Court of Canada's decision in *Dutton*,[100] although, oddly, the decision does not seem to be mentioned in the debates or elsewhere in the historical record (neither is the Newfoundland debate mentioned in the *Dutton* decision). *Dutton* involved the mismanagement of investment funds belonging to participants in the federal government's Business Immigration Program. The Court of Appeal for Alberta had allowed the representative action to proceed; the Supreme Court of Canada, in a unanimous decision written by Chief Justice Beverley McLachlin, not only upheld the Court of Appeal decision[101] but also overturned *Naken*. The Court found that, when interpreting the representative action rules of the various provinces, attention should

(as in the Law Society Civil Litigation Committee's 1995 *Group Actions Made Easier* report). Lord Woolf's interim report, released in June 1995, did not even mention class actions. It was the publication of *Group Actions Made Easier* in September 1995 that influenced his thinking in this area, although this focused not on opt-out class actions but on the case management of multiple individually viable claims arising from similar circumstances. Lord Woolf published an issues paper in January 1996, and this led to his recommendations on opt-out and opt-in class actions in Chapter 17 of his final *Access to Justice* report (*supra* note 93). Nevertheless, those recommendations attracted barely any attention compared to Lord Woolf's wider proposals; his recommendation on opt-out class actions appeared almost as an afterthought, and as a corollary to the opt-in approach.

[96] *Civil Procedure Rules* (UK), Part 19.III: Group Litigation.

[97] See the *Consumer Rights Act 2015* (UK), 2015 c 15, Schedule 8, amending s 47 of the *Competition Act 1998* (UK).

[98] *Dutton, supra* note 3. Part of the Supreme Court's reasoning for doing so was the fact that "many jurisdictions have enacted comprehensive class action legislation" (at para 30). England's GLO framework was included in this list, even though the GLO framework does not, as explained above, constitute comprehensive class action legislation.

[99] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 44 (6 December 2001) (third reading).

[100] *Dutton*, s*upra* note 3.

[101] See *ibid* at paras 59–60. The Court allowed the plaintiffs' appeal regarding the discovery of individual class members, finding that such discovery at this stage of the proceedings would be premature.

be paid to the criteria and procedures set out in class actions legislation in Ontario, British Columbia, Québec and elsewhere.[102]

It further held that representative actions should not be refused based on the existence of traditional bars to their use, such as separate contracts or individual damages assessments.[103] In doing so, the Court modified the requirements for bringing a representative action:[104]

1. the class is capable of clear definition;
2. there are issues of law or fact common to all class members;
3. success for one class member means success for all; and
4. the proposed representative adequately represents the interests of the class.

The Court held that countervailing considerations that may outweigh the benefits of a class action also had to be considered, with a balance to be struck between efficiency and fairness.[105] While these requirements overlap somewhat with the certification requirements in the Newfoundland and Labrador *Class Actions Act*,[106] the latter was influenced much more obviously by the ULCC Act[107] and the BC *CPA*.[108]

Three further points of interest can be drawn from the decision. First, the court justified its departure from *Naken* in two ways. It distinguished the previous decision on its facts.[109] More importantly, it found that the modern class action was no longer, as it had been in 1983, an untested procedure, and that "[i]n the intervening years, the importance of the class action as a procedural tool in modern litigation has

[102] *Ibid*, at paras 46–47, 51. See also Alberta Law Reform Institute, *Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions* (2004) at 77.

[103] *Dutton*, *supra* note 3 at para 43.

[104] *Ibid* at paras 38–41, 43, 48.

[105] *Ibid* at paras 42, 44. This was the "cost-benefit" test that had already been rejected by the Ontario and British Columbia legislatures. It is not to be confused with the guidance, contained in the *BC CPA* (supra note 70) and the Newfoundland *Class Actions Act* (*supra* note 5), on whether a class action is the "preferable procedure".

[106] *Class Actions Act*, *supra* note 5, s 5.

[107] *BC CPA*, *supra* note 70, s 4.

[108] *Ibid*, s 4, which provides further guidance on when a class proceeding might be considered the "preferable procedure" for the fair and efficient resolution of the common issues. This guidance is not provided in the Ontario or Québec class proceedings provisions.

[109] The Court found that *Naken* would have required particularised fact-finding at both the liability and damages stages, which "would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims" (*Dutton*, *supra* note 3 at para 47). Given the fiduciary duty claims in *Dutton*, it is not entirely clear that the resolution of that case would be any less complicated: see Picard JA's dissent in the *Dutton* case at the Court of Appeal of Alberta: *Western Canadian Shopping Centres Inc v Bennett Jones Verchere*, 1998 ABCA 392 at paras 22–33.

become manifest."[110] Ontario and BC had passed class actions legislation since *Naken*, but those were not the only changes that had taken place.

In the three decades since, numerous legal, political, and social changes had occurred in Canada that had changed the workings of the civil justice system as well as the perception of the courts' role in society. I have detailed these changes elsewhere.[111] They include the growing movement for consumer protection and environmental rights, and legal procedures to enforce those rights; the acceptance of contingency fees, which would help to promote access to justice in general and class actions in particular; and the advent of the *Canadian Charter of Rights and Freedoms*. This latter development entailed a more activist judiciary, as well as a challenge to the classic two-party model of adversarial litigation, with the rise of public interest standing, intervention, and the court's ability to strike down legislation. All of these developments accelerated the acceptance of class actions.

In Newfoundland, the debate on class actions coincided with a growing feeling that Ottawa was leaving the province behind. The cod fisheries were closed in July 1992, ending one of the main sources of economic activity in the province; a decade later, unemployment remained twice the Canadian rate, and the province's population had fallen by 10 per cent.[112] In 2003, the findings of the *Royal Commission on Renewing and Strengthening Our Place in Canada* were released, which revealed the depressed state of the economy, as well as the fact that hydroelectricity resources in Labrador had primarily benefited Québec.[113] While class action legislation was a fairly minor issue compared with these fundamental problems, it was one way in which Newfoundland could catch up with the rest of Canada. As one MPP said in the debates on the legislation:

> It is a bill that we felt ought to be consistent with at least a number of other Canadian jurisdictions. As it turns out, they are in fact the largest three Canadian jurisdictions, namely the Provinces of Québec, Ontario and British Columbia. I think it is only fitting that we, in this Province, have similar legislation.[114]

Bill Kelly, too, declared that such legislation was necessary so that, "[n]ever again will

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[110] *Dutton*, *supra* note 3 at para 46.

[111] Chiodo, *supra* note 8 at 47–69.

[112] William E Schrank, "The Newfoundland fishery: ten years after the moratorium" (2005) 29:5 Marine Policy 407.

[113] Victor Young et al, *Report of the Royal Commission on Renewing and Strengthening Our Place in Canada* (St. John's: Office of the Queen's Printer, 2003).

[114] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 36 (22 November 2001) (John Ottenheimer).

ordinary Newfoundlanders and Labradorians be left on the sidelines".[115] His grass-roots campaign made his province's experience of class action reform unique. While reform efforts in other provinces were led by politicians with legal backgrounds (such as Attorney General Ian Scott in Ontario, and Minister for Social Development Pierre Marois in Québec), Bill Kelly was an ordinary person. He was a local celebrity who had help from Chesley Crosbie, but essentially he orchestrated his own campaign, mobilised his own army of volunteers, and got his petition signed by thousands of people.[116] Reform would not have taken place when it did without him. Because of his activism, class actions came about in Newfoundland years ahead of the other Maritime provinces.[117]

Since then, Newfoundland's Act has also proved influential on the common-law development of class actions in Prince Edward Island. In *King & Dawson v Government of PEI*,[118] the province's Supreme Court allowed a representative action to proceed under Rule 12.01 of the PEI Rules of Civil Procedure (the wording of which is substantially similar to Newfoundland's representative action rule). In an effort to provide a procedural framework for the prosecution of the action, the Court appended the wording of Newfoundland's *Class Actions Act* to its decision, while at the same time calling for the PEI legislature to enact its own statute.[119]

In comparison to the larger provinces of Ontario, British Columbia, and Québec, however, Newfoundland has found itself overshadowed in the two decades since it enacted class proceedings legislation.

Part III—Class Actions in Newfoundland and Labrador

Since the passage of the *Class Actions Act*, class actions in Newfoundland and Labrador have been much fewer in number than those commenced in Ontario and Québec.[120] This is not simply due to the novelty of the statute. It is also because the

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[115] Newfoundland and Labrador Executive Council (Justice), News Release, "Justice Minister announces Class Actions Legislation" (21 November 2001), online: <www.releases.gov.nl.ca/releases/2001/just/1121n05.htm>.

[116] Newfoundland and Labrador, House of Assembly, 44-3, vol XLIV, No 44 (6 December 2001) (third reading: Jack Harris).

[117] New Brunswick's *Class Proceedings Act*, SNB 2006, c C-5.15, was proclaimed in force on 30 June 2007, and Nova Scotia's *Class Proceedings Act*, SNS 2007, c 28, was proclaimed in force on 3 June 2008.

[118] *King & Dawson v Government of PEI*, 2019 PESC 27.

[119] *Ibid* at paras 14–16. As noted above, PEI is the only province in Canada without its own class proceedings statute.

[120] Ontario, for example, saw approximately 850 class actions commenced in the first 18 years following the passage of the Ontario *CPA*: Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (2018) at 5 [LCO Report]. In the 18 years since the passage of the *Class Actions Act* (*supra* note 5) only 22 class actions have been commenced in Newfoundland and Labrador (these are actions that have

Class Actions Act is provincial by nature; for class actions commenced under that statute, people from outside the province are required to opt in. Because of inertia, or lack of information, or other barriers to proceeding, opt-in classes tend to be much smaller than opt-out classes (where people meeting the class definition are included in the class until they opt out). Class actions in Newfoundland have therefore been largely provincial, both in class member composition and in subject matter.

This has had its advantages and disadvantages. The disadvantages are that Newfoundland has not been able to compete with provinces such as Ontario when it comes to class actions that are national in scope. In the first class action to be commenced under the new legislation, concerning the cholesterol-lowering drug Baycol,[121] the Newfoundland action was certified at the same time that a settlement agreement was reached in Ontario, on behalf of a national class.[122] The Newfoundland court stayed the certification application until the settlement agreement in Ontario was approved;[123] thereafter, the Newfoundland case was wrapped into the national settlement out of Ontario. However, the Ontario settlement only included class members who suffered from rhabdomyolysis, a muscle condition that can cause kidney failure, and only one Newfoundland class member qualified.[124] In cases such as this, Newfoundland residents can find their rights decided in another province or another part of the country entirely, which greatly restricts the ability of residents to object to a settlement or otherwise take part in proceedings.[125] This was the reasoning of the Newfoundland Trial Division when it took jurisdiction over Newfoundland residents in a later class action that arose out of events in New Brunswick.[126]

On the other hand, the advantages of the *Class Actions Act* are demonstrated when the class actions are truly provincial. Provincial class actions are, in many ways, more representative of local interests and tied more closely to local events that figure more largely in the public consciousness; they therefore tend to be "class actions that the population supports".[127] The most prominent example is the class action that arose from the breast cancer testing scandal at Eastern Health in St. John's.[128] In that case, more than 400 patients from 1997 to 2005 received inaccurate results from hormone

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been reported on CanLII—it is likely that more have been commenced, although the number would still be far less than the number of class actions in Ontario).

[121] *Pardy et al v Bayer Inc-Class Actions Act*, 2003 NLSCTD 109.

[122] *Pardy et al v Bayer Inc*, 2004 NLSCTD 72.

[123] *Ibid* at para 180.

[124] Daryl-Lynn Carlson, "Clash Actions" *The National* (April/May 2005) at 31–33.

[125] *Ibid* at 31.

[126] *Ring v Canada (AG)*, 2007 NLTD 213.

[127] Interview with C Crosbie, *supra* note 50.

[128] *Doucette v Eastern Regional Integrated Health Authority*, 2007 NLTD 138 [*Doucette 1*].

receptor testing, which meant they were not given the correct treatment.[129] While class actions arising from corporate wrongdoing or negligence are generally commenced *after* a public enquiry or regulatory finding, in the case of the breast cancer testing scandal it was the other way around.[130]

In that case, Chesley Crosbie was once more to play a key role in the development of class actions in his province. Women who had been affected by the faulty testing initially went to him to commence individual medical malpractice lawsuits. As more and more women came forward, Crosbie realized there was an extensive problem and began investigations to start a class action lawsuit.[131] In response to these investigations, Eastern Health produced documents that revealed the extent of the crisis. This provoked intense criticism in the provincial legislature, which eventually led the Health Minister to announce a judicial inquiry.[132] The Cameron Inquiry began in 2008, which found numerous mistakes in the diagnosis and treatment system, leading to the publication of a condemnatory report in 2009.[133] The class action eventually settled;[134] together with the Cameron Report, it mandated numerous systemic changes at Eastern Health,[135] thereby fulfilling the behaviour modification goal of class proceedings.[136]

While the number of actions commenced since the enactment of the *Class Actions Act* has not been high, these actions have been reflective of local concerns. In fact, of the 22 reported actions commenced under the Act to date, 19 have involved facts arising out of provincial occurrences or issues, including the following:

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[129] Barb Sweet, "Cameron Report: Breast cancer testing scandal propelled passionate activism", *The Telegram* (9 April 2019) online: <www.thetelegram.com/news/local/cameron-report-breast-cancer-testing-scandal-propelled-passionate-activism-299448/>; Anna Wilde Mathews "Bad Cancer Tests Drawing Scrutiny", *Wall Street Journal* (4 January 2008) at B1.

[130] Interview with defence counsel in St. John's, Newfoundland (11 April 2019).

[131] Interview with C Crosbie, *supra* note 50.

[132] Mark Quinn, "Newfoundland launches judicial inquiry" (2007) 177:1 CMAJ 24.

[133] The Honourable MA Cameron, *Commission of Inquiry on Hormone Receptor Testing* (St. John's: Government of Newfoundland and Labrador, 2009); Government of Newfoundland and Labrador (Health and Community Services), News Release, "Government Releases Cameron Inquiry Report" (3 March 2009), online: <www.releases.gov.nl.ca/releases/2009/health/0303n05.htm>. See also "Eastern Health can't win breast cancer lawsuit: premier" *CBC News* (14 April 2008), online: <www.cbc.ca/news/canada/newfoundland-labrador/eastern-health-can-t-win-breast-cancer-lawsuit-premier-1.702698>.

[134] *Doucette v Eastern Regional Integrated Health Authority*, 2010 NLTD 29 [*Doucette 2*].

[135] Katherine Chubbs, "The estrogen receptor/progesterone receptor testing errors in Newfoundland and Labrador: A journey of hope, health, and healing" (2013) 26:4 Healthcare Management Forum 196; Deborah M Gregory & Patrick S Parfrey, "The Breast Cancer Hormone Receptor Retesting Controversy in Newfoundland and Labrador, Canada: Lessons for the Health System" (2010) 23:3 Healthcare Management Forum 114; Newfoundland and Labrador, House of Assembly*,* 46-1, vol XLVI, No 53 (23 March 2009) (Yvonne Jones).

[136] The goal of behaviour modification was noted in *Dutton*, *supra* note 3 at para 29; the other two goals of class proceedings are judicial economy (*ibid* at para 27) and access to justice (*ibid* at para 28).

- Indigenous groups seeking status and recognition;[137]
- medical negligence at local clinics and hospitals;[138]
- impugned decisions of provincial administrators;[139]
- claims against educational institutions in the province;[140]
- sexual assault claims against provincial institutions;[141]
- privacy breaches against locally-based corporations;[142]
- claims against a payday loan company in St. John's;[143]
- residents suing corporations for flooding and property damage;[144]
- high rates of vehicle collisions caused by moose on the roads;[145] and
- allegedly addictive video lottery gaming terminals.[146]

The following table also illustrates the numbers of class actions by category compared to those commenced in Ontario.[147] As can be seen, Crown liability, privacy, and environmental class actions are much more common in Newfoundland than they are in Ontario. Of the Crown liability actions, one-third involved local Indigenous rights; two-thirds of the privacy actions involved localized breaches; and both of the environmental class actions involved localized flooding. Conversely, class actions involving national or cross-provincial issues such as competition law, securities, and franchise law were non-existent. Despite these differences, the rate of certification of

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[137] *Davis v Canada (AG)*, 2008 NLCA 49; *Best v Nunatsiavut Government*, 2015 NLTD(G) 83.

[138] *Doucette 1*, *supra* note 128; *Doucette 2*, *supra* note 134; *Rideout v Health Labrador Corp*, 2007 NLTD 150.

[139] *HP Management Inc v R*, 2007 NLCA 65; *Sundance Saloon Limited v Newfoundland and Labrador (Finance)*, 2014 NLCA 15; *Brown v Newfoundland and Labrador (Workplace Health, Safety and Compensation Commission)*, 2009 NLTD 106.

[140] *Memorial University of Newfoundland v Lee and Acreman*, 2011 NLCA 55; *Thorne v The College of the North Atlantic*, 2017 NLCA 30; *Chen v Memorial University of Newfoundland and Labrador*, 2019 NLSC 193.

[141] *Jane Doe (#7) v Her Majesty in Right of Newfoundland and Labrador*, 2019 NLSC 170; *Anderson v Canada (AG)*, 2015 NLTD(G) 181.

[142] *Hynes v Western Regional Integrated Health Authority*, 2014 NLTD(G) 137; *Butt v Kiewit Energy Corporation*, 2019 NLSC 119.

[143] *Bellows v Quik Cash Ltd*, 2004 NLSCTD 191.

[144] *Dewey v Corner Brook Pulp and Paper Limited*, 2019 NLCA 14; *Chiasson v Nalcor Energy*, 2019 NLSC 133.

[145] *George v Newfoundland and Labrador*, 2016 NLCA 24.

[146] *Piercey Estate v Atlantic Lottery Corporation Inc*, 2008 NLTD 202; *Rice v Atlantic Lottery Corporation Inc*, 2012 NLTD(G) 58; *Atlantic Lottery Corporation Inc-Société des loteries de l'Atlantique v Babstock*, 2018 NLCA 71.

[147] The categories and numbers for Ontario are taken from the LCO Report, *supra* note 120 at 15. The Ontario numbers represent class actions from 1993–2018. The numbers in this table do not include the 'other' category in Ontario, which represents 3% of class actions filed in that province. The numbers for Newfoundland are those reported on the CanLII website, as indicated above.

class actions is similar in Newfoundland as compared to Ontario and Québec,[148] indicating that the provincial nature of the *Class Actions Act* is not an impediment to the working of the statute.

Category	**Number of NFL class actions**	**Percentage of NFL class actions**	**Percentage of ON class actions**
Securities	0	0	16
Product Liability	1	5	15
Privacy	2	10	3
Negligence	2	10	3
Mass Torts	0	0	6.5
Insurance	0	0	6.5
Franchise	0	0	2
Environmental	2	10	2
Employment & Pensions	3	14	12
Crown Liability	9	37	7
Consumer Protection	3	14	12
Competition Act	0	0	15
Total	22	100	100

Actions arising out of local circumstances, and spearheaded by local counsel,[149] are much more likely to be representative of class members' interests, and thereby provide them with a voice and greater opportunities for participation. An empirical study of this phenomenon—for example by comparing the opt-out rates in class actions arising out of purely provincial events with those in class actions arising from national events—is beyond the scope of this paper. However, it would provide an interesting avenue for future research.

Conclusion

Since the passage of class actions legislation in Ontario and elsewhere, class action activity has migrated towards the more financially fruitful national opt-out class action. This is not the case in Newfoundland and Labrador, however, which has been

[148] Of the 18 actions in Newfoundland in which the result of certification is reported on CanLII, 13 (72%) were certified, while 5 (28%) were not. The percentage of cases that have been certified vs not certified are: for Ontario, 71% vs 29%; for Québec, 71% vs 29% (see LCO Report, *supra* note 120 at 39). I note that my numbers for Newfoundland are significantly higher than those reported by The Honourable Ward Branch in *Class Actions in Canada*, 2nd ed (Toronto: Carswell, 2019), which reports a 58% certification rate (at para 22.80). Many of the Newfoundland certification decisions reported on CanLII are relatively recent, which may explain the discrepancy.

[149] Almost half of the actions listed involved Chesley Crosbie.

forced by the terms of its statute to adopt a more local approach. A review of the case law indicates that this local representation has given rise to more opportunities for litigant participation. This is a hypothesis that would benefit from further empirical testing. The historical record is clear, however: the story of class actions in Newfoundland and Labrador is one of grass roots activism that arose from and reflected the needs of the people of the province. To a large extent, that remains true in the practice of class actions there today.