# ACCESS TO JUSTICE, JUDICIAL ECONOMY, AND BEHAVIOUR MODIFICATION: EXPLORING THE GOALS OF CANADIAN CLASS ACTIONS

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*The author examines the three goals of class actions in Canada: access to justice, judicial economy, and behaviour modification, with a focus on the preferability inquiry at certification. A comprehensive analysis of the goals is undertaken through an examination of the various law commission reports, critical commentary, and case law from the Supreme Court of Canada and lower courts in every Canadian jurisdiction with class proceedings legislation. While courts and commentators have focused on the economic aspects of access to justice in certification applications, the author advances the position that the definition and use of access to justice needs to be broadened, mainly by considering non-economic factors. The certification stage is vital to access to justice as it can transform claims that are otherwise non-viable (because the cost of litigation exceeds any potential benefits) into aggregate viable claims. Through this transformation, certification breathes new life into substantive rights, something that the author asks the courts to consider when they engage with whether or not to certify a class.*

*L'auteur examine les trois objectifs des recours collectifs au Canada: accès à la justice, économie de frais juridiques, et modification de comportement, en insistant sur la question de la meilleure procédure à la certification. Une étude exhaustive des objectifs est entreprise au moyen de l'examen des rapports de diverses commissions du droit, d'observations critiques ainsi que de la jurisprudence de la Cour suprême du Canada et de tribunaux inférieurs dans les ressorts au Canada qui ont des lois sur le recours collectif. Alors que les tribunaux et les commentateurs ont surtout parlé des aspects économiques de l'accès à la justice dans les demandes de certification, l'auteur avance la position que la définition et utilisation d'accès à la justice doit être élargie, essentiellement en tenant compte des facteurs non économiques. L'étape de la certification est essentielle pour l'accès à la justice parce qu'elle peut transformer des demandes, qui autrement n'auraient pas été viables (les frais de procès dépassant les avantages potentiels), en un ensemble viable de demandes. Grâce à cette information, la certification revivifie des droits importants, ce que l'auteur demande aux tribunaux d'envisager lorsqu'ils décident d'accorder la certification à un recours collectif.*

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## I. INTRODUCTION

The Supreme Court of Canada has held that class proceedings are intended to further three goals: judicial economy; access to justice; and behaviour modification.[1] These goals are meant to inform judicial decision-making — but what do they mean? How do they affect actual parties in actual class actions? Do they matter at all? This article is an attempt to address these issues.

Consider the following scenario: a bank unlawfully deducts one half of one cent from the accounts of 1,500,000 customers each month for 15 years. Customers complain, but the bank refuses to return the funds. Over time, customers might lose a few dollars each, but the loss to each individual is so minimal as to be almost meaningless. Nevertheless, the bank unlawfully profits to the tune of more than $1,000,000. Although the loss suffered by each customer is tiny, their rights have been infringed. They have a right to recover that money from the bank. No sane individual or rational economic actor, however, would take on the expense of a lawsuit to recover their missing pennies. The economic cost, the opportunity cost, and the sheer difficulty of recovering such a small amount from an institutional defendant conspire to prevent recovery. Only a class action offers plaintiffs the opportunity and the means to recover their money and deprive the bank of its unlawful gain.

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[1] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 27-29 [*Dutton*].

Each of the claimants in this example has what I call a *legitimate* claim. They have a valid and actionable legal right that, if only it were more substantial, would be exercised through the courts. To return to the example, if the bank had unlawfully deducted $1,000 per month from its corporate account holders, they would not hesitate to sue to recover the money. These are individually viable claims. For the half-cent customers, the costs of suing (money, time, and psychological trauma) outweigh the potential benefits (the return of the money) on an individual level. Their claims are individually non-viable. Only in the aggregate, as a class action where all of the claims are combined together, do they become realistically actionable. The only way open to the plaintiffs to recover their funds is to seek certification as a class of individuals harmed by the actions of the defendant and pursue their action as a collective.

According to the Supreme Court, the "preferability inquiry [at certification in a class action] should be conducted through the lens of … judicial economy, access to justice, and behaviour modification."[2] This gives the three goals a potentially determinative role in tipping the balance for or against certification in a given case. Certification can transform individually non-viable claims into collectively viable claims because class actions are a means by which rights that go unasserted on an individual level may be asserted in the aggregate. Class proceedings are a powerful procedural tool and the Supreme Court has said that "[w]ithout class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims."[3]

In spite of their ability to substantially alter the outcome of an action, the meanings of "access to justice," "judicial economy," and "behaviour modification" remain fluid. They recur frequently in class action judgments, but their precise definitions are elusive. Canadian class proceedings statutes do not mention them at all. Courts and commentators have ascribed a variety of meanings to them without any significant debate or deliberate reasoning. This is not because the terms are not being used by the courts. On the contrary, the lower courts have enthusiastically adopted and applied them in a range of decisions, from judging interlocutory motions to assessing fees. The goals are invoked most frequently at certification and play a significant role in judicial reasoning.

In Part II, I examine how courts, law commissions, and commentators have defined and used access to justice in shaping class actions policy and cases. I propose that a less restrictive definition is more likely to facilitate meaningful access to justice through the mechanism of the class action. Plaintiffs and their grievances are not monolithic and a vehicle like the class action for the vindication of legitimate claims must be used as flexibly as possible to promote the resolution of as many claims as possible.

Access to justice currently covers a multitude of meanings, but the only constant is the focus on the economic. The viability of actions, the unit cost of litigation, and the aggregative pursuit of small value claims all reveal an undercurrent of economic considerations. These are considered the barriers that must be overcome to assert a claim in the courts. Instead of

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2 *Hollick v. Toronto (City of)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 27 [*Hollick*]. While the Court specifically says "in the absence of legislative guidance," this has never been the practice in the courts. Even in British Columbia and other jurisdictions where the legislation enumerates factors to consider at the preferability stage, the terms are still in heavy (almost universal) use.

3 *Dutton*, *supra* note 1 at para. 28.

defining access to justice in predominantly economic terms, I argue that the definition should take into account broader considerations. Such considerations include cost, delay, and complexity of proceedings, as well as geographic and physical inaccessibility, socio-cultural, psychological, and demographic characteristics of litigants as barriers to the resolution of claims, each of which may prevent a claimant from seeking a remedy for a wrong done to them. These considerations are informed by access to justice scholarship beyond the class action realm. Viewed in this way, a class action may be the appropriate procedure in a greater range of cases than is currently accepted in order to overcome barriers to the resolution of claims. Creating the potential for more actions to be certified means that more individually non-viable claimants will be able to pursue claims that would otherwise be left without vindication. More claimants will have a shot at their day in court.

In Part III, I assess judicial economy and behaviour modification. First, I present the current meanings of these terms from the commissions, courts, and commentators. Unlike in Part II, I do not believe that these definitions need to be widened. There is ample interpretive scope available to judges; they need only be aware of the possibilities inherent in these terms to justify certification on a wider variety of grounds. Individually non-viable claims that go unasserted as class actions are harms for which there are no remedies. Justice ignored is justice denied. Expanding awareness of the reasons that are available to justify certification (or that make a class action the preferable procedure) should result in the prosecution of more legitimate claims.

At the same time, the lower courts have indicated a preference for access to justice over the other terms to justify certification. Embracing the term that is most likely to facilitate certification hints that something else is going on. Part III proposes a theory for why access to justice has become the dominant concern for the courts at certification. I am not interested in whether access to justice *should* be the dominant factor in the courts, but in *why* it is and what that says about the process and mechanics of certification. I believe that the timing and transformative aspects of certification combine to make access to justice the most useful factor for judges. Early in a class proceeding, only access to justice is truly determinative when assessing the potential benefits of a class. The key moment is the transformation of heretofore individually non-viable claims into a collectively viable action by combining them with individually viable claims or numerous non-viable claims, with the result that rights can be meaningfully exercised. This process reveals the unique utility of the class proceeding: it can alter the nature of substantive rights, transmuting dross into gold. Where claims are otherwise non-viable, only through the medium of the class action do they become actionable. Procedure, in effect, breathes new life into substantive rights.

The result of certification and the increased pursuit of legitimate claims will undoubtedly create more litigation. Justice may well mean more litigation. Rights that go unexercised are meaningless, and their exercise, whether the plaintiff is successful or not, is the hallmark of a functioning legal system. The courts exist to allow the vindication of rights — class actions permit more people to use them to that end.

This project is necessarily descriptive because no one has comprehensively examined the issue, particularly the case law. My research covers all of the provinces with class action legislation, including Quebec (although it is not my focus).[4] Jurisdictions with ad hoc systems are not addressed specifically, although cases are included where appropriate.

## II. DEFINING ACCESS TO JUSTICE IN CANADIAN CLASS ACTIONS

### A. ACCESS TO JUSTICE

The first sections of this Part introduce the definitions of access to justice in the various law commission reports that provide the framework for Canadian class action legislation. It presents the small body of critical commentary addressing access to justice in the class action context, followed by the courts' understanding and use of the term. In the latter half of this Part, I introduce possibilities for broadening the current definition to include the role of class actions in overcoming non-economic barriers to the resolution of legitimate claims. To return to my example, this Part proposes a number of new reasons for why certification should be allowed: not only because the amount at issue is small, but because of other, less economically-oriented reasons that may prevent plaintiffs from suing to recover their money as they are entitled to do.

This Part is primarily about reorienting the meaning of access to justice in class actions scholarship towards a version that recognizes that money is not the only factor preventing individuals from exercising their rights. This article is both an attempt to synthesize current thinking from various domains and to move forward in a new direction. By drawing awareness to the full range of barriers that impede the pursuit of legitimate claims, courts may be more willing to certify. More certification results in the pursuit of more individually non-viable claims, with the result that justice (in whatever form) is available to all with legitimate grievances.

### B. THE SCOPE OF ACCESS TO JUSTICE — A CATEGORICAL APPROACH

Throughout this article, I use a categorical approach to describe the understandings of access to justice, judicial economy, and behaviour modification. Categories are useful to identify similarities and differences across a range of sources. These categories are the result of having read through all the cases and commentary. I have not imposed them on the sources, but identified them as the dominant themes.

The definitions of access to justice can be divided into two open categories:

(1) Economic viability of claims

(2) Overcoming non-economic barriers to litigation

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[4] See *Class Proceedings Act*, S.A. 2003, c. C-16.5; *Class Proceedings Act*, R.S.B.C. 1996, c. 50; *Class Proceedings Act, 1992*, S.O. 1992, c. 6; *The Class Proceedings Act*, S.M. 2002, c. 14, C.C.S.M. c. C130; *Class Proceedings Act*, S.N.S. 2007, c. 28; *Class Proceedings Act*, S.N.B. 2006, c. C-5.15; *An Act respecting the class action*, R.S.Q. c. R-2.1.

The definition adopted by a court or commentator may fall into one or both categories. Although separating the categories into the economic and the non-economic might seem teleological, the cases and commentary really do divide along these lines. By defining "economic" broadly, I hope to demonstrate that while there may appear to be many meanings, at their core they all share a fascination with dollar value.

### C. ACCESS TO JUSTICE AND THE LAW COMMISSION REPORTS

Because of the relative age of class actions legislation in Canada, the understanding of their purpose is circumscribed by the various law reform commission reports. Their findings have set the interpretive boundaries on access to justice and, in order to identify how the term is defined, it is necessary to look at how they understand it. I have classified their respective definitions and uses by reference to my categories.

There are a number of law commission reports on class actions. The most significant was the Ontario Law Reform Commission's *Report on Class Actions*,[5] followed by a later report from the Attorney General.[6] Outside Ontario, a consultation document was prepared for the British Columbia Ministry of the Attorney General,[7] as well a report by the Manitoba Law Reform Commission (MLRC).[8] The Alberta Law Reform Institute (ALRI) released a report in 2000,[9] the same year that the Federal Court Rules Committee published a discussion paper.[10] There was an earlier report for the Federal Court, but its impact has been minimal.[11] The Uniform Law Conference of Canada discussed the potential for class actions legislation in 1988.[12]

The economic understanding of access to justice focuses on the "potential of class actions to provide access to justice for aggrieved persons who would otherwise be denied the benefit of existing remedies" in the face of economic barriers.[13] Access to justice creates savings by lowering the unit cost of litigation.[14] Class actions are essential procedural mechanisms

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5 Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) [OLRC Report].

6 Ontario, Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Class Action Reform* (Toronto: Queen's Printer, 1990) [OAG Report].

7 Ministry of Attorney General, *Consultation Document: Class Action Legislation for British Columbia* (Victoria: Ministry of Attorney General, 1994). It is worth noting that this report on the feasibility of class actions makes no mention at all of access to justice.

8 Law Reform Commission, *Class Proceedings*, no. 100 (Winnipeg: Manitoba Law Reform Commission, 1998) at 1 [MLRC Report].

9 Alberta Law Reform Institute, *Class Actions: Final Report No. 85* (Edmonton: Alberta Law Reform Institute, 2000) [ALRI Report].

10 Federal Court of Canada, Rules Committee, *Class Proceedings in the Federal Court of Canada: A Discussion Paper* (Ottawa: Federal Court of Canada, 2000) [FCC Report].

11 Jennifer Whybrow, "The Case for Class Actions in Canadian Competition Policy: An Economist's Viewpoint" in Department of Consumer and Corporate Affairs, *A Proposal for Class Actions Under Competition Policy Legislation* (Ottawa: Information Canada, 1976) 196 at 214 (describing the costs vs. recovery rationale; surprisingly, the term "access to justice" does not appear).

12 Michael G. Cochrane, "Class Actions: A Path to Reform" in Uniform Law Conference of Canada, *Proceedings of the Seventieth Annual Meeting, Toronto, Ontario, 1988* 49, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/poam2/70th%20Annual%20Meeting.pdf> [*ULCC Proceedings*]. The report does not directly address access to justice. It does state, as one of the three reasons for class actions legislation that class proceedings legislation "could provide improved access to the courts for people whose claims might not otherwise be asserted" (at 52). This seems to be a fairly economic definition.

13 OLRC Report, *supra* note 5 at 121 (in a section entitled "Access to the Courts").

14 OAG Report, *supra* note 6 at 17, 60.

because "rights and obligations are of little value if they cannot be asserted or enforced effectively *and economically*."[15] Access to justice is important for "individuals who may collectively have experienced significant loss, but who individually cannot justify the cost of litigation to obtain compensation."[16] Where there is a mix of individually viable and non-viable actions, the class shares risks and rewards between members.[17] As legal fees skyrocket, "the cost of individual litigation deprives many people of a remedy because they [cannot] afford to go to court."[18]

Finally, overcoming non-economic barriers to litigation is a proper role for access to justice. The social and psychological characteristics of claimants can present barriers.[19] Class actions "may provide an antidote to the social frustration" where rights are not otherwise vindicated.[20] Making justice more user-friendly and reducing psychological barriers is a goal of class proceedings.[21]

Collectively, these reports demonstrate that economic considerations are the defining characteristic of access to justice. While the OLRC Report delves into social and psychological barriers, and the MLRC and ALRI reports refer to that discussion, the prime factor remains the economic viability of claims. This economic focus becomes even more pronounced in the critical commentary.

### D. ACCESS TO JUSTICE IN CRITICAL COMMENTARY

Perhaps because of the young age of Canadian class proceedings legislation, commentators have not yet written extensively on access to justice in the class action context. Few commentators mention the term more than cursorily. This is telling: if commentators do not pay attention to the definition of the term, then either its meaning is so widely accepted and static that it deserves no analysis or, and this is what I believe, it is a fluid, albeit unproblematized, referent. The term can be used any way that a commentator requires because its meaning is not fixed. While such inconclusiveness may be helpful to commentators, it is not helpful to courts seeking to determine issues on access to justice considerations and may blind them to the full potential of the term.

Despite the absence of an accepted definition, access to justice does appear in a number of treatments. The commentators subscribe to a predominantly economic understanding, although there are occasional mentions of psychological barriers. Mentions are brief; another indication that access to justice has not yet been fully theorized in the class action context.

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15 *Ibid.* at 16 [emphasis added]. See also MLRC Report, *supra* note 8 at 23; FCC Report, *supra* note 10 at 13.

16 MLRC Report, *ibid.* at 1, 22, 25 (citing *Hollick v. Toronto (Metropolitan)* (1998), 63 O.T.C. 163 at para. 19 (Ct. J. (Gen. Div.)); see also Neil J. Williams, "Damages Class Action Under the Combines Investigation Act" in Department of Consumer and Corporate Affairs, *supra* note 11, 1 at 69 [Williams, "Damages"].

17 MLRC Report, *ibid.* at 24. See also Williams, "Damages," *ibid.* at 30.

18 ALRI Report, *supra* note 9 at 43, 47.

19 OLRC Report, *supra* note 5 at 127-31, 139. See also MLRC Report, *supra* note 8 at 2.

20 OLRC Report, *ibid.* at 130.

21 ALRI Report, *supra* note 9 at 44, 47, 53. The Report reduces the definition to the economics of pursuing deserving claims. See also Williams, "Damages," *supra* note 16 at 30.

I have classified commentators by reference to my categories, not by reference to the authors, in order to focus on the definitions themselves.

Access to justice has been described as the "most important objective" of class proceedings legislation.[22] It is, however, a concept defined by economic considerations. The "high cost of litigation …[is] a substantial barrier to redress" and, therefore, the impetus for class action legislation.[23] Access to justice in class proceedings is the pursuit of claims otherwise too small to justify the expense,[24] because the costs deter individual claimants.[25]

For some, access to justice is reduced to purely economic considerations of feasibility — the pursuit of "individually non-viable claims."[26] For two leading commentators, access to justice is a "purely procedural ambition" of class proceedings, designed to facilitate compensation.[27] It occurs as a by-product or benefit of effective economic deterrence. Access to justice is about efficiency,[28] because economic reality often constrains the vindication of legitimate rights.[29] Cost-sharing is an advantage for parties with individually non-feasible claims[30] because it furthers claims that might not otherwise be pursued.[31]

Class proceedings can also overcome non-economic barriers to redress and provide leverage against large defendants,[32] and psychological security[33] through safety in numbers.[34] Non-monetary barriers (language, leverage, education, and poverty) are access to justice considerations[35] because access is frustrated by such social barriers.[36]

### E. ACCESS TO JUSTICE AT THE SUPREME COURT OF CANADA

While commentators and law reform commissions produce frameworks to understand access to justice, the Supreme Court has provided its own definition. In *Hollick*[37] and

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22 Garry D. Watson, "Class Actions: The Canadian Experience" (2001) 11 Duke J. Comp. & Int'l L. 269 at 269.

23 Ward K. Branch, *Class Actions in Canada*, looseleaf (Aurora: Canada Law Book, 2008) at paras. 2.30, 6.20. The benefits to plaintiffs of aggregative proceedings include "economies of time, effort and expense."

24 McCarthy Tétrault LLP, *Defending Class Actions in Canada* (Toronto: CCH Canadian, 2007) at 3.

25 Watson, *supra* note 22 at 275.

26 *Ibid.* at 269. See also Michael G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (Aurora: Canada Law Book, 1993) at 5-6.

27 Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003) at 28.

28 Jamie Cassels & Craig Jones, *The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (Toronto: Irwin Law, 2005) at 335 (although there are brief mentions (and here they cite the MLRC & ALRI Reports) of overcoming social or psychological barriers).

29 *Ibid.* at 337-38, citing Allen Linden, *Canadian Tort Law*, 7th ed. (Markham: Butterworths, 2001) at 22.

30 Jennifer K. Bankier, "Class Actions for Monetary Relief in Canada: Formalism or Function?" (1984) 4 Windsor Y.B. Access Just. 229 at 231-32, 299.

31 Branch, *supra* note 23 at paras. 3.10, 3.40.

32 *Ibid.* at para. 6.30. While he does not clearly define this advantage as belonging to access to justice, its description fits within the same characterization.

33 Neil J. Williams, "Consumer Class Actions in Canada — Some Proposals for Reform" (1975) 13 Osgoode Hall L.J. 1 at 3-4 [Williams, "Reform"].

34 Branch, *supra* note 23 at para. 6.40, citing Williams, "Reform," *ibid.*

35 Bankier, *supra* note 30 at 231-32, 299.

36 Michael A. Eizenga *et al.*, *Class Actions Law and Practice*, looseleaf (Markham: LexisNexis, 1999) at para. 1.7.

37 *Hollick*, *supra* note 2.

*Dutton*,[38] and with minor mentions in *Bisaillon*,[39] *Danier Leather*,[40] and *Dell*,[41] the Supreme Court has fixed the interpretive bounds of access to justice.[42]

*Dutton* was the Court's first major statement on access to justice in class proceedings. The Court found that one of the three advantages of class actions over a multiplicity of individual suits was cost-spreading.

> [B]y allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.[43]

In *Hollick*, the Chief Justice stated that

> [t]he [Ontario *Class Proceedings*] Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool.… [B]y distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own.[44]

The Court also said that "one important benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all."[45] The value of the claims is also a determining factor, because if "class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions."[46] These statements indicate an economic interpretation of access to justice.

The Supreme Court commented on access to justice in *Danier Leather*. While ruling on costs, the Court found that, in that shareholder class action, no departure from ordinary cost consequences was warranted.[47] It cast the case as "a piece of Bay Street litigation … well run and well financed on both sides."[48] In doing so, it implied that access to justice considerations are directed at those without the means to advance their actions — namely, the economically disadvantaged.

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38 *Dutton*, *supra* note 1.
39 *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 [*Bisaillon*].
40 *Kerr v. Danier Leather*, 2007 SCC 44, [2007] 3 S.C.R. 331 [*Danier Leather*].
41 *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 [*Dell*].
42 Interestingly, no mention was made, however, in *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, despite the fact that it was a class action.
43 *Dutton*, *supra* note 1 at para. 28 [footnotes omitted].
44 *Hollick*, *supra* note 2 at para. 15 [footnotes omitted].
45 *Ibid.* at para. 33.
46 *Ibid.*
47 *Danier Leather*, *supra* note 40 at para. 69.
48 *Ibid.*

The term was also mentioned in *Bisaillon*. The majority commented that the

> class action has a social dimension. Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights. This Court has already noted that legislation on class actions should be construed flexibly and generously. The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights.[49]

The Supreme Court in *Dell* repeated this and added that a class action is an option for citizens to bring a claim where they otherwise "might lack the financial means to do so."[50] Bear in mind, however, that, like *Bisaillon*, this was a case under the *Civil Code of Québec*.[51] For that reason, the definition of access to justice and its importance in the context of the class action is not necessarily the same as in common law Canada.

What these judgments reveal is that the Supreme Court has adopted a primarily economic understanding of access to justice. Class proceedings allow for cost-sharing, making individually non-viable claims feasible. *Danier Leather* suggests that access to justice should only be a consideration for the economically disadvantaged. Only *Bisaillon* tempers the focus on the economic, but that broadened definition is probably restricted to Quebec.

### F. ACCESS TO JUSTICE IN THE LOWER COURTS

The Supreme Court has only addressed class actions and access to justice in a few cases. As usual, it is left to the lower courts to understand the term in a functional context. They have obliged: a QuickLaw search returned more than 400 results, including cases from both before and after the introduction of class proceedings legislation.[52] Interestingly, the age of a case had no bearing on its interpretation of access to justice. While many mentions were without analysis (that is, the term simply appears, usually as part of a quote from *Dutton* or *Hollick*), some of the judgments engage with the meaning and importance of access to justice.

The predominant definition adopts the Supreme Court's reasoning in *Dutton* and *Hollick*, which emphasizes economic considerations. As long ago as 1973, class actions were described as "an inexpensive means of preventing the frustration of justice by costly and piecemeal litigation."[53] Recently, the focus on the economic is especially notable.

According to the courts, access to justice is necessary where there is "economic unfeasibility,"[54] an "economic bar to the resolution of … claims,"[55] a claim is otherwise

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49 *Bisaillon*, *supra* note 39 at paras. 16-17 [footnotes omitted]. The minority took no issue with this point.
50 *Dell*, *supra* note 41 at para. 106.
51 S.Q. 1991, c. 64.
52 The QuickLaw search string used in April 2008 was "'class action' or 'class proceeding' and 'access to justice.'"
53 *Shaw v. Real Estate Board of Greater Vancouver* (1973), 36 D.L.R. (3d) 250 at para. 35 (B.C.C.A.), Nemetz J.A.
54 *W.W. v. Canada (Attorney General)*, 2004 BCSC 99, 24 B.C.L.R. (4th) 347 at paras. 137-38 [*W.W.*]. See also *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at 472 (Div. Ct.) [*Abdool*].
55 *MacKinnon v. National Money Mart*, 2004 BCCA 473, 203 B.C.A.C. 103 at para. 47 [*MacKinnon*].

"uneconomical to litigate,"[56] individual proceedings are "uneconomic and impractical,"[57] or the "cost of litigating a claim individually is not economically sensible or feasible,"[58] and to mandate individual actions would "deny access to justice save for the wealthy."[59] There must be "economic access to justice."[60] In some cases, the courts have required evidence of economic unfeasibility of individual proceedings,[61] with the onus on the plaintiff.[62] One defendant argued that access to justice is based on three assumptions:

(i) that a widespread demand exists for access to judicial relief;

(ii) that demand is being stifled by the expense of individual litigation; and

(iii) that certification will eliminate the expense barrier.[63]

Cost-spreading is another component, because it "is only by spreading the costs of the litigation amongst many that members of the class will have access to justice."[64] Where potential cost exceeds potential recovery, access to justice is engaged.[65] Similarly, access to justice has been described as "efficiency,"[66] "expediency,"[67] and "practicability."[68]

The least mentioned characteristics of access to justice are the non-economic: sharing information between plaintiffs,[69] assisting the disadvantaged and vulnerable,[70] and reducing complexity and delay.[71] Quebec, however, differs: access to justice is a "social policy that encourages access to justice by enabling fair and comparable compensation for all members

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56 *Ayrton v. PRL Financial (Alta.) Ltd.*, 2005 ABQB 311, 370 A.R. 141 at para. 95 [*Ayrton*]. See also *Antoniali v. Coquitlam (City of)*, 2005 BCSC 1310, 15 M.P.L.R. (4th) 199 at para. 28 [*Antoniali*]; *Abdool*, *supra* note 54 at 471; *Koo v. Canadian Airlines International Ltd.*, 2000 BCSC 281, 95 A.C.W.S. (3d) 22 at para. 74 [*Koo*]; *MacLean v. Telus Corp.*, 2006 BCSC 766, 151 A.C.W.S. (3d) 172 at paras. 66-67 [*MacLean*]; *Collette v. Great Pacific Management Co.*, 2001 BCSC 237, 86 B.C.L.R. (3d) 92 at para. 4 [*Collette*].

57 *Cooper v. Merrill Lynch Canada Inc.*, 2006 BCSC 1905, 153 A.C.W.S. (3d) 1042 at para. 122 [*Cooper*].

58 *Walls v. Bayer Inc.*, 2007 MBQB 131, 217 Man. R. (2d) 66 at para. 20 [*Walls*].

59 *Ernewein v. General Motors of Canada Ltd.*, 2004 BCSC 1462, 135 A.C.W.S. (3d) 994 at para. 111 [*Ernewein*].

60 *MacKinnon*, *supra* note 55 at para. 47. Cited again in *MacKinnon v. National Money Mart*, 2007 BCSC 348, 156 A.C.W.S. (3d) 294 at para. 86.

61 *Roberts v. Canadian Pacific Railway*, 2006 BCSC 1649, 35 C.P.C. (6th) 231 at para. 83 [*Roberts*]. See also *Nelson v. Hoops L.P., a Limited Partnership*, 2003 BCSC 277, 121 A.C.W.S. (3d) 221 at paras. 38-39 [*Hoops*].

62 *Cloud v. Canada (Attorney General)* (2003), 65 O.R. (3d) 492 at 499 (Sup. Ct.) [*Cloud*, Sup. Ct.].

63 *Hoy v. Medtronic, Inc.*, 2003 BCCA 316, 14 B.C.L.R. (4th) 32 at para. 72 [*Hoy*].

64 *Reid v. Ford Motor Co.*, 2003 BCSC 1632, 126 A.C.W.S. (3d) 392 at para. 4, 93 [*Reid*], citing *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.). See also *T.L. v. Alberta (Director of Child Welfare)*, 2008 ABQB 114, 436 A.R. 217 at para. 97 [*T.L.*]; *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 at 793 (Sup. Ct.) [*Ford*]; *Gregg v. Freightliner Ltd. (c.o.b. Western Star Trucks)*, 2003 BCSC 241, 35 C.C.P.B. 31 at para. 81 [*Western Star Trucks*].

65 *Boulanger v. Johnson & Johnson Corp.* (2007), 40 C.P.C. (6th) 170 at para. 52 (Ont. Sup. Ct.) [*Boulanger*]; *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 at para. 57 (Ont. C.A.).

66 *Rideout v. Health Labrador Corp.*, 2007 NLTD 150, 270 Nfld. & P.E.I.R. 90 at para. 115 [*Rideout*]. See also *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 422 (C.A.).

67 *Doucette v. Eastern Regional Integrated Health Authority*, 2007 NLTD 138, 271 Nfld. & P.E.I.R. 39 at para. 87 [*Doucette*]. See also *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 at para. 17 (Gen. Div.) [*Delgrosso*].

68 *MacDougall v. Ontario Northland Transportation Commission* (2006), 31 C.P.C. (6th) 86 at para. 98 (Ont. Sup. Ct.) [*MacDougall*].

69 *Boulanger*, *supra* note 65 at para. 52.

70 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at 423 (C.A.) [*Cloud*, C.A.].

71 *Kerr v. Danier Leather* (2001), 19 B.L.R. (3d) 254 at para. 63 (Ont. Sup. Ct.).

while avoiding a multiplicity of similar actions, in a manner that ensures an equal distribution of power between the parties."[72]

As this wealth of footnotes demonstrates, the primary understanding of access to justice in the courts is in overcoming economic barriers. The sheer frequency with which the term "economic" and its permutations appears points to the marginalization of other meanings. It is unclear if this is because judges have devoutly followed the Supreme Court's reasoning or whether it is because there is no awareness of the other possible meanings. Further, the absence of references to the OLRC's "social and psychological" barriers effectively ignores half of the proposed rationale for access to justice in class actions. In order to demonstrate the possible breadth of access to justice, it is necessary to examine access to justice scholarship outside the class action context.

### G. ACCESS TO JUSTICE IN ACCESS TO JUSTICE SCHOLARSHIP

While access to justice has been co-opted by class proceedings, it lives life on a grander scale in access to justice scholarship. Although this article only briefly reviews this scholarship, even a cursory exploration highlights the narrow focus adopted by class actions. The term "access to justice" took its present form in the late 1970s. It meant "the ability to avail oneself of the various institutions, governmental and non-governmental, judicial or non-judicial, in which a claimant might find justice."[73] Even at first blush, this definition is far broader than the restrictive economic definition found in class proceedings.

Access to justice can be defined by the barriers to achieving justice. Roderick Macdonald divides those barriers into objective and subjective categories. Objective barriers include:

- Cost (including court fees, counsel fees, expert fees)
- Delay
- Complexity of the system (intelligibility and procedures)
- Unintelligibility of legal texts
- Geographic isolation of certain communities
- Physical accessibility of courthouses (including hours of operation)
- Lack of adequate translation services

Subjective barriers include:

- Socio-cultural background
- Perceptions of the legal system
- Knowledge of rights

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[72] *Pharmascience inc. v. Option Consommateurs*, 2005 QCCA 437, [2005] R.J.Q. 1367 at para. 20 [footnote omitted] [*Pharmascience*].

[73] Marc Galanter, "Access to Justice as a Moving Frontier" in Julia Bass, W.A. Bogart & Frederick A. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Caanda, 2005) 147 at 147.

- Socio-demographic characteristics of litigants
- Sociological and psychological barriers[74]

Overcoming these barriers results in access to justice. For a judicial system to meet the goal of access to justice, it must have the following characteristics: "(1) just results, (2) fair treatment, (3) reasonable cost, (4) reasonable speed, (5) understandable to users, (6) responsive to needs, (7) certain[ty], and (8) [be] effective, adequately resourced and well-organized."[75] Needless to say, this encompasses more than merely economic considerations.

Mary Jane Mossman divides access to justice into three categories: (1) efficiency for existing litigants; (2) access to justice for new litigants in new settings; and (3) access to justice as *justice*.[76] Category (1) adds to Macdonald's objective barriers. Category (2) adds legal education, public provision of legal services, and social justice as additional subjective barriers. Category (3) values substantive outcomes over procedural accessibility. Mossman refers here to goals of (re)distributive justice and social change to achieve specific ideological goals, such as equality.[77] What is most relevant is the idea that procedure is not the only consideration, and that outcome is relevant to access to justice and should not be sidelined. Mossman states that the main emphasis of access to justice scholarship has been on accessibility issues and not on justice.[78] The focus has been an "exceedingly narrow conceptualization of access — that of access as efficiency."[79] This is obviously the case in class actions, but as she demonstrates in the context of access to justice generally, that conception leaves out other core issues of access and justice.

Andrew Roman questions what we mean when we define "justice."[80] Historically, access to justice was "synonymous with 'access to the courts.'"[81] He also differentiates between the concept of justice and legal justice. The former is about fair results, the latter procedure. The former is what citizens seek, the latter what courts and lawyers provide. Courts must be clear when they seek to enable access to justice to decide which conception they are furthering.

Macdonald has also addressed the access to justice component of class actions. Class actions promote access to justice by adopting an existing system of litigation to deal with mass claims in a modern society. He emphasizes the benefits of sharing resources and the

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74 Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Bass, Bogart & Zemans, *ibid.*, 19 at 26-29 [Macdonald, "Access to Justice"]. See also Roderick A. Macdonald, "Prospects for Civil Justice" in Ontario Law Reform Commission, *Study Paper on Prospects for Civil Justice* (Toronto: Ontario Law Reform Commission, 1995) 1.

75 Macdonald, "Access to Justice," *ibid.* at 23-24.

76 Mary Jane Mossman with Heather Ritchie, "Access to Civil Justice: A Review of Canadian Legal Academic Scholarship 1977-1987" in Allan C. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990) 53 at 55-68. Although the text is a little dated, it is part of a major collection on access to justice commentary and theory and is cited by Roderick Macdonald as recently as 2005.

77 *Ibid.*

78 *Ibid.* at 75. The authors also note that the majority of authors are mostly of the same race and gender.

79 Ian Morrison & Janet Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups" in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996) vol. 2, 637 at 642.

80 Andrew J. Roman, "Barriers to Access: Including the Excluded" in Hutchinson, *supra* note 76, 180 [Roman, "Barriers to Access"]. Interestingly, he is also the author of a report to the Uniform Law Conference of Canada on class actions. See Andrew Roman, "Class Actions in Canada: The Path to Reform?" in *ULCC Proceedings*, *supra* note 12, 96.

81 Roman, "Barriers to Access," *ibid.* at 178.

importation of principles of distributive justice as a result.[82] He states, however, that "[t]he mere existence of class action legislation does not … ensure a greater access to justice."[83]

Macdonald also notes that the failure of class actions to achieve greater access to justice results from the fact that the legislation presupposes that the class will "be relatively easy to establish."[84] In practice, however, it may be difficult to determine the boundaries of an action, thereby stopping the suit before it starts. The definition of class itself, he points out, may be too restrictive in its focus on similarities between consumers, ignoring any mention of social class.[85] The current emphasis is on the economic rather than the political. Strikingly, he does not suggest broadening the class action use of access to justice to include other goals, but this is likely because he is stressing the potential for class actions to achieve access to justice in society at large.

Mossman and Macdonald share the belief that access to justice goes far beyond efficiency of outcome and economics. Cost and delay are only a small part of access to justice. More likely, they are the concerns of actors within the justice system and not of transients (as most litigants are). The definition proposed by Mossman and Macdonald faces outward at society as a whole, and not just towards those invested in the economics of judicial administration. Access to justice is not monolithic and for class actions to meet the goal of access to justice, an awareness and understanding of its subtleties is needed.

### H. THE DIAGNOSIS: DIFFERENT CONCERNS

It is not that the courts and commissions have completely ignored the issues raised by access to justice scholarship. Objective considerations are present in the jurisprudence; the narrow focus on economics is clear evidence of that fact. There are fewer mentions of delay and complexity is mentioned exclusively with reference to procedure or expediency (but not intelligibility). Subjective barriers, however, are barely mentioned at all.

The law commissions, for example the mentions of social and psychological bariers in the OLRC, MRLC, and ALRI reports, do slightly better.[86] These barriers include the socio-cultural background of claimants, knowledge of rights and injuries, and perceptions of the legal system, all of which fall under Macdonald's subjective classification. However, with respect to the commissions, this aspect of access to justice is included only as window dressing and not substance, most notably in the MLRC and ALRI reports, which copy the OLRC.[87]

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82 Macdonald, "Access to Justice," *supra* note 74 at 63.

83 *Ibid.* at 62-63. This is because some claims are excluded from class proceedings, because class actions against mass defendants are ineffective under this model, and because start-up costs for litigation can be prohibitive.

84 *Ibid.* at 63.

85 *Ibid.*

86 OLRC Report, *supra* note 5 at 126-27; MLRC Report, *supra* note 8; ALRI Report, *supra* note 9.

87 MLRC Report, *ibid.*; ALRI Report, *ibid.* Despite their comparative recency, the MLRC and ALRI Reports did not expand on the OLRC's assertions. For its part, the OLRC Report, *supra* note 5 at 126-27, nn. 101, 103-104, cites an Australian study on subjective barriers to participation, as well as the Ontario, Ministry of the Attorney General, *Report of the Task Force on Legal Aid* (Toronto: Ministry of the Attorney General, 1974) (Chair: The Hon. Mr. Justice John H. Osler).

There is piecemeal recognition by commentators that access to justice is more than economic viability. Ward Branch's mentions of leverage,[88] Jamie Cassels, Craig Jones, and Michael Eizenga *et al.*'s mentions of "economic, social and psychological barriers,"[89] Neil Williams' mention of "psychological lift,"[90] and Jennifer Bankier's "non-monetary barriers" (language, leverage, education) also qualify.[91] That the sum total of the scholarship on this point can be listed in one sentence underlines the need for a more in-depth approach. Part of the problem is that the intertextual references have gone unexpurgated: authors cite without delving into the details of their references. It may also be due to the specialization of the members of the assorted law commissions; access to justice, in terms other than the economic, may be foreign to their expertise, leaving gaps that are replicated by later writers.

As I indicated above, the focus on economic considerations is probably the product of interests within the administration of the justice system. Class proceedings are a procedural mechanism designed by legislators to produce practical effects on court proceedings by amalgamating claims. Economic considerations make sense in that context, because claims that could be pursued individually would not need to be combined. But that is not where the analysis should stop.

## I. ROOM FOR IMPROVEMENT

Despite the narrowness of the present definition, I believe that class proceedings can improve access to justice in other ways, namely, the non-economic ways mentioned by Mossman and Macdonald. With respect to objective barriers, delay is closely linked to economics but it receives little consideration. Surely the timely resolution of disputes by concentrating judicial and expert resources is a valid consideration. Class actions could also reduce the complexity of the system by standardizing procedures and requirements across a class. Notice serves a quasi-educative function, reducing complexity of procedures and making the law and its application more intelligible to litigants. While it might not seem likely that class actions can address the problem of the centralization of judicial institutions, geographic and physical inaccessibility, or the language of proceedings, there are possibilities: the selection of a representative plaintiff reduces such difficulties to a single individual and not a class level. Only one plaintiff need attend court (in an ideal situation) and only one set of needs has to be accommodated. Once counsel have identified their class, they can make provisions for the defined needs of their clients. If, for example, claimants are largely Cantonese-speaking, counsel can practically retain a translator to manage communication with class members.

On the subjective side, lawyer initiated litigation, although it has its detractors, can play an important role in spreading knowledge of rights and injuries. Counsel have the expertise to identify and notify individuals when their rights have been infringed. This practice should be embraced as a means of informing the public and making up for their informational deficiencies. Proceeding as a class can iron out demographic and cultural differences and weaknesses; counsel can tailor their communications to the characteristics of their client, and

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88 Branch, *supra* note 23.
89 Eizenga *et al.*, *supra* note 36 at para. 1.7; see also Cassels & Jones, *supra* note 28 at 335.
90 Williams, "Reform," *supra* note 33 at 3.
91 Bankier, *supra* note 30 at 231, n. 8.

a wider class means an averaging out of differences. Negative perceptions of the legal system can be mediated by the double intermediaries of counsel and the class representative. Psychological barriers can be overcome by careful selection of a class representative mentally prepared to face the ordeal of litigation.

By tying the multiple dimensions of access to justice to specific elements of a class proceeding, it is clear that class proceedings do not have to be only procedural vehicles for the efficient funding of litigation. What I suggest here would require no real modifications to the class action process. It is simply a recasting of terms, drawing links between existing ideas. Judicial reasoning need only follow suit, which is really a question of encouraging judges to view access to justice in a multi-dimensional way. In doing so, the class proceeding system has the potential to produce the eight characteristics of Macdonald's accessible system.

### J. ACCESS TO JUSTICE IN THE COURTS

The examples that follow point to the many situations in which access to justice considerations (not the definition of the term itself, but the result of effecting access to justice) arise. By presenting the uses of access to justice, I hope to demonstrate that the term's definition has more than just academic significance.

At the Supreme Court, in *Danier Leather*, access to justice considerations were used to deny an award of costs in favour of the defendant mainly on the grounds that the plaintiff was well-financed and acting largely in his own personal interest. The Court agreed with the plaintiff that an "award of costs that exceeds or outweighs the potential benefits of litigation raises access to justice issues," however, it also noted 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."[92] In *Hollick*, "in the absence of legislative guidance," the Court actively used the "lens of the three principal advantages" in its preferability inquiry.[93] In *Dell*, access to justice considerations arose in relation to whether an arbitration agreement in a consumer contract was void or inoperative because it was abusive. The Court found that simply because a contract of adhesion included an arbitration provision it was not abusive and that "it may well facilitate the consumer's access to justice."[94]

Most commonly at the lower court level, access to justice considerations tip the balance in favour of certification.[95] However, in one case a plaintiff was required to prove that the

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92 *Danier Leather*, *supra* note 40 at para. 69.

93 *Hollick*, *supra* note 2 at paras. 27, 30. In this case, the Court was dealing with the Ontario *Class Proceedings Act, 1992*, *supra* note 4, and not, for example, the British Columbia, *Class Proceedings Act*, *supra* note 4, which includes factors that the courts must consider in assessing preferability.

94 *Dell*, *supra* note 41 at para. 229.

95 *Samos Investments v. Pattison*, 2001 BCSC 1790, 22 B.L.R. (3d) 46 at para. 156 [*Samos*]. See also *Hoy*, *supra* note 63 at para. 72; *MacLean*, *supra* note 56 at paras. 66-67; *Western Star Trucks*, *supra* note 64 at para. 81; *Pharmascience*, *supra* note 72 at para. 20; *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 7, [2008] 4 F.C.R. 391 at para. 60 [*Hinton*]; *Hoops*, *supra* note 61 at paras. 38-39; *Arabi v. Toronto-Dominion Bank* (2006), 30 C.P.C. (6th) 164 at para. 1 (Ont. Sup. Ct.) [*Arabi*]; and *Abdool*, *supra* note 54 at 472.

individual claims were not economically viable before proceeding.[96] The two other major areas in which access to justice is invoked are at the preferability inquiry, generally,[97] and as an interpretive aid to the class proceedings acts.[98] Access to justice is trumped, however, where individual issues would render a class action a "monster of complexity and cost," or the absence of common issues "frustrates the goals of access to justice."[99] The same can occur where alternate procedures might also advance a claim.[100]

Access to justice is also frequently raised in costs orders,[101] or when a plaintiff seeks a departure from normal costs consequences.[102] Similarly, it is relevant to justifying contingency fees,[103] fee multipliers,[104] fee arrangements,[105] above average fee percentages,[106] and in the approval of settlements.[107]

Access to justice is used in a number of other areas: where causation would be difficult to prove and is a deterrent to modest claims at the certification stage;[108] to bar certification in *Canadian Charter of Rights and Freedoms* cases because access to justice in that context is for individuals and not classes and any results will be available to similarly situated

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96 *W.W.*, *supra* note 54 at para. 137.

97 *Cooper*, *supra* note 57 at para. 72. See also *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172, 43 B.C.L.R. (4th) 169 at paras. 60-61 [*Knight*]; *T.L.*, *supra* note 64 at paras. 98-99; *Sorotski v. CNH Global N.V.*, 2007 SKCA 104, 304 Sask. R. 83 at para. 70 [*Sorotski II*]; *Benning v. Volkswagen Canada*, 2006 BCSC 1292, 151 A.C.W.S. (3d) 772 at paras. 63-66, 87-88 [*Benning*]. Cassels & Jones, *supra* note 28 at 345, have also made this point.

98 *Knight*, *ibid.* at paras. 60-61. See also *Imperial Tobacco Canada Ltd. v. Conseil québécois sur le tabac et la santé*, 2007 QCCA 694, 165 A.C.W.S. (3d) 988 at para. 29; *Howarth c. DPM Securities*, [2004] Q.J. No. 3417 at para. 18 (Sup. Ct.) (QL); *Chen v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1573, [2005] 3 F.C.R. 82 at para. 9; *Sorotski v. CNH Global N.V.*, 2006 SKQB 168, 281 Sask. R. 212 at paras. 70-72 [*Sorotski*]; *Benning*, *ibid*. at paras. 31-33. See also *Hollick*, *supra* note 2 at para. 27.

99 *Scott v. TD Waterhouse Investor Services (Canada)*, 2001 BCSC 1299, 94 B.C.L.R. (3d) 320 at para. 117 [*Scott*]. See also *Koo*, *supra* note 56 at para. 74; *Collette*, *supra* note 56 at paras. 96-99; *MacLean*, *supra* note 56 at paras. 70-71; *Hoffman v. Monsanto Canada*, 2005 SKQB 225, 264 Sask. R. 1 at paras. 322-24 [*Hoffman*]; *Spencer v. Regina (City of)*, 2003 SKQB 109, 231 Sask. R. 68 at para. 44 [*Spencer*]; *Benning*, *supra* note 97 at paras. 87-88; *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 at para. 30 (C.A.) [*Pearson*]; *Price v. Panasonic Canada*, [2002] O.T.C. 426 at para. 48 (Sup. Ct.); *Arabi*, *supra* note 95 at paras. 57-59; *Williams v. Mutual Life Assurance Co.* (2003), 226 D.L.R. (4th) 112 at para. 54 (Ont. C.A.) [*Williams*]. Compare *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 47 C.P.C. (6th) 209 at para. 63 [*Cassano*].

100 *Condominium Plan No. 0020701 v. Investplan Properties*, 2006 ABQB 224, 57 Alta. L.R. (4th) 310 at para. 99 [*Condominium Plan No. 0020701*]. See also *Paron v. Alberta (Environmental Protection)*, 2006 ABQB 375, 402 A.R. 85 at paras. 102-12 [*Paron*]; *Pearson*, *ibid.* at paras. 78-84; *Lee Valley Tools Ltd. v. Canada Post Corp.* (2007), 57 C.P.C. (6th) 223 at paras. 47-48 (Ont. Sup. Ct.).

101 *Consumers' Assn. of Canada v. Coca-Cola Bottling*, 2006 BCSC 1233, 56 B.C.L.R. (4th) 363 at para. 15; *Papaschase Indian Band v. Canada (Attorney General)*, 2004 ABQB 913, 365 A.R. 88 at paras. 10, 16-17 [*Papaschase*]; *Pauli v. ACE INA Insurance*, 2004 ABCA 253, 354 A.R. 348 at paras. 31-38; *McLeod v. Dziewiontkowski*, 2002 ABQB 786, 325 A.R. 23 at paras. 8, 32; *Smith v. Canada (Attorney General)*, 2006 BCCA 407, 230 B.C.A.C. 254 at paras. 1-12 [*Smith*] (no cause of action, no access to justice basis to refuse to pay costs); *Ruffolo v. Sun Life Assurance Co. of Canada* (2008), 90 O.R. (3d) 59 at paras. 79-80 (Sup. Ct.); *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 389 (Gen. Div.).

102 *Ayrton v. PRL Financial (Alta.) Ltd.*, 2006 ABCA 88, 384 A.R. 1 at paras. 28-40 [*Ayrton II*]. Indemnification is not determinative, see *Pauli v. ACE INA Insurance*, 2003 ABQB 600, 336 A.R. 85 at paras. 29-32 [*Pauli II*].

103 *Webb v. 3584747 Canada Inc.* (2005), 40 C.C.E.L. (3d) 74 at para. 25 (Ont. Sup. Ct.) [*Webb*]. See also *Windisman v. Toronto College Park Ltd.* (1996), 3 C.P.C. (4th) 369 at paras. 20-21 (Ont. Gen. Div.).

104 *Châteauneuf v. Canada*, 2006 FC 446, [2007] 1 F.C.R. 23 at para. 31.

105 *Rideout*, *supra* note 66 at paras. 172-73; *Pearson*, *supra* note 99 at paras. 95-96 (no requirement for representative plaintiff to produce a funding arrangement).

106 *Murphy v. Mutual of Omaha Insurance*, 2000 BCSC 1510, 80 B.C.L.R. (3d) 384 at paras. 8-11; *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 at paras. 1, 12-13 (Sup. Ct.).

107 *Cardozo v. Becton, Dickinson and Co.*, 2005 BCSC 1612, 29 C.P.C. (6th) 112 at para. 14.

108 *Knight*, *supra* note 97 at paras. 60-61.

plaintiffs;[109] balanced against fairness to defendants at the certification stage[110] (but certification that would provide an unfair advantage to defendants is a denial of access to justice);[111] in pre-certification carriage issues;[112] to shift notice costs to a defendant;[113] to trump the impecuniosity of a representative plaintiff;[114] to bar speculative claims;[115] in inter-jurisdictional issues;[116] to redress a power imbalance;[117] to bar litigation that is wholly lawyer driven;[118] to void a contract purporting to oust class proceedings;[119] to hold that the amount of an individual claim is not a determinative limiting factor in certification;[120] and the right to costs from the Class Proceedings Fund.[121] This list is undoubtedly incomplete, but it shows the variety of issues in which access to justice considerations arise.

There is one final use that I call the "Alleluia!" This occurs when courts mention access to justice as a goal of class action legislation, but do not actively engage with the concept. The use of access to justice as part of the triumvirate, along with deterrence/behaviour modification and judicial economy, makes the judge feel as though they have considered all the angles in a motion for certification. Take this example:

> However, the inadequacy of the normal process does not necessarily mean a class action is a better or more desirable process. It must still be demonstrated that the class action will result in judicial economy, access to justice and behaviour modification. I am satisfied that in this instance it will.[122]

There is no other mention in the judgment, but the term has been put to rest. It is a refrain, an "Alleluia!" that is repeated to validate a conclusion without the need to engage in anything more than superficial analysis. It is nothing more than an intellectual shortcut.

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109 *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)* (1999), 12 Admin. L.R. (3d) 261 at para. 50 (B.C.S.C.) [*Auton*].

110 *Dobbie v. Canada (Attorney General)*, 2006 FC 552, 291 F.T.R. 271 at para. 32.

111 *Metera v. Financial Planning Group*, 2003 ABQB 326, 332 A.R. 244 at para. 94 [*Metera*].

112 *Grasby v. Merck Frosst Canada Ltd.*, 2007 MBQB 97, 216 Man. R. (2d) 117 at paras. 16, 20, 25. See also *Nelson v. Merck Frosst Canada Ltd.*, 2006 BCSC 1549, 61 B.C.L.R. (4th) 157 at para. 30 [*Nelson*].

113 *Walls*, *supra* note 58 at paras. 50-54.

114 *T.L. v. Alberta (Director of Child Welfare)*, 2006 ABQB 104, 395 A.R. 327 at para. 122. See also *Windsor v. Canadian Pacific Railway Ltd.*, 2006 ABQB 348, 402 A.R. 162 at paras. 135-42 [*Windsor*].

115 *Papaschase*, *supra* note 101 at paras. 36-39.

116 *Wheadon v. Bayer Inc.*, 2004 NLSCTD 72, 237 Nfld. & P.E.I.R. 179 at paras. 88-89 [*Wheadon*]. See also *Englund v. Pfizer Canada*, 2007 SKCA 62, 299 Sask. R. 298 at para. 17.

117 *May v. Saskatchewan*, 2006 SKQB 145, 277 Sask. R. 21 at para. 120 [*May*] (i.e. to allow an employee to sue an employer as part of a class); *Bondy v. Toshiba of Canada Ltd.* (2007), 39 C.P.C. (6th) 339 at paras. 18-21 (Ont. Sup. Ct.). See also *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at 549-50 (Sup. Ct.) [*Great Atlantic*] (franchisee-franchisor).

118 *Hoy v. Medtronic, Inc.*, 2001 BCSC 944, 91 B.C.L.R. (3d) 352 at paras. 9-24. Earlier reasons in *Hoy v. Medtronic, Inc.*, 2000 BCSC 1715, 101 A.C.W.S. (3d) 228 at paras. 1-16.

119 *2038724 Ontario Ltd. v. Quizno's-Canada Restaurant* (2008), 89 O.R. (3d) 252 at paras. 75-76 (Sup. Ct.) [*2038724*].

120 *Sharbern Holding v. Vancouver Airport Centre Ltd.*, 2005 BCSC 232, 137 A.C.W.S. (3d) 682 at paras. 174-76 [*Sharbern*].

121 *Garland v. Consumers' Gas* (1995), 22 O.R. (3d) 767 (Gen. Div.).

122 *Frey v. BCE Inc.*, 2006 SKQB 328, 282 Sask. R. 1 at para. 71. Similar use occurs in *Tihomirovs v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, [2006] 4 F.C.R. 341 at paras. 32-33 [*Tihomirovs*]; *Hinton*, *supra* note 95 at para. 60; *Tembec Industries Inc. v. Parisian*, 2006 MBQB 248, 209 Man. R. (2d) 230 at para. 65 [*Tembec*].

## K. WHAT THIS MEANS

Most importantly, these cases mean that access to justice and its definition matter in the administration of justice. The definition cannot be left to the opinions of individual judges; it cannot be something that is made up in each case. If access to justice is used to make determinations that impact parties when rights and resources are at stake, the law demands consistency. Consistency does not mean blindly adopting the popular economic definition, because that is an ill-considered definition that is the product of custom and not deep thought. The incredible diversity of situations in which access to justice is a determining factor of litigation outcomes means that its definition must meet criteria that actually lead towards access to justice. I am not suggesting that the courts or commentators adopt a boilerplate definition — that is what exists now. Instead, we should seize the opportunity afforded by the realization that access to justice is a flexible term in order to define it in an appropriately broad form.

## L. A NEW DEFINITION

I believe that the courts and most commentators have unduly narrowed the definition of access to justice to economic viability. Instead, the definition should take into account a more nuanced approach to "access" and to "justice." Why? Because class proceedings are not just about economic results. They may be cast in that light by Jones[123] with respect to the internalization of the costs of wrongdoing and deterrence and as a purely procedural mechanism by the administrators of the justice, but they are still part of a fault-based system designed to remedy injustice. Ignoring the broader possibilities of the term strikes at the ability of the justice system to facilitate the exercise of rights — economically viable or not.

I do not wish to engage yet with the argument about whether access to justice is the "overriding consideration" over judicial economy and deterrence[124] because I believe that all three are relevant.[125] The "legislation is not limited to that objective" alone, and the courts should address all three issues in their reasoning.[126] Access to justice is not paramount, subservient as it is to the need for common issues among the members of the class. As I noted above, if a class action is likely to degenerate into individual trials, even access to justice considerations will not trump the common issues requirement.[127] Nevertheless, access to justice plays a vital role.

The definition of access to justice will come down, in large part, to our understanding of the purpose of the class action. If it is merely procedural, in the sense that it looks inward

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123 *Supra* note 27.

124 As it is in *Ruddell v. B.C. Rail Ltd.*, 2005 BCSC 1504, 50 B.C.L.R. (4th) 87 at para. 106 [*Ruddell*], citing *Bouchanskaia v. Bayer Inc.*, 2003 BCSC 1306, [2003] B.C.T.C. 1306 [*Bouchanskaia*]. See also *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.) [*Harrington*]; *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd.*, 2002 BCSC 528, 112 A.C.W.S. (3d) 1020 [*Dalhuisen*]. See *Brogaard v. Canada (Attorney General)*, 2002 BCSC 1149, 7 B.C.L.R. (4th) 358 at para. 116; *Koo*, *supra* note 56 at para. 67; *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 at para. 54 (S.C.). This is addressed in Part III, below.

125 I also address this issue in Part III, below.

126 *Sharbern*, *supra* note 121 at para. 176.

127 See e.g. *Scott*, *supra* note 99 at paras. 117-18. See also *Koo*, *supra* note 56 at para. 74; *Collette*, *supra* note 56 at paras. 96-99; *MacLean*, *supra* note 56 at paras. 70-71; *Benning*, *supra* note 97 at paras. 87-88; *Pearson*, *supra* note 99 at para. 30; *Arabi*, *supra* note 95 at paras. 57-59.

towards lawyers, judges, and judicial administration, then perhaps it does not require a broader definition. If, however, and I suspect that this is where the consensus lies, class actions are not merely a means of ensuring efficient litigation, but of allowing the claimants, ordinary people with (legal) problems, to exercise their rights and achieve some kind of closure, then the definition has to be more inclusive.

The key to widening the definition may lie in the assumption that undergirds the access to justice considerations: the prosecution of legitimate legal rights. While none of the judgments explores this particular facet in explicit terms, many of them make reference to it: if an action appears to be based on a legitimate claim, the courts merely seek the best way to proceed. Very few of the judgments I examined rejected a motion for certification on the basis that there was no claim at all.[128] Jones and Cassels, when they note that economic reality often constrains the vindication of legitimate rights,[129] have hit the nail on the head: the rights exist, but owing to the inability to prosecute them, they go unexercised. What they have not recognized is that the same effect results from non-economic barriers. The non-economic barriers identified by Macdonald and Mossman also constrain the vindication of legitimate rights.

Instead of reducing access to justice to purely economic terms, I propose that commentators and courts consider all of Macdonald's factors to define access to justice. For the reasons outlined in this article, the definition should include subjective and objective considerations: cost, delay, complexity, intelligibility, accessibility, socio-cultural and demographic characteristics of litigants, and psychological barriers to resolution. In this way, the goals of both access and justice can be more fully realized.

There is already evidence that courts are capable of taking the broader view. Two judgments in particular illustrate the potential breadth of access of justice. The first is notable for the judge's adamant refusal to "accept the implicit proposition that the question of whether 'access to justice' is served by a class proceeding turns on economic considerations alone."[130] In that case, the judge ruled that

> [i]t would be inconsistent with the goals of the CPA, and the admonition of the Supreme Court in Hollick that it "should be construed generously", to simply examine the economics of litigation in determining whether a class proceeding meets the goal of providing "access to justice". Although class proceedings serve a primary purpose of permitting meritorious, non-economic claims to be litigated, there are cases where economic considerations are not the only barriers to litigation.… [The Court must consider] other factors that favour a class proceeding as a means of providing access to the justice system. The vulnerability of franchisees has been commented on above, as has the effect of the ongoing relationship of the members of the proposed class with the defendant. Both of these are barriers to litigation on an individual basis, regardless of the overall economics.[131]

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128 See e.g. *Papaschase*, *supra* note 101 (barred as a speculative claim); *Smith*, *supra* note 101 (disclosed no reasonable cause of action).

129 Cassels & Jones, *supra* note 28 at 337, citing Linden, *supra* note 29 at 22.

130 *Great Atlantic*, *supra* note 117 at 552-53.

131 *Ibid.* at 553.

This is a nuanced examination of the claimant's need for justice and a model for other decisions. In the other case, the presiding judge found that it

> would be wrong to suggest that class actions are appropriate only when pursuit of individual claims would be economically unfeasible. Such cases are mere examples of how class actions facilitate increased access to justice. Further, this is but one aspect of access to justice and access to justice is itself but one of the stated goals of class proceeding legislation.[132]

These cases are notable for their recognition that economics alone should not dictate whether access to justice is a legitimate concern. Instead, the actual situation of the complainants, having regard to all of their circumstances, is a more just and equitable manner of evaluating claims. That is a process more likely to actually achieve justice for injured parties.

## M. INTERMEZZO

"It has been said that if ordinary citizens have any hope of access to justice, class actions are essential."[133] This realization should inform our understanding of the nature and practice of class actions. Only by overcoming all of the barriers that prevent the vindication of legitimate rights will there truly be access to justice. A greater awareness on the part of the courts that access to justice encompasses barriers other than just the economic may mean that certification is considered in more cases. Given the range of decisions in which the term has been invoked, the courts have shown a willingness to use access to justice to tip decisions in favour of certification. Expanding the definition will further advance this process. The more situations there are in which certification is available to parties with otherwise non-viable claims, then the more likely it is that legitimate claims will be prosecuted. If access to justice includes access to the courts, then it should be used to get legitimate litigants into a courtroom.

Consider my earlier example: if the amount withdrawn was the same, but the class of affected plaintiffs was far smaller (50,000) and more vulnerable (elderly people with seniors' accounts), a broadened definition of access to justice would be more likely to lead to certification. The court could consider the age and vulnerability of the plaintiffs, as well as the value of time, in addition to economic feasibility in deciding whether to certify.

The complementary roles of judicial economy and behaviour modification, as well as what the primacy of access to justice reveals about the process and impacts of certification, are discussed in Part III. What those terms mean, and when they matter is equally important to understanding how class actions work and for giving the courts the broadest possible grounds on which to certify new classes. Given that legitimate claims can sometimes only be pursued through class certification means that the grounds to justify a class action should be broad indeed, and the transformative power of certification recognized.

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132 *Kristal Inc. v. Nicholl and Akers*, 2006 ABQB 168, 54 Alta. L.R. (4th) 275 at para. 133 [*Kristal*].

133 *Arabi*, *supra* note 95 at para. 1.

## III. DEFINING JUDICIAL ECONOMY AND BEHAVIOUR MODIFICATION

### A. INTRODUCTION

My objective in this Part is to present the definitions of judicial economy and behaviour modification. Unlike in Part II, I will not expand the definition of either term. Instead, my goal is to dissect the definitions to identify the current boundaries of the terms so that courts understand the scope of the concepts when they use them in deciding certification. This will give judges ample reason to support certification in the widest possible set of circumstances. Then, based on this information, I explain that it is because of the timing of certification that access to justice has become the dominant consideration for the courts despite the other two terms. Only access to justice offers judges enough flexibility to endorse or deny certification so early in a proceeding. More importantly, my analysis reveals that, because of the timing and nature of certification, the moment of certification is a transformative one for certain claims. Claims that had not been viable on their own become pursuable in the aggregate. This is a feature of class actions that has not yet received any attention. Its impact cannot be ignored, as this Part demonstrates.

### B. THE SCOPE OF JUDICIAL ECONOMY

The definition of judicial economy is divided into four categories:

1. Efficiency
2. Conservation of resources
3. Consistency of results/Avoidance of duplicative proceedings
4. Benefits to defendants

As with the other two terms, uses may blur the lines between categories. Nevertheless, categories offer a helpful means of identifying recurring themes.

### C. THE SCOPE OF BEHAVIOUR MODIFICATION

The definition of behaviour modification is divided into three categories:

1. Deterrence and accountability of wrongdoers
2. Disgorgement or other reparations
3. Cost internalization by the wrongdoer

The same considerations apply here as above.

### D. JUDICIAL ECONOMY AND THE LAW COMMISSION REPORTS

It is instructive to look at the origins of class proceedings legislation, as well as to see where case law and commentary have diverged from the original understanding of their meaning and purpose. I refer here to the same law commission reports listed in Part II.

In the context of efficiency, "a class action can achieve judicial economy by dealing, in a more efficient manner, with litigation that would arise in any event."[134] Judicial economy is the efficient and effective use of judicial resources[135] to "achieve economies of time and expense" for class members.[136] A single suit can decide many claims.[137]

Judicial and party resources are conserved by reducing the total amount of litigation arising from mass wrongs.[138] Class proceedings can save time and expense for parties and the courts,[139] while providing "redress to many individuals who have suffered a loss or injury."[140] However, the success of any class proceeding system in relation to this objective "should be measured not merely by dollars spent but by dollars well spent. It goes far beyond judicial calendar-clearing."[141]

Judicial economy also avoids duplicative hearings for individually-viable claims,[142] with their attendant consumption of money and time.[143] Aggregation means "avoiding inconsistent outcomes"[144] between similarly situated plaintiffs.[145]

Judicial economy can also reduce "defence costs by eliminating the need to assert common defences in each individual suit."[146] Defendants benefit from judicial economy in the wider sense (such as time spent litigating); multiple lawsuits are avoided; settlements can be made early with the class mechanism; and the class-wide resolution of claims is available.[147]

### E. BEHAVIOUR MODIFICATION AND THE LAW COMMISSION REPORTS

With respect to deterrence and "accountability,"[148] class proceedings "may inhibit misconduct by those who might be tempted to ignore their obligations to the public because claims by the injured were too small or too difficult to assert."[149] Class actions have the ability to "modify inappropriate behaviour" by actual or potential wrongdoers.[150] Aggregation is a more effective means of discouraging repetition of the misconduct,[151] particularly

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134 OLRC Report, *supra* note 5 at 119. See also OAG Report, *supra* note 6 at 17.

135 MLRC Report, *supra* note 8 at 25-26. Although the report recognized that each class action requires more judicial time and resources than a standard civil litigation case, the overall savings achieved through aggregation outweigh any downsides.

136 Williams, "Damages," *supra* note 16 at 69.

137 FCC Report, *supra* note 10 at 13.

138 OLRC Report, *supra* note 5 at 118 [footnote omitted]. As such, judicial economy has a role in any superiority requirement (ensuring that there are sufficient common issues to proceed) (at 391), and in the context of opt outs and res judicata (at 766).

139 *Ibid.* at 118-19. See also Cochrane, *supra* note 12 at 51.

140 OAG Report, *supra* note 6 at 17.

141 ALRI Report, *supra* note 9 at 46 [footnotes omitted]. This is by far the broadest definition of any law commission recommendation.

142 OLRC Report, *supra* note 5 at 118-19.

143 ALRI Report, *supra* note 9 at 52.

144 MLRC Report, *supra* note 8 at 25. See also FCC Report, *supra* note 10 at 13.

145 ALRI Report, *supra* note 9 at 52.

146 OLRC Report, *supra* note 5 at 118.

147 ALRI Report, *supra* note 9 at 54.

148 The MLRC Report, *supra* note 8 at 28, is the only law commission report to describe behaviour modification with this alternate term.

149 OAG Report, *supra* note 6 at 18.

150 OLRC Report, *supra* note 5 at 140. See also *ULCC Proceedings*, *supra* note 12 at 52.

151 OLRC Report, *ibid.* at 142. See also OAG Report, *supra* note 6 at 17.

through disgorgement and the payment of damages.[152] Class actions "provide additional incentives for compliance with the law by avoiding unjust enrichment of the defendant and by requiring wrongdoers to internalize the costs of their unlawful actions."[153]

In the context of disgorgement, "a civil action has the potential to deprive wrongdoers of any unjust enrichment that results from their misconduct."[154] Deterrence may extend beyond compensation or disgorgement from a particular defendant, to similarly situated potential defendants.[155]

Behaviour modification is accomplished by making the defendant "internalize" the cost of its harm, modifying behaviour through market mechanisms, even where a defendant receives no material benefit from harm that it has caused.[156] By facilitating internalization, class actions produce economic efficiency.[157]

Together, the emphasis in the reports is on deterring future wrongdoing by warning potential malefactors. There are few mentions of cost internalization or disgorgement. The goal of behaviour modification is merely a "by-product" of the pursuit of access to justice and judicial economy, but one that should be pursued in order to support those objectives.[158] I will return to these issues again later.

### F. CRITICAL COMMENTARY

There are few wholehearted attempts by commentators to define the goals in the context of Canadian class proceedings. As Part II revealed, the definitions are flexible and the same is true here. Very little scholarship mentions these terms substantively, although there are exceptions.[159] However, the fact that these terms have been ignored points to their unstable meaning. That they have received even less attention than access to justice also points to the primacy of that term for most commentators. Reading the commentators reveals that their definitions are far more ambitious in scope than those of the law commission reports. There is less of a focus on consistency. I include this commentary, therefore, to highlight the fluid way in which these words have been treated. Whether this trend towards a multiplicity of meanings continues in the courts is the subject of the next sections.

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152 ALRI Report, *supra* note 9 at 43.

153 FCC Report, *supra* note 10 at 13 [footnote omitted]. As mentioned above, the earlier proposals did not address the issue of behaviour modification specifically. See also Williams, "Damages," *supra* note 16 at 31-37, for examples of potential uses for class actions, all of which concern the enforcement of the *Combines Investigation Act*, R.S.C. 1952, c. 314, to produce behaviour modification. Given, however, that the proposal had as its goal enforcement under the *Combines Investigation Act*, behaviour modification must have been a prime motivation for a class procedure. In this particular report, it may be that behaviour modification was the dominant concern, especially where it directly concerned altering anti-competitive behaviours.

154 OLRC Report, *supra* note 5 at 140, 146.

155 *Ibid.* at 414.

156 *Ibid.* at 141, 146.

157 *Ibid.*

158 *Ibid.* at 145. The Commission also rejected the view that deterrence should be pursued by criminal or quasi-criminal sanction rather than through an aggregative mechanism (at 143-44). See also ALRI Report, *supra* note 9 at 52.

159 See e.g. Cassels & Jones, *supra* note 28; Jones, *supra* note 27. To be clear, Cassels and Jones, especially, engage with these terms but they do so primarily in the context of the purpose and function of class actions and not with respect to the meaning of the terms themselves.

### 1. JUDICIAL ECONOMY

In terms of efficiency, judicial economy is the efficient handling of claims by multiple plaintiffs for substantially the same harm.[160] Efficiency occurs when suits that might have been brought separately are joined together.[161]

Not much is said about the conservation of party resources — only that there are advantages to the plaintiff of economies of time, money, and effort[162] from proceeding as a class. Professor Bankier notes:

> [T]he reduction of multiplicity of litigation in situations that would give rise to many repetitious law suits even in the absence of class actions. The resolution of the overlapping elements of these claims through a class action would be more economic for both the courts and the parties, and there is general agreement in the legal community that judicial economy of this kind is a good thing.[163]

Class actions also have the power to avoid "repetitive litigation relating to the same events"[164] and the "potential of inconsistent results."[165] Avoiding duplicative actions reduces the costs to parties and the judicial system.[166] This sort of savings occurs only when claims are individually viable because they would have resulted in litigation in the absence of class proceedings, unlike non-viable claims.[167]

There are also benefits to defendants because of fewer proceedings based on the same wrongdoing.[168] Class proceedings produce consistency by: evaluating the defendant's conduct only once, through res judicata for the whole class; binding settlement on the class; and a unified claims management structure.[169]

### 2. BEHAVIOUR MODIFICATION

Deterrence comprises the modification of the behaviour of actual or potential wrongdoers and encourages voluntary (or court ordered) compliance by wrongdoers.[170] The rationale is

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160 Branch, *supra* note 23 at para. 3.10. See also Cochrane, *supra* note 26 at 5. Another Cochrane document discussed the issue of judicial economy, although it does not provide any definition for the terms: see Michael G. Cochrane, *Ontario's New Class Proceedings Act: Are You Prepared?* (Toronto: Law Society of Upper Canada, 1992) (Conference held in Toronto, 14 April 1992. Unfortunately, the keynote address by the Honourable Howard Hampton, Attorney General of Ontario, entitled "The Goals of Class Action Reforms: Access, Economy and Justice" was not published with the rest of the proceedings).

161 Branch, *ibid.* at para. 3.30.

162 *Ibid.* at 6.10-6.260.

163 Bankier, *supra* note 30 at 230-31 [footnote omitted].

164 Watson, *supra* note 22 at 270.

165 John A. Campion & Victoria A. Stewart, "Class Actions: Procedure and Strategy" (1997) 19 Advocates' Q. 20 at 26.

166 McCarthy Tétrault LLP, *supra* note 24 at 3.

167 *Ibid.* at 3. See also Watson, *supra* note 22 at 270.

168 Branch, *supra* note 23 at paras. 6.10-6.260.

169 *Ibid.*

170 *Ibid.* at para. 3.50. These definitions are followed or drawn from the case law. His definition is descriptive, in large part, rather than prescriptive, which is unusual among commentators. He cites the OLRC Report, *supra* note 5, as authority for this proposition, and while he is correct to do so, it remains an unusual formulation in the body of critical commentary. It is striking that Branch includes the economic viability of claims under the rubric of behaviour modification: see paras. 6.10-6.260.

to discourage repetition of the misconduct[171] and to sanction the wrongdoer.[172] Costs avoided or costs internalized are the hallmark of deterrence[173] because deterrence is the most efficient use of economic resources, particularly in the prevention of harm.[174]

With respect to disgorgement, class actions can deprive a wrongdoer of an unlawful benefit.[175] Class proceedings encourage compliance with the law[176] by withholding from defendants their unjustified gains.[177]

Forcing tortfeasors to internalize the costs[178] of their wrongful behaviour[179] is a major benefit. It consists of "forcing wrongdoers to bear the cost of illegal or harmful activities" to the benefit of society at large.[180]

## G. DEFINITIONS AT THE SUPREME COURT OF CANADA

### 1. JUDICIAL ECONOMY

The Supreme Court of Canada has engaged the term on several occasions.[181] In *Dutton*, the Chief Justice found that

> class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times).[182]

In *Hollick*, the Chief Justice again noted that class proceedings avoid "unnecessary duplication in fact-finding and legal analysis."[183]

The Court also discussed issues relevant to judicial economy in *Rumley*.[184] There, McLachlin C.J.C. connected the commonality inquiry on certification with the same terms used to describe judicial economy in *Dutton*. She stated that "the guiding question should be

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171 Mr. Justice Robert J. Sharpe, "Commercial Law Damages: Market Efficiency or Regulation of Behaviour?" in The Law Society of Upper Canada, *Special Lectures 2005: The Modern Law of Damages* (Toronto: Irwin Law, 2006) 327 at 348.

172 *Ibid.* at 328.

173 Whether behaviour modification is an appropriate goal may depend on the substantive area of the law in which it is sought (for example, it may be appropriate for an environmental class action or an anti-trust action, but not for some other proceeding): see Benjamin S. DuVal, Jr., Book Review of *Report on Class Actions* by Ontario Law Reform Commission, (1983) 3 Windsor Y.B. Access Just. 411 at 433.

174 Cassels & Jones, *supra* note 28. See also Jones, *supra* note 27 at 32. That said, Jones does not explicitly define behaviour modification. It might be implicit in his work that behaviour modification means "lower costs."

175 Sharpe, *supra* note 171 at 348.

176 Campion & Stewart, *supra* note 165 at 26.

177 Bankier, *supra* note 30 at 231-32.

178 *Ibid.*

179 Campion & Stewart, *supra* note 165 at 26.

180 McCarthy Tétrault LLP, *supra* note 24 at 3-4.

181 Unlike access to justice, judicial economy does not appear in the judgment in *Danier Leather*, *supra* note 40. Nor does it appear in *Bisaillon*, *supra* note 39, in which access to justice received a brief mention. It does not come up in *Dell*, *supra* note 41, although access to justice is engaged.

182 *Dutton*, *supra* note 1 at para. 27 [footnotes omitted].

183 *Hollick*, *supra* note 2 at para. 15.

184 *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 [*Rumley*].

the practical one of 'whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis.'"[185]

On balance, the Court's definition blurs the line between efficiency, the conservation of resources, the avoidance of duplicative proceedings, and benefits to defendants. It remains a fundamentally material assessment of judicial economy, concerned with preserving resources.

### 2. BEHAVIOUR MODIFICATION

The Court has also commented on behaviour modification.[186] It has defined behaviour modification by the ability of a class action to force a defendant to bear the costs of its harms. Furthermore, the Court's definition emphasizes the ability of plaintiffs to bring suit for small value claims. This echoes the Court's economic definition of access to justice. The result is a blurring of the distinctions between access to justice and deterrence, reducing the ability of either term to encompass a full range of meanings.

In the context of deterrence, the Court stated in *Dutton* that

> class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery.[187]

With respect to the internalization of harm, the Court also noted that "[c]ost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation."[188] A defendant should be forced to internalize the costs of its conduct.[189] Behaviour modification can be achieved, said the Court, where the wrongdoer "takes full account of the costs of its actions," whether through a class proceeding or some alternative mechanism.[190]

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185 *Ibid.* at para. 29. Notably, the words judicial economy do not appear in the judgment. More unusually, while engaging in a review of the preferability inquiry the Court does not even address the three goals of class actions.

186 Unlike access to justice, behaviour modification does not appear in the judgment in *Danier Leather*, *supra* note 40 or *Bisaillon*, *supra* note 39. The same is true of *Dell*, *supra* note 41 and *Rumley*, *ibid.*

187 *Dutton*, *supra* note 1 at para. 29. This statement was repeated in *Hollick*, *supra* note 2 at para. 15.

188 *Dutton*, *ibid.*

189 *Hollick*, *supra* note 2 at para. 34.

190 *Ibid.* at para. 35.

## H. JUDICIAL ECONOMY IN THE LOWER COURTS

The lower courts have also engaged with this term, although less frequently than with access to justice.[191] With respect to efficiency, judicial economy has been variously referred to as "systemic economy,"[192] "litigation efficiency,"[193] the "efficient handling of complex issues,"[194] and "similar claims."[195] It includes "the benefits to lessening the trial burden on judicial systems already strained"[196] and "more efficient handling of costly and time consuming proceedings."[197] The "goal of judicial economy speaks to the management of the proceeding in an efficient form"[198] and "to enable the court system to deal efficiently with a large number of claims being made by many aggrieved persons who have all suffered injuries from the same event or product."[199]

In terms of the conservation of resources, judicial economy is "judicial efficiency,"[200] the "cost in judicial time,"[201] and the "more effective use of … scarce judicial resources."[202] In "the context of class proceedings [it] means a simple and efficient means of dealing with a large number of claims involving common issues of fact or law within a single proceeding with a view to preventing a drain on court resources."[203] It is aimed at conserving "the resources not only of the court system, but also of the plaintiffs and the defendants."[204] A class action can achieve "economies in cost and time because it would allow the parties to deal with complex legal issues once and avoid repetitive litigation."[205] Towards the end of simplifying proceedings, the "purpose of judicial economy is to seek to relieve the complexity and volume by properly hiving off and determining common issues that advance the claims of all members of a class."[206]

To maintain consistency in results and "provide a certain uniformity in the decision making process,"[207] judicial economy maintains the integrity of precedent by "avoiding the unseemly possibility of inconsistent findings of fact between what might otherwise be many

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191 As in the first part of this project, I performed a QuickLaw search based on the string "'class action' or 'class proceeding' and 'judicial economy.'" This returned almost 500 results (although not all were relevant). I have culled the results to focus on their definitions of behaviour modification and not on the use of the term. Uses will be discussed in further detail below.

192 *Metera*, *supra* note 111 at para. 79.

193 *Ibid.*, citing *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 at para. 4 (C.A.) [*Carom*].

194 *Dalhuisen*, *supra* note 124 at para. 13.

195 *Kristal*, *supra* note 132 at para. 134, citing the ALRI Report, *supra* note 9 at 67.

196 *Northwest v. Canada (Attorney General)*, 2006 ABQB 902, 45 C.P.C. (6th) 171 at para. 34.

197 *Kristal*, *supra* note 132 at para. 79, citing the ALRI Report, *supra* note 9.

198 *Great Atlantic*, *supra* note 117 at para. 56.

199 *Carom*, *supra* note 193 at para. 4.

200 *Ernewein*, *supra* note 59 at para. 73.

201 *May*, *supra* note 117 at para. 119.

202 *Ammaq v. Canada (Attorney General)*, 2006 NUCJ 24, 154 A.C.W.S. (3d) 23 at para. 11 [*Ammaq*].

203 *Paron*, *supra* note 100 at para. 113 [footnote omitted], cited in: *T.L.*, *supra* note 64 at para. 97; *Elder Advocates of Alberta Society v. Alberta*, 2008 ABQB 490, 94 Alta. L.R. (4th) 10 at para. 531 [*Elder Advocates*].

204 *Metera*, *supra* note 111 at para. 79. See also *Antoniali*, *supra* note 56 at para. 28.

205 *Ruddell*, *supra* note 124 at para. 108.

206 *Windsor*, *supra* note 114 at para. 128.

207 *Scott v. Ontario Business College (1977) Ltd.*, [1999] O.J. No. 3441 at para. 2 (Sup. Ct. J.) (QL).

cases where the evidence provided would be essentially the same."[208] It is "the avoidance of potential conflicting decisions,"[209] especially in the treatment of awards.[210]

A lesser, but distinct, definition focuses on the benefits to defendants. A "meritorious defence will terminate the litigation once and for all"[211] with the "resolution of all claims."[212]

> From a defendant's perspective, there is also benefit to be gained. Albeit many class actions will be complex to litigate, the defendant is thereby required to do so once only. The defendant has the comfort of knowing that any person who falls within the class and has not opted out of the litigation within a specified period of time will be bound by its outcome. The defendant knows, therefore, that there will be no potential plaintiffs sitting in the weeds as it were, awaiting the outcome of a lawsuit and, if successful, then starting a fresh action. As well, the defendant will be aware of any who have opted out and presumably the existence and nature of their respective claims.[213]

A "class action may be an appropriate vehicle by which to resolve a common issue at a reasonable cost to the public who pay the lion's share of the cost of the justice system."[214] Considerations of judicial economy in the context of a lawyer's contingency fees may also "discourage unnecessary work that might otherwise be done by the lawyer simply in order to increase the base fee."[215]

## I. BEHAVIOUR MODIFICATION IN THE LOWER COURTS

As for judicial economy, these results[216] are those that deal with the definition of the term, and not its use. In the broadest terms, behaviour modification is "general deterrence and accountability,"[217] "warning,"[218] and the "modification of wrongdoing."[219] Conduct may be "denounced by the monetary award,"[220] leading to the "modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations."[221] The impact of behaviour modification is not restricted to the instant action. That an individual defendant shows signs of behaviour modification is not sufficient to make the

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208 *Walls*, *supra* note 58 at para. 21. See also *Cloud*, C.A., *supra* note 70 at para. 86, cited in *Pearson*, *supra* note 99 at para. 71.

209 *Eaton v. HMS Financial Inc.*, 2008 ABQB 631, 2 Alta. L.R. (5th) 168 at para. 174 [*Eaton*]. See also *Ruddell*, *supra* note 124 at para. 108.

210 *Webb*, *supra* note 103 at para. 26.

211 *Great Atlantic*, *supra* note 117 at para. 52.

212 *Delgrosso*, *supra* note 67 at para. 17. See also *Attis v. Canada (Minister of Health)* (2007), 46 C.P.C. (6th) 129 at para. 52 (Ont. Sup. Ct.).

213 *Walls*, *supra* note 58 at para. 22.

214 *Pawar v. Canada* (1996), [1997] 2 F.C. 154 at para. 11 (T.D.) [*Pawar*]. See also *Cassano*, *supra* note 99 at para. 56 ("institutional capacity of the courts to efficiently address a matter of this potential size").

215 *Endean v. Canadian Red Cross Society*, 2000 BCSC 971, 78 B.C.L.R. (3d) 28 at para. 13 [*Endean II*].

216 I performed a QuickLaw search based on the string "'class action' or 'class proceeding' and 'behaviour modification' or 'deterrence.'" This returned just over 300 results (not all were relevant). It must be noted that "deterrence" results in a number of unrelated cases, mostly for punitive damages and that it is not the term favoured by the courts. I included it for completeness and because critical commentators are fond of it.

217 *Cassano*, *supra* note 99 at para. 56.

218 *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 at para. 110 (Ont. Sup. Ct.) [*Tiboni*].

219 *Webb*, *supra* note 103 at para. 33.

220 *Ernewein*, *supra* note 59 at para. 78.

221 *Abdool*, *supra* note 54 at 461. See also *Paron*, *supra* note 100 at paras. 37, 99; *Ruddell*, *supra* note 124 at para. 119.

objective moot, since "modification of behaviour does not only look at the particular defendant, but more broadly at similarly situated defendants."[222]

The purpose of behaviour modification is to "bring home to defendants … the full impact of the economic injury arising [from their actions]."[223] This is achieved by the private prosecution of claims that inhere to "the benefit of society as a whole. In this way, private litigation yields public benefits."[224] The class proceedings acts are "specifically intended to correct the behaviour of wrongdoers."[225] "[B]ehaviour modification is obtained as claims that might otherwise go unprosecuted will now be brought."[226]

Behaviour modification "may also be achieved through an award of damages, or by the agreement of a defendant to reform its conduct, or by a combination of both."[227]

Only rarely do the courts mention the need for defendants to "internalize the costs of any unlawful behaviour."[228]

### J. USE OF THE TERMS BY THE COURTS

Beyond assessing how the courts interpret these terms, it is necessary to understand how they are used. My objective is to draw attention to the limited uses of these terms, in contrast to access to justice, and to identify their most frequent functions. The fact that the list of cases in which these terms have guided judicial decision-making is noticeably shorter than for access to justice (at least for behaviour modification) reveals the primacy of access to justice in the reasoning of the courts.[229]

The Supreme Court of Canada in *Dutton* did not rely directly on any of the three advantages in making its determination. At the same time, they clearly underlie and inform the reasoning in the judgment, particularly when the Court sought to achieve a balance between efficiency and fairness.[230] In *Hollick*, judicial economy (in terms of predominance of individual over common issues) and behaviour modification (in terms of the alternative options for redress and internalization of costs by the defendant) were both used to deny certification in the preferability inquiry.[231]

In the lower courts, judicial economy has been used to accomplish a number of tasks. It is rarely determinative as a freestanding goal. In fact, so rarely is the issue of judicial economy determinative that I have highlighted those few cases where I feel that it was at all

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222 *Paron*, *ibid.* at para. 100. See also *Windsor v. Canadian Pacific Railway Ltd.*, 2007 ABCA 294, 417 A.R. 200 at paras. 143-51 [*Windsor II*]; *Jeffery v. London Life Insurance* (2008), 89 O.R. (3d) 686 at para. 133 (Sup. Ct.) [*Jeffery*].

223 *Eaton*, *supra* note 209 at para. 178.

224 *Wheadon*, *supra* note 116 at para. 149. See also *Alfresh Beverages Canada v. Hoechst AG* (2002), 16 C.P.C. (5th) 301 at para. 16 (Ont. Sup. Ct.) [*Alfresh*] ("the private class action litigation bar functions as a regulator in the public interest for public policy objectives").

225 *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 at para. 123 (Div. Ct.) [*Serhan*].

226 *Tembec*, *supra* note 122 at para. 65. This sounds a great deal like access to justice.

227 *Rideout*, *supra* note 66 at para. 66. Presumably, this may include resolution by settlement.

228 *Wheadon*, *supra* note 116 at para. 148.

229 The consequences of this disparity are discussed below.

230 *Dutton*, *supra* note 1 at para. 51.

231 *Hollick*, *supra* note 2 at paras. 18-21, 32, 34-35.

determinative. In the context of preferability, however, it matters a great deal: where, at the commonality inquiry, individual issues predominate over common issues, the court will state the goal of judicial economy is not met. It strikes me that this consideration of judicial economy is not the same as when common issues are not involved. I return to this difference below. While the list is similar in length and diversity to access to justice, because judicial economy is so much less important, it is not as broadly applicable as it might initially appear.

The most frequent consideration of judicial economy occurs during the preferability inquiry during a motion for certification.[232] Where there are insufficient common issues, the court usually states at preferability that the goal of judicial economy is not made out, even though the existence of common issues is a separate inquiry.[233] This is usually accompanied by mentions of the common issues inquiry or a statement to the effect that common issues were (independently) determinative.[234] In some isolated cases, judicial economy appears in both the common issues inquiry and the preferability stage.[235]

The term is almost as important during the common issues inquiry (the commonality phase), especially where there is tension around the relative importance of individual and common issues.[236] Judicial economy serves as shorthand in the headnotes for the result of the certification inquiry: "common issues were … [dominated by] individual issues" or vice versa.[237]

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232 See e.g. *Kristal*, *supra* note 132; *Condominium Plan No. 0020701*, *supra* note 100; *Hicks v. Saskatchewan Crop Insurance*, 2008 SKQB 102, 313 Sask. R. 238 at paras. 63, 65 [*Hicks*]; *Olsen v. Behr Process*, 2003 BCSC 1252, 17 B.C.L.R. (4th) 315 at para. 36; *Sharbern*, *supra* note 121 at paras. 180-81; *Reid*, *supra* note 64 at paras. 99-100; *Roberts*, *supra* note 61 at para. 84; *Bodnar v. The Cash Store*, 2005 BCSC 1228, 142 A.C.W.S. (3d) 30 at paras. 62-63; *Jeffery*, *supra* note 222 at para. 131; *Anderson v. Wilson* (1997), 32 O.R. (3d) 400 at paras. 410-11 (Gen. Div.) [*Anderson*].

233 See e.g. *Lavier v. MyTravel Canada Holidays*, [2008] O.J. No. 2753 at paras. 73-78, 138-40 (Sup. Ct.) (QL).

234 See e.g. *May*, *supra* note 117; *Spencer*, *supra* note 99 at para. 45; *Wheadon*, *supra* note 116 at paras. 139-43; *Davis v. Canada (Attorney General)*, 2007 NLTD 25, 263 Nfld. & P.E.I.R. 114 at paras. 119-22; *Doucette*, *supra* note 67; *Rideout v. Health Labrador Corp.*, 2005 NLTD 116, 12 C.P.C. (6th) 91 at paras. 125-27 [*Rideout II*]; *Walls v. Bayer Inc.*, 2005 MBQB 3, 189 Man. R. (2d) 262 at paras. 67-69; *Cooper*, *supra* note 57 at para. 122; *L.R. v. British Columbia* (1998), 65 B.C.L.R. (3d) 382 at para. 74 (S.C.) [*L.R.*]; *Barbour v. University of British Columbia*, 2006 BCSC 1897, [2006] B.C.J. No. 3278 at para. 65 (QL); *Fakhri v. Alfalfa's Canada, Inc.*, 2003 BCSC 1717, 26 B.C.L.R. (4th) 152 at paras. 57, 98-99 [*Fakhri*]; *Koo*, *supra* note 56 at para. 74; *Collette*, *supra* note 56 at para. 23 (citing *Abdool*, *supra* note 54); *Dalhuisen*, *supra* note 124 at paras. 12-14, 23; *Benning*, *supra* note 97 at para. 88; *Price v. Panasonic Canada* (2002), 22 C.P.C. (5th) 382 at para. 44 (Ont. Sup. Ct.); *Pearson*, *supra* note 99 at paras. 69-77; *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Sup. Ct.) [*Carom v. Bre-X*]; *Arabi*, *supra* note 95 at paras. 57-59; *Boulanger v. Johnson & Johnson Corp.* (2007), 40 C.P.C. (6th) 170 at paras. 52-53 (Ont. Sup. Ct.); *Lee Valley Tools Ltd. v. Canada Post* (2007), 57 C.P.C. (6th) 223 at paras. 48-51 (Ont. Sup. Ct.); *Williams*, *supra* note 99 at paras. 51-61; *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 at para. 24 (Sup. Ct. J.) (QL) [*Shaw*].

235 *Ring v. Canada (Attorney General)*, 2007 NLTD 146, 51 C.C.L.T. (3d) 260 at paras. 149, 159 [*Ring*]; *Gariepy v. Shell Oil* (2002), 23 C.P.C. (5th) 360 at paras. 68, 74 (Ont. Sup. Ct.) [*Gariepy*].

236 *Shiels v. TELUS Communications*, 2004 ABQB 76, 1 C.P.C. (6th) 174 [*Shiels*]; *Cloud, C.A.*, *supra* note 70 at para. 86; *Hoffman*, *supra* note 99; *Ring*, *ibid.* at para. 149; *Gariepy*, *ibid.* at para. 68; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 331 at paras. 139-42 (QL) [*Pro-Sys*]; *MacDougall*, *supra* note 68 at paras. 107-16.

237 *Jeffery*, *supra* note 222 at para. 56; see also *Paramount Pictures (Canada) Inc. v. Dillon* (2006), 53 C.C.P.B. 88 (Ont. Sup. Ct.).

Judicial economy is also invoked in the certification inquiry generally[238] as a bar to certification where the class representative is not appropriate[239] or where a viable alternative procedure is available,[240] where a party seeks certification in the face of a carriage order made in a different jurisdiction,[241] on appellate review of certification,[242] to prevent certification of a constitutional questions case[243] or to deal with preferability in a constitutionality case,[244] in the process of converting a judicial review application into a class action,[245] in deciding between judicial review and a class action,[246] or in allowing an application for judicial review to be heard by the case management judge.[247]

Frequently, judicial economy is invoked alongside the other goals of class actions as laid out in *Dutton*[248] and/or *Hollick*.[249] Occasionally, this occurs without any attempt to use or apply the term in a meaningful way (for example: "There is no judicial economy to certifying these … claims as a class action"[250]). It may also be treated as an "Alleluia!" at the end of a judgment or certification inquiry to impart legitimacy to what the court has decided.[251]

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238 Usually marked by overlap between the common issues determination and the preferability inquiry: see *Paron*, *supra* note 100; *Windsor II*, *supra* note 222 at para. 10; *Brooks v. Canadian Pacific Railway Ltd.*, 2007 SKQB 247, 298 Sask. R. 64; *Sorotski*, *supra* note 98; *Abdool*, *supra* note 54 at 472-75; *Pearson v. Inco Ltd.* (2002), 33 C.P.C. (5th) 264 at paras. 116-29 (Ont. Sup. Ct.) [*Pearson II*]; *Smith v. Canadian Tire Acceptance Ltd.* (1995), 22 O.R. (3d) 433 (Gen. Div.); *Chippewas of Sarnia Band v. Canada (Attorney General)* (1996), 29 O.R. (3d) 549 (Gen. Div.) (certification of a defendant class).

239 *Scott v. St. Boniface General Hospital*, 2002 MBQB 196, 165 Man. R. (2d) 181 at paras. 36-37.

240 *Rogers Broadcasting Ltd. v. Alexander* (1994), 4 C.C.L.S. 227 at para. 33 (Ont. Ct. J. (Gen. Div.)) (alternate procedure available under *Canada Business Corporations Act*).

241 *Tiboni*, *supra* note 218 at para. 101.

242 *Ayrton II*, *supra* note 102; *Hoy*, *supra* note 63 at paras. 54-55 (preferability); *Bennett v. British Columbia*, 2007 BCCA 5, 63 B.C.L.R. (4th) 96 at para. 49; *Tiemstra v. Insurance Corp. of British Columbia* (1997), 38 B.C.L.R. (3d) 377 (C.A.) at para. 17.

243 *Perron v. Canada (Attorney General)*, [2003] 3 C.N.L.R. 198 (Ont. Sup. Ct.) [*Perron*].

244 *Howard Estate v. British Columbia* (1999), 66 B.C.L.R. (3d) 199 at para. 41 (S.C.); *Nanaimo Immigrant Settlement Society v. British Columbia*, 2001 BCCA 75, 84 B.C.L.R. (3d) 208.

245 *Tihomirovs*, *supra* note 122; *Hinton*, *supra* note 95.

246 *Williams v. College Pension Board of Trustees*, 2005 BCSC 788, 45 B.C.L.R. (4th) 158; *Auton*, *supra* note 109.

247 *McLaughlin v. Falconbridge Ltd.* (1999), 36 C.P.C. (4th) 40 at para. 35 (Ont. Sup. Ct.).

248 See e.g. *Metera*, *supra* note 111 at para. 76; *Gillespie v. Gessert* (2006), 32 C.P.C. (6th) 319 at para. 21 (Alta. Q.B.); *Doucette*, *supra* note 67 at para. 25; *Tembec*, *supra* note 122 at para. 61; *Bouchanskaia*, *supra* note 124 at para. 168; *2038724*, *supra* note 119 at para. 128.

249 *Cole v. Prairie Centre Credit Union Ltd.*, 2007 SKQB 330, 305 Sask. R. 82 at para. 12; *Samos*, *supra* note 95 at para. 67; *Pro-Sys*, *supra* note 236 at para. 178; *Epp v. Alma Mater Society of the University of British Columbia*, 2006 BCSC 659, 18 B.L.R. (4th) 277 at para. 45 [*Epp*]; *Pearson*, *supra* note 99 at para. 69.

250 *Bendall v. McGhan Medical* (1993), 14 O.R. (3d) 734 at 744 (Gen. Div.); *909787 Ontario Ltd. v. Bulk Barn Foods Ltd.* (1999), 93 O.T.C. 66 at para. 42 (Sup. Ct. J.) ("I find that there is judicial economy in the certification."); *Ducharme v. Solarium de Paris* (2007), 48 C.P.C. (6th) 194 at para. 39 (Ont. Sup. Ct.) [*Ducharme*].

251 For a complete discussion of the "Alleluia!" concept, see Part II, above. See also *Daniels v. Canada (Attorney General)*, [2003] 2 C.N.L.R. 98 (Sask. Q.B.); *Hinton*, *supra* note 95 at paras. 39, 60; *Walton v. Mytravel Canada Holdings Inc.*, 2006 SKQB 231, 280 Sask. R. 1 at para. 71 [*Walton*]; *Tembec*, *supra* note 122 at para. 61; *Bouchanskaia*, *supra* note 124 at para. 168; *Western Star Trucks*, *supra* note 64 at para. 74; *Pro-Sys*, *supra* note 236 at para. 178; *Lacroix v. Canada Mortgage and Housing*, [2001] O.J. No. 6251 at para. 45 (Sup. Ct.) (QL); *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235, 54 B.C.L.R. (4th) 204; *Epp*, *supra* note 249 at para. 45; *Cloud*, Sup. Ct., *supra* note 62 at para. 35; *Givogue v. Burke* (2003), 25 C.C.E.L. (3d) 91 at paras. 33-36. (Ont. Sup. Ct.); *Wilkins v. Rogers Communications* (2008), 66 C.P.C. (6th) 251 at para. 71 (Ont. Sup. Ct.); *Ducharme*, *ibid.* at para. 39.

Considerations of judicial economy also occur in non-certification motions: to strike pleadings;[252] to permit plaintiffs to serve additional materials;[253] to compel particulars[254] (including from a non-defendant[255]); to have a defendant struck from the statement of claim;[256] to substitute plaintiffs to avoid a limitations period;[257] summary trial motions;[258] carriage motions;[259] to refuse a motion for consolidation;[260] to keep multiple defendants in a suit despite their motion to be struck;[261] and to prevent disclosure of a fee agreement (which had not yet been approved) on grounds of solicitor-client privilege for a settlement class that had not yet been approved in a residential schools class action that had not yet been certified.[262]

In the context of administrating a class action, judicial economy matters in the approval of form of notice of certification[263] and the ability of the plaintiff to make repeated applications for certification.[264] It also matters when the court is deciding to keep jurisdiction,[265] to determine the place of hearing for certification,[266] or to refuse individual discovery of class members by defendant.[267] It arises in fee[268] and settlement class[269] approval or settlement agreements.[270] It plays a role in statutory interpretation,[271] although to a lesser degree than access to justice.

Despite the number of cases involving judicial economy, there are very few where it is the determining factor. The few, other than where individual or common issues predominate, are worth mentioning: in the sequencing of motions (whether they should follow or precede

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252 *Pawar*, *supra* note 214; *Millership v. Canada*, 2005 FC 1455, 143 A.C.W.S. (3d) 484 (for estoppel); *Potter v. Bank of Canada* (2005), 9 C.P.C. (6th) 36 at para. 6 (Ont. Sup. Ct.).

253 *Toms Grain & Cattle v. Arcola Livestock Sales Ltd.*, 2004 SKQB 338, 133 A.C.W.S. (3d) 19.

254 *Bellan v. Curtis*, 2007 MBQB 221, 219 Man. R. (2d) 175 at paras. 23-25; *Anderson v. Canada (Attorney General)*, 2008 NLTD 166, 280 Nfld. & P.E.I.R. 67 at para. 32 [*Anderson II*].

255 *CC&L Dedicated Enterprise Fund (Trustee Of) v. Fisherman* (2001), 6 C.P.C. (5th) 281 at para. 38 (Ont. Sup. Ct.).

256 *Anderson II*, *supra* note 254 at para. 32.

257 *Logan v. Canada (Minister of Health)* (2003), 36 C.P.C. (5th) 176 at paras. 23-25 (Ont. Sup. Ct.).

258 *Consumers' Assn. of Canada v. Coca-Cola Bottling*, 2005 BCSC 1042, 46 B.C.L.R. (4th) 137 at paras. 73-77.

259 *Nelson*, *supra* note 112, followed in *Joel v. Menu Foods Genpar Ltd.*, 2007 BCSC 1248, 78 B.C.L.R. (4th) 112.

260 *Northfield Capital v. Aurelian Resources* (2007), 29 B.L.R. (4th) 149 at paras. 38-40 (Ont. Sup. Ct.); *Obonsawin v. Canada*, [2002] O.T.C. 435 (Sup. Ct.).

261 *Eaton*, *supra* note 209.

262 *Sparvier v. Canada (Attorney General)*, 2006 SKQB 362, 283 Sask. R. 244 at para. 37-38.

263 *Walls*, *supra* note 58 at paras. 21-22.

264 *MacKinnon v. National Money Mart*, 2006 BCCA 148, 265 D.L.R. (4th) 214 at paras. 17, 26-28, 34 [*MacKinnon II*].

265 *Ho-A-Shoo v. Canada (Attorney General)* (2000), 47 O.R. (2d) 115 (Sup. Ct.).

266 *Hollick v. Toronto (Metropolitan of)* (1998), 18 C.P.C. (4th) 409 at para. 11(Ont. Ct. J. (Gen. Div.)). *Joseph v. Lefaivre Investments (Ottawa) Ltd.*, [2005] O.T.C. 445 at paras. 11-12 (Sup. Ct.); *Menegon v. Philip Services* (2000), 50 O.R. (3d) 348 at para. 5 (Sup. Ct.).

267 *Enge v. North Slave Métis Alliance*, 2003 NWTSC 13, [2003] N.W.T.J. No. 14 (QL).

268 *Endean II*, *supra* note 215 at para. 13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), [2005] O.J. No. 1117 (Sup. Ct.) (QL) [*Vitapharm*]; *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.) (fee multipliers).

269 *Kuptana v. Canada (Attorney General)*, 2007 NWTSC 1, 45 C.P.C. (6th) 323 (residential schools settlement); *Ammaq*, *supra* note 202 (residential schools settlement); *Nutech Brands v. Air Canada* (2008), 59 C.P.C. (6th) 166 (Ont. Sup. Ct.); *Millard v. North George Capital Management Ltd.* (2000), 47 C.P.C. (4th) 365 at para. 16 (Ont. Sup. Ct.).

270 *Epstein v. First Marathon Inc.* (2000), 41 C.P.C. (4th) 159 at para. 69 (Ont. Sup. Ct.); *Ford*, *supra* note 64 at at paras. 42, 145.

271 *MacKinnon II*, *supra* note 264 at paras. 17, 26-28, 34.

certification);[272] to order an early certification hearing out of fairness to the defendant;[273] in isolated preferability inquiries;[274] to keep jurisdiction in a multi-jurisdictional case;[275] and in de-certification.[276]

For its part, behaviour modification plays multiple roles. As with the other two goals, deterrence is most important at the preferability inquiry[277] or the appellate review of the same.[278] It is also a consideration in certification generally, especially where the potential for liability is no longer ongoing.[279] The term is engaged occasionally in the inquiry into whether there is an appropriate representative plaintiff,[280] in settlement approval,[281] in the assessment of costs[282] (specifically of notice[283]), and in the approval of fees.[284]

Infrequently, behaviour modification matters in the determination of remedies,[285] to amend statements of claim,[286] in statutory interpretation,[287] and to change solicitors.[288] Like judicial

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272 *Pauli v. ACE INA Insurance*, 2002 ABQB 715, 322 A.R. 104; *Birrell v. Providence Health Care Society*, 2006 BCSC 1814, 154 A.C.W.S. (3d) 195 at para. 26, aff'd 2007 BCCA 574, 162 A.C.W.S. (3d) 8. Depending on the sequence and success of the parties, more hearings might be required and judicial economy decreased.

273 *Paron v. Alberta (Environmental Protection)*, 2004 ABQB 760, 366 A.R. 183 at para. 21.

274 *Windsor*, *supra* note 114; *MacLean*, *supra* note 56 at paras. 68-71; *Axiom Plastics v. E.I. DuPont Canada* (2007), 87 O.R. (3d) 352 at 393 (Sup. Ct.) [*Axiom*] ("Judicial economy is the primary reason for certifying this action").

275 *Wuttunee v. Merck Frosst Canada Ltd.*, 2008 SKQB 229, 312 Sask. R. 265 at paras. 41-43 (primarily because of easy access to the appellate court: comparatively speedier process in Saskatchewan, in contrast to Ontario's overloaded appellate court).

276 *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 at para. 11 (C.A.) [*Chadha II*].

277 See e.g. *Eaton*, *supra* note 209 at paras. 168, 178-79; *Paron*, *supra* note 100 at paras. 99-101; *Kristal*, *supra* note 132 at para. 135; *Metera*, *supra* note 111 at paras. 83-85; *T.L.*, *supra* note 64 at para. 97; *Elder Advocates*, *supra* note 203 at para. 531; *Windsor II*, *supra* note 222 at paras. 143-51; *Shiels*, *supra* note 236 at para. 52; *Wheadon*, *supra* note 116 at paras. 148-49; *Ring*, *supra* note 235 at para. 159; *Rideout II*, *supra* note 234 at paras. 129-32; *May*, *supra* note 117 at para. 121; *Sorotski*, *supra* note 98 at para. 81; *Hoffman*, *supra* note 99 at paras. 327-28; *Pro-Sys*, *supra* note 236 at paras. 191-92 (defendants already subject to criminal sanction); *Parsons v. Coast Capital Savings Credit Union*, 2006 BCSC 552, 148 A.C.W.S. (3d) 692 at paras. 170-71; *Ruddell*, *supra* note 124 at paras. 119-20; *Koo*, *supra* note 56 at paras. 75-77; *Jeffery*, *supra* note 222 at paras. 115 & 133; *Carom v. Bre-X*, *supra* note 234 at paras. 177, 274-75; *Axiom*, *supra* note 274 at paras. 159-63, 173; *Pearson II*, *supra* note 238 at paras. 133-35; *Anderson*, *supra* note 232 at para 412.

278 *Sorotski II*, *supra* note 97 at paras. 73-74; *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 at paras. 20-23, 88-92 (Sup. Ct. (Div. Ct.)) [*Chadha*] and *Chadha II*, *supra* note 276 at paras. 11, 18, 62-68; *Pearson*, *supra* note 99 at paras. 31-33, 85-91.

279 *Spencer*, *supra* note 99 at paras. 46-50 (company no longer in business); *W.J.R. v. British Columbia*, 2005 BCSC 372, 137 A.C.W.S (3d) 1105 at para. 80; *Cloud*, C.A., *supra* note 70 at para. 21 ("residential schools are now a thing of the past in Canada"); *Ward-Price v. Mariners Haven Inc.*, [2002] O.T.C. 871 at para. 45 (Sup. Ct.).

280 *Ayrton II*, *supra* note 102 at para. 18 (minor mention); *Bouchanskaia*, *supra* note 124 at paras. 168-70.

281 *Rideout*, *supra* note 66 at paras. 66-70; *Vitapharm*, *supra* note 268 at para. 145; *Alfresh*, *supra* note 224 at para. 16; *799376 Ontario Inc. (Trustee of) v. Cascades Fine Papers Group* (2008), 65 C.P.C. (6th) 223 at para 14 (Ont. Sup. Ct.); *Wong v. Sony Corp.*, [2008] O.J. No. 3096 at para. 5 (Sup. Ct.) (QL).

282 *Pauli II*, *supra* note 102 at paras. 11-19; *Poulin v. Ford Motor Co. of Canada* (2007), 52 C.P.C. (6th) 294 at paras. 30-35 (Ont. Sup. Ct.); *Edwards v. Law Society of Upper Canada* (1998), 38 C.P.C. (4th) 136 at paras. 14-15 (Ont. Ct. J. (Gen. Div.)).

283 *Walls*, *supra* note 58 at para. 50.

284 *Wilson v. Servier Canada Inc.* (2005), 252 D.L.R. (4th) 742 at para. 62 (Ont. Sup. Ct.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.T.C. 208 at para. 101 (Sup. Ct.).

285 *Serhan*, *supra* note 225 at para. 123.

286 *Reid v. Ford Motor Co.*, 2006 BCSC 712, 149 A.C.W.S. (3d) 804 at para. 25.

287 *Smith Estate v. National Money Mart* (2008), 57 C.P.C. (6th) 99 at para. 118 (Ont. (Div. Ct.)) (in the context of arbitration clauses).

288 *Fantl v. Transamerica Life Canada* (2008), 60 C.P.C. (6th) 326 at para. 63 (Ont. Sup. Ct.).

economy, it is often mentioned with little or no analysis[289] or as an "Alleluia!" at the end of a judgment or certification inquiry.[290] It can also be found in the frequent restatement of the three goals, citing *Dutton*[291] and *Hollick*.[292] The court sometimes "must assume, for this purpose, that the allegations … can be proven."[293] Deterrence "suffers where lengthy individual proceedings [are required] … prior to a determination of liability."[294]

Only rarely is behaviour modification determinative of anything. There are only a few cases where it is determinative at the preferability inquiry.[295] Its subservience to access to justice and judicial economy is the subject of a later section.

## K. BEHAVIOUR MODIFICATION — A FOUR CORNERS APPROACH

I have declined to take a law and economics approach to evaluating behaviour modification in this context. Partly, it is because I am not interested in expanding the meaning of the term. Moreover, while I recognize that there is a substantial body of critical literature on the economic imperatives and components of behavioural modification (in contract, tort, and litigation generally), that is not the purpose of this project. Instead, I want to define the term within the four corners of the jurisprudence. Given how little attention is given to the definition of behavior modification in the case law, I prefer to focus on how the courts have dealt with it, in conjunction with and in contrast to the commentators.

Furthermore, the courts are not, for the most part, adopting a law and economics approach to behaviour modification. According to the judicial definition, stopping harms too small to be policed on an individual basis is a proper concern for access to justice and not for behaviour modification. Instead, the courts have identified a positive (or normative-economic) basis for changing harmful practices. There is no other tool to modify these practices and, therefore, class actions must play the role of public prosecutor.

After reading these cases, the basic, unproblematized definition is, frankly, to stop bad people from doing bad things. Deterrence is reduced to a fear factor of punishment by payment. If class actions force malefactors to pay for their wrongdoing then defendants will either change their ways or be bankrupted. The courts seem inclined not to let the bad guys get away with their loot. While commentators focus on the internalization of costs by wrongdoers, the courts and the law commissions seem keener on disgorgement or repayment of ill-gotten gains.

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289 See *Ayrton*, *supra* note 56 at para. 97 ("finally, if the plaintiffs are successful in their claims, the goals of accountability for wrongful actions and deterrence of future wrongful actions will likely be met"). See also *Hoffman v. Monsanto Canada*, 2005 SKQB 225, 264 Sask. R. 1; *L.R.*, *supra* note 234; *Hicks*, *supra* note 232.

290 See e.g. *Walton*, *supra* note 251 at para. 71; *Perron*, *supra* note 243 at para. 103.

291 See e.g. *Tihomirovs*, *supra* note 122 at para. 32; *Wheadon*, *supra* note 116 at paras. 87, 148; *Reid*, *supra* note 64 at paras. 101-02; *Fakhri*, *supra* note 234 at para. 100; *2038724*, *supra* note 119 at para. 68.

292 See e.g. *Tihomirovs*, *ibid.*

293 *Scott*, *supra* note 99 at para. 142.

294 *Carom v. Bre-X*, *supra* note 234 at 177.

295 *Scott*, *supra* note 99 at para. 142 ("Behaviour modification is the primary goal of this class proceeding"); *Chadha*, *supra* note 278 at para. 41 ("Therefore, it appears that certification … would serve primarily the goal of behaviour modification. *This also militates against certification*" [emphasis added]). See also *Bédard v. Kellogg Canada*, 2007 FC 516, 325 F.T.R. 79 at paras. 112-15.

The more nuanced approach, espoused by commentators such as Jones and Cassels, starts with the premise that distribution of economic impacts is the means by which to achieve both deterrence and compensation. This approach takes a broad view, something that judges seem only minimally concerned with in the context of class actions. The judicial definition is focused on reparations in the instant case (or on closely related wrongdoers). Commentators are concerned with internalizing costs and spreading the cost of the harm. They look at risk-spreading on a systemic level, not just the one incident before the bar, but the potential impact of similar claims in the aggregate. They want to know how certification will impact the system as a whole. It may simply be the focus that distinguishes the courts from the commentators: for judges, compensation for those wronged, while for the academics, cost internalization to save society money. That said, the courts are looking to penalize wrongdoers, not merely spread the cost of their harm to the most efficient economic actor.

## L. JUDICIAL ECONOMY — BEYOND RES JUDICATA

My original intention was to draw links between the concepts of res judicata and issue estoppel and the functions of judicial economy in class actions. Judicial economy, I surmised, was principally about preventing re-litigation of the same issue by multiple parties. The use of the term by the courts, however, goes beyond preventing collateral attack and reducing duplicative proceedings. While the notion of "preventing the courts from wasting time on the continual re-argument of the same causes"[296] is relevant, the definition is far broader.

Indeed, where at the preferability stage of the certification inquiry judicial economy leads to the conclusion that a class action is not the preferable procedure, there may be an increase in proceedings. Individually viable cases could be brought separately, resulting in litigation on strikingly similar issues. Furthermore, if a class is not certified, then individual claims may seek determination of the same issues in multiple cases, which would not be barred by issue estoppel. Uncertified claims that are resolved do not block the re-litigation of the same issues by new plaintiffs. Cause of action estoppel is not available to protect defendants from actions by new plaintiffs on similar facts. If res judicata was the primary concern for judicial economy, it would be natural to assume that some cases would deal with re-litigation by plaintiffs who have opted out of a certified class.[297] Nevertheless, there was not a single case dealing with this issue in the more than 400 that I examined.

Res judicata still plays a role in judicial economy, but it is primarily in the guise of consistency. Although this aspect of judicial economy does come up in the case law, it is a remarkably passive issue: in no case is it determinative. Over time, perhaps there will be a shift in the importance of this aspect of judicial economy.

The efficient use of judicial resources might also be subsumed under res judicata: by adjudicating in as few situations as possible for similarly situated plaintiffs, the effectiveness of judicial resources is maximized and there are as few potentially conflicting decisions as

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296 Linda S. Abrams & Kevin P. McGuinness, *Canadian Civil Procedure Law* (Markham: LexisNexis Canada, 2008) at 164. See also Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d. ed. (Markham: LexisNexis Butterworths, 2004).

297 OLRC Report, *supra* note 5 at 760-65. This is something that the OLRC Report dealt with in its discussion of res judicata.

possible.[298] The predominant definition, however, by both courts and the commentators, is a material one. Judicial economy conceives of the litigation process in material terms — how much time and money will be spent by judges and parties hearing and preparing a case, how many cases will be dealt with in a single trial of common issues, how "efficient" the whole process will be.

The focus on the material echoes the economic definition of access to justice identified in Part II. Here, as there, it seems a shame that the definition is restricted to resource management. While maximizing dollar value in an already overburdened justice system is unobjectionable, courts and commentators are restricting themselves to the economic impacts of litigation. More attention should be paid to the wider benefits of judicial economy, most clearly laid out by the ALRI Report, including early settlements, class-wide resolution of claims,[299] and the simplification of proceedings for parties.[300]

What critical and judicial definitions of judicial economy have neglected (with the possible exception of Branch[301]) is the tension and interdependency between the commonality phase of certification and the preferability inquiry. Judicial economy plays a role in commonality (usually as a result of a provision in the relevant class proceedings act) that I do not believe was conceived by the original law commission reports or the Supreme Court of Canada (although it is hinted at in *Rumley*). Because judicial economy is implicated at the commonality stage of a certification inquiry (as I outlined above), it loses some of its force at the preferability stage. This dual role reduces the scope and flexibility of the term at preferability, where it is, at least according to the Supreme Court, intended to provide guidance to the sitting judge. What this means going forward is discussed below.

### M. THE PRIMACY OF ACCESS TO JUSTICE

It is my contention that access to justice has been adopted by the courts as the defining criterion in the preferability phase of certification in Canada. What I mean by primacy is that access to justice is the principal concern, in that it either trumps the other two or else it is the primary focus of the preferability inquiry. At this point in my analysis, I am not concerned with whether it should be the dominant term, but why it has become so.

My assertion that access to justice is the dominant concern is not merely a gestalt assessment of its role in the case law. In absolute numbers, the terms appear with particular frequencies: in the QuickLaw search described above,[302] switching access to justice for judicial economy and behaviour modification revealed a distinct trend. Access to justice returned 568 results; judicial economy returned 481 results; behaviour modification returned 307 results. The frequency with which the terms appear in cases points to their relevance in

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298 Although, it is worth noting that whether class actions actually conserve judicial resources remains a contested question: see Cassels & Jones, *supra* note 28 at 363.

299 ALRI Report, *supra* note 9 at 54.

300 It is arguable that these benefits might also be cast as a particular version of economic value, but I do not think that they should be restricted to cost savings. They are broad enough to also encompass psychological and social values (such as accessibility and personal opportunity costs).

301 *Supra* note 23.

302 See *supra* notes 52, 191, 216.

the real world. Furthermore, the rate at which the terms play a determinative role falls from most significant (access to justice) to least significant (behaviour modification).

The courts have also explicitly commented on and adhered to the primacy of access to justice, especially in British Columbia. In *Endean v. Canadian Red Cross Society*, the Court recognized that "the intention behind these provisions of the Act is to put more emphasis on the goal of access to justice than on that of judicial economy."[303] *Bouchanskaia* held that "[a]ccess to justice is the overriding consideration."[304] The fact that behaviour modification does not even merit dismissal points to its relative insignificance for the courts.

In Ontario, one judge found that while "[o]ne of the main goals of the Act is to promote judicial economy … that cannot override the ultimate goal of a just determination between the parties."[305] Access to justice can also trump judicial economy, even in a case where certification will increase the judicial workload.[306] The Ontario Court of Appeal "has noted that in cases where access to justice is not a significant goal and judicial economy would be undermined, 'the circumstances requiring behaviour modification would have to be extremely compelling to allow that single goal to overcome the other deficiencies.'"[307]

The OLRC Report found access to justice to be the most important goal of class proceedings.[308] Moreover, access to justice and judicial economy take precedence over behaviour modification. The Commission wrote that

> [i]t bears emphasizing that … the justification for endorsing class actions aggregating individually recoverable and individually nonrecoverable claims *lies mainly in the ability of these types of class action to achieve either judicial economy or increased access to justice. Behaviour modification is essentially an inevitable, albeit important, by-product of class actions.*[309]

Behaviour modification is merely a "by-product" of the pursuit of access to justice and judicial economy, but should still be pursued in order to support those objectives.[310] At the same time, behaviour modification is not the central purpose of class actions, but "many believe it is a useful by-product."[311] These statements all point to the predominance of access to justice.

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303 (1997), 36 B.C.L.R. (3d) 350 at para. 54 (S.C.), citing *Harrington*, *supra* note 124. Followed in *Koo*, *supra* note 56 at para. 67; *Pausche v. British Columbia Hydro & Power Authority*, 2000 BCSC 1556, 81 B.C.L.R. (3d) 221. See also *Reid v. British Columbia (Egg Marketing Board)*, 2003 BCSC 985, 123 A.C.W.S. (3d) 434 at para. 36.

304 *Supra* note 124 at para. 169. Cited also in *Ruddell*, *supra* note 124 at para. 106.

305 *Peppiatt v. Royal Bank of Canada* (1996), 27 O.R. (3d) 462 at para. 447 (Gen. Div.). See also *Chadha*, *supra* note 278 at para. 41. See also *Fehringer v. Sun Media* (2002), 27 C.P.C. (5th) 155 at para. 31 (Ont. Sup. Ct.) (behaviour modification "by itself, cannot justify certification").

306 *Smith v. National Money Mart* (2007), 37 C.P.C. (6th) 171 at para. 135 (Ont. Sup. Ct.).

307 *Shaw*, *supra* note 234 at para. 24, citing *Chadha II*, *supra* note 276 at para. 62.

308 OLRC Report, *supra* note 5 at 119-40. It is worth noting that the OLRC Report also devotes 21 pages to the benefits and meaning of access to justice, three pages to judicial economy, and just over six pages to behaviour modification.

309 *Ibid.* at 145 [emphasis added]. See also the ALRI Report, *supra* note 9 at 52, which also refers to behaviour modification as a "by-product."

310 OLRC Report, *ibid.* at 144-46. Only in a case where *cy pres* distribution of any damages or settlement is the single possible outcome can "behaviour modification … serve as an independent goal of civil litigation, separate and apart from compensation" (at 145).

311 ALRI Report, *supra* note 9 at 52.

It is important to distinguish between scholarly assessments of the goals and the opinions of the courts. Although Jones, Cassels, and others argue that deterrence should be the most important goal of class actions, the cases reveal that in the collective consciousness of the courts, it is not.[312]

One theory as to why access to justice takes precedence over behaviour modification has to do with the timing of certification. Certification happens near the beginning of a class action. That is, while an action may be filed seeking certification, it does not actually become a class proceeding until a court certifies it. At the moment of certification, the class action is a purely procedural vehicle. The act of certification outlines a particular procedure — *not* a particular outcome for an action.

Since the inception of class proceedings in Canada, behaviour modification has been cited as a central goal. Whether this occurs only with a victory for the plaintiff and a finding of liability against a defendant, or whether a settlement serves the same purpose is open to debate.[313] What is less open to debate is that behaviour modification presupposes a substantive outcome. It can only occur with the resolution of the dispute. The courts have recognized the consequential nature of deterrence: at certification, "no conclusion of merits are made … and no judgment or criticism of the defendant is being proposed."[314] Behaviour modification "is not a large or appropriate consideration *until liability is determined*."[315] Courts are understandably reluctant to prejudge issues on the merits at certification, and deterrence requires them to presuppose liability. While they may temper their words by pointing to the *possibility* of behaviour modification as a result of an action, judges are infrequently focused on an action's potential.

While individual defendants may modify their behaviour in response to an action, that is not considered a sufficient result by most courts.[316] It may be that simply by starting a lawsuit, there is an impact on the behaviour of actual and potential wrongdoers — they see the writing on the wall and (at their own expense and inconvenience) voluntarily change their ways for the better. How they know what is better remains unclear. But that type of self-correction will not always be the immediate result.[317] Furthermore, that reasoning assumes that deterrence is at least partly voluntary, which it surely is not in every situation. If a defendant contests liability for tort or negligence, they are unlikely to change their behaviour until the end of an action. This consequential aspect of behaviour modification is likely the reason that it plays a minor role at certification.

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312 Jones, *supra* note 27; Cassels & Jones, *supra* note 28 at 360-62.

313 Although see *Rideout*, *supra* note 66 at para. 66, which held that "[Behaviour modification] may be achieved through an award of damages, or by the agreement of a defendant to reform its conduct, or by a combination of both." Presumably, this might include resolution by settlement. On the merits of settlement, see Owen M. Fiss, "Against Settlement", Comment, (1984) 93 Yale L.J. 1073.

314 *Doucette*, *supra* note 67 at para. 92.

315 *Eaton*, *supra* note 209 at para. 178 [emphasis added]. See also *Ayrton*, *supra* note 56 at para. 97; *Rideout II*, *supra* note 234 at para. 129.

316 See e.g. *Paron*, *supra* note 100 at para. 100. (The fact that a defendant shows signs of individual behaviour modification is not sufficient to make the objective moot, since "modification of behaviour does not only look at the particular defendant, but more broadly at similarly situated defendants.") See also *Windsor II*, *supra* note 222 at paras. 143-51; *Jeffery*, *supra* note 222 at para. 133.

317 See e.g. *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 at para. 71 ("The defendant has said that it will continue to conduct business in a manner that may violate the law until presumably the law is changed or it is required to stop by court order. A class proceeding would therefore meet the goal of behaviour modification").

The reason that judicial economy plays a lesser role than access to justice is twofold. Partly, it is because judicial economy matters outside of the preferability inquiry. The definitions by the law commission reports and the Supreme Court do not account for this dual role. Because judicial economy is implicated at the commonality stage of certification, it loses some of its force at preferability. This may account for its reduced significance as an individual term on par with access to justice and its limited use by the courts.

This, however, does not completely explain its subservience to access to justice. I began by asking myself, "Why is judicial economy *not* the dominant consideration in class action certification?" If class actions are truly procedural vehicles, then the courts should be most concerned with the procedural goals inherent in judicial economy. Behaviour modification, as a substantive outcome, should be a secondary concern. In this theory, so too should access to justice. If access simply means the ability to bring a claim, then access is a procedural concern. If justice means resolution, then it is a substantive outcome. The experience in the courts, however, has been to value access to justice above all else, and to focus on its ability to further a claim (procedurally and substantively).

One possible reason for the focus on access to justice is that it is the stated concern, but judicial economy remains the real, de facto concern. Access to justice is named as a stand-in for something else; something that might be unpalatable for the courts to state openly. Judges probably do not want to be seen to lighten their own workloads while denying plaintiffs the opportunity to pursue legitimate claims. This, however, is likely too simplistic a reason for this phenomenon.

The question then becomes, "why is access to justice the dominant concern?" Recall that we are dealing primarily with the certification stage of an action. It may be that access to justice is the dominant concern because it is the only goal that leads to a determinative outcome at certification. Without the aggregative function of class certification (of both individually viable and non-viable claims), these cases (at least the non-viable ones) would not be pursued beyond the certification motion. Access to justice is the only goal of the three that has a determinative outcome at certification. If, for example, behaviour modification is not used at certification and the claim does not proceed as a class, it may still occur later on (through individually viable claims) or via other avenues outside of the court (voluntary payments, government action, or criminal sanction).

With respect to judicial economy, it may be that judicial economy is an uncertain prospect because the court will not know until the end of the proceedings whether there were any savings to the court or the parties. Alternatively, in the event that a class is not certified, there may still be judicial economy because some claims will not be pursued,[318] resulting in a savings. This is not to say that there would not be some duplicative claims, and the ratio of judicial economy achieved by barring individually non-viable claims would vary, but the possibility of achieving some judicial economy would still be active. At the same time, the possibility of access to justice would be moot or severely diminished.

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[318] These might include individually non-viable claims as well as viable ones. As I said in Part II, above, there may be barriers other than the purely economic that bar individually viable claimants from pursuing reparations (for example social or psychological barriers, lost opportunity cost).

Where access to justice enables an action to proceed where otherwise it would not (individually non-viable actions), certification itself is a substantive outcome. Certification results in the prosecution of the suit. If certification is unsuccessful, then individually non-viable suits will not be brought and will go dormant. For such plaintiffs, the act of certification is a determinative outcome: suddenly their claims are collectively viable. It is the transformation or, better yet, the *transmutation* of non-viable into viable that is a substantive outcome.

While this flies in the face of established thinking, which holds that certification is *never* a substantive result and that it confers *no* rights, I believe that certification radically alters the position of certain plaintiffs.[319] The creation of a collectively viable claim through certification is a process that does not occur elsewhere. Other than in a class action, when can a legitimate claim too small to be taken up (whether for economic, social, or other burdens) be pursued through a vehicle that makes it viable?

## N. GOING FORWARD — A DELIBERATE APPROACH

The purpose of this Part is not to expand the definitions of behaviour modification or judicial economy. Employing these words to embrace more than they already do would unnecessarily complicate their application. Though there is a range of possible meanings for each of these terms, it is a pre-existing and defined range. With the exception of expanding access to justice to embrace its full potential, courts should draw upon the established characteristics of judicial economy and behaviour modification as laid out in the case law and the commentary.

It is my hope that with some knowledge about the scope of the terms, including access to justice, the courts will adopt a reasoned and deliberate approach to their use of the goals. The current approach may offer some flexibility for judges seeking to use the terms in novel ways, but the effect is that the interpretive lens offered by the terms is distorted. Judges should be precise in their application of these goals: judicial economy, for instance, should not be shortchanged by applying it only to the evaluation of commonality. Decision-makers should take advantage of the full range of meanings offered by the terms, not restricting themselves to the one they find most convenient. In the case of judicial economy, it behooves the courts to look not just at time-saving or judicial calendar-clearing, but also at the possibilities for simplifying trials and generating cost savings for defendants (and the court system) available through early settlement or unified procedure.

This flexibility should, in turn, increase the possibility of certification. The reader has undoubtedly concluded that I believe that certification is an inherently positive action. I do. With regards to access to justice, whether claimants win or lose is immaterial, but no justice system can be said to be functional when it denies certain litigants a chance to vindicate their rights. Class actions represent the last, best chance for otherwise non-viable claims, which are always *legally* viable, and the courts should strive to allow them their day in court. The transformative effect of certification must be recognized and respected by the courts.

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[319] See e.g. the Supreme Court of Canada in *Dell*, *supra* note 41 at para. 105: "The class action is a procedure, and its purpose is not to create a new right."

To return to my example, the transformative effect of certification is that 1,500,000 people who have claims too small to pursue on their own (individually non-viable) are transmuted into a collective with a viable action. Where before the bank loomed large and unassailable over the individuals, certification means that, instead of not pursuing their claims at all, the plaintiffs have a chance at a successful resolution. If the class were not certified, the case would go dormant and become a meaningless, unexercised right. This should underline the transformative power of certification.

## IV. CONCLUSIONS

It is my hope that, in future, there will be more active use of the goals of class proceedings and the full breadth of their meanings. By instructing courts to look at certification and the class proceedings legislation through the lens of the three goals, the Supreme Court has provided them with a rationale to further the purposes of class actions legislation. The courts should not give up this valuable opportunity through inaction. Parties should be sure to remind courts of the role that the terms are meant to play.

I believe that an expanded access to justice consideration should be the most important criterion in a certification decision. It should not, however be the only concern: if, for example, access to justice will not be substantially enhanced by certifying a class, then the courts should give adequate consideration to judicial economy and behaviour modification before deciding whether or not to certify. Although access to justice should continue to trump judicial economy (where it stands to increase the judicial workload), it should not be the be-all and the end-all at preferability.

I do not mean for the relevance of the three goals of class proceedings to overshadow the rest of the requirements in a motion for certification. Preferability is only one factor in addition to numerosity, commonality, superiority, and an adequate representative plaintiff. Judicial economy, behaviour modification, and access to justice should be considered alongside the other requirements. At the same time, they are the *goals* of class proceedings. Their existence should inform the actions of the courts.

The courts should embrace the determinative possibilities of all three goals. Instead of merely including them as an "Alleluia!" to provide legitimacy to a decision made on another basis, or for the sake of completeness, judges should engage with their interpretive and determinative potential. Courts should examine all the aspects of each goal before making a decision on preferability or certification in the largest sense. In order to allow the pursuit of the maximum number of legitimate claims in the most efficient vehicle possible, courts should use the terms to canvass the full set of reasons for why certification might be called for.

At the moment, access to justice remains the dominant concern in the courts because it gives judges the interpretive space that they need to certify claims having regard to all the circumstances. In light of the timing of certification, access to justice offers the greatest number of interpretive possibilities to permit certification, which transmutes individually non-viable claims into pursuable aggregated classes.

In an overburdened court system where justice has become prohibitively expensive, the class action offers vast remedial possibilities for the vindication of rights and the pursuit of justice. In my example, only a class action provides a mechanism for 1,500,000 individuals with legitimate claims to exercise their rights in the courts. Without certification, their rights go unexercised and justice is ignored. The solution to these problems is the more efficient prosecution of claims, including those that, historically, might not have been advanced. Individually non-viable claims are equally deserving of justice (whatever the final result might be) as any other claim. Parties should be given every chance to certify their claims.

The substantive effects of certification mean that particular care should be paid by courts when deciding whether or not to certify an action. To a degree not seen in most other types of litigation, the choice of procedure is positively transformative. Courts must know that, by deciding whether or not to certify, their procedural decision has a substantive impact on the existence of claimant's rights. Given that, the phenomenon of the transmutation of individually non-viable claims into collectively viable actions is a subject that merits further scrutiny.