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Behaviour Modification in Class Actions: A Chimera?

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It now appears to be axiomatic that the three objectives of class actions in Canada are access to justice, judicial economy and behaviour modification. That these are the three primary objectives, often called the “pillars”, of class actions seems now to be beyond question. But what does this mean in practice? There is little doubt about access to justice. It is simply that those who have been wronged will be able to seek redress which, absent the class action procedure, wouldn’t otherwise be available. Similarly, judicial economy is an unambiguous concept, meaning that the collective hearing of a number of claims with common issues is an efficient way to deploy judicial resources. These are fairly straight forward objectives and relatively easy to apply.

The third objective, behaviour modification, is another story. It is a concept that has bedevilled the development of class action procedures in various jurisdictions. It has been, and remains, a subject about which there is strong disagreement. It is the thesis of this paper that much of the controversy about behaviour modification is as a result of misunderstanding what it entails and how the concept should be applied in Canadian class actions. But at present, behaviour modification appears to be a source of confusion for the parties, lawyers and, most importantly, to the judiciary who have decided they are required to consider the concept in the class action process.

The best place to start is with an examination of where behaviour modification came from in the context of the development of class action procedures in Canada. Its primary source is the Ontario Law Reform Report on Class Actions which was released in 1982.¹

The Ontario Law Reform Commission (OLRC) was alive to the difficulties inherent in the idea that class action procedures might be justified on the grounds that they could be an instrument

for social change by bettering behaviour, particularly behaviour in the economic sphere. Quoting from an article by two American scholars, the OLRC wroteⁱⁱ:

The function of a legal system is not limited to its role in providing individuals with a mechanism by which to resolve disputes and redress grievances. Law also serves as a standard of the conduct which the community or the society expects from its members and, by the same token, the judicial system should provide realistic sanctions which the community can invoke in order to enforce obedience to its prescribed values and rules of conduct.ⁱⁱⁱ

The OLRC found that “[c]lass actions can contribute to the achievement of behaviour modification because of their potential to overcome economic and other barriers to litigation.”^{iv} If sellers, manufacturers and, as it has turned out, actors in the governmental and regulatory worlds, are immune from civil suit for the reasons the OLRC identified, it is possible that behaviour not in accord with societal standards would continue unmodified.

The OLRC was clearly aware that there were many who believed that behaviour modification was not an appropriate object either of class actions or, for that matter, of the law generally. This view is based simply on the premise that the civil process is intended to, and has developed, to resolve private disputes so that resort is not had to self help. Of course, the resolution of disputes generates rules to guide future behaviour, but that is not the objective and is not a consideration in the resolution of a particular dispute, according to this school of thought.

The opposing view was well described by the OLRC in another quote from an American learned journal as follows:

A Behaviour Modification Model, on the other hand, sees the courts and civil process as a way of altering behaviour by imposing costs on a person. Not the resolution of the immediate dispute but its effect on the future conduct of others is the heart of the matter.^v

The debate as to the merits of the two models, as it related to the wisdom of adopting a class action procedure in Ontario, was resolved by the OLRC as follows:

..., in the view of the Commission, the justification for endorsing class actions...lies mainly in the ability of these types of class action (sic) to achieve either judicial economy or increased access to justice. Behaviour modification is essentially an inevitable, albeit important, by-product of class actions.^{vi} (emphasis added)

The OLRC concluded its analysis in the following manner:

...we do not eschew the goal of behaviour modification. The Commission is of the view that the potential of class actions to provide the incentives for increased compliance with the law, through the prevention of unjust enrichment or cost internalization, reinforces the “judicial economy” and “access” arguments in favour of the adoption of an expanded class action procedure in Ontario.^{vii}

This debate was about one of the goals of class action procedures and whether it was an appropriate consideration. The OLRC, and others following it, concluded that behaviour modification was both a proper object of the law at large and of the proposed subset, class actions. Other jurisdictions did not share that view and it is useful to briefly examine why. The utility in doing so is to put in focus exactly what the debate in Canada was about and, importantly, what it was not about. It was about the goals of class actions at large; it was not about the certification process in a particular case. This distinction will be developed more fully below but it is clear that the Supreme Court of Canada understood that the debate was about goals not procedure when it wrote in *Western Canada Shopping Centres v. Dutton*:

Third, 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. Cost-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.^{viii}

Like the OLRC, the Supreme Court of Canada seems to regard behaviour modification by deterrence “...something of a serendipitous side effect of class litigation, not without value but subservient to procedural ambitions.”^{ix} If this is true, (and at least in the case of some judges there is reason to doubt that behaviour modification is relegated to such a secondary role in their analysis), then it is evident the courts are aware of the problems that behaviour modification can create in application in individual cases. Other jurisdictions have found such problems to be insuperable and declined to adopt full class action regimes on the Canadian and American models.

It is sometimes thought that the United States was the source of what the OLRC styled the “Behaviour Modification Model”, the deterrence of wrongful conduct by requiring the defendant to “internalize” the costs of their conduct.^x However, one searches the American case law and literature in vain for any developed theory of behaviour modification as a stand-alone pillar supporting their class action regime. The American system, founded originally on Rule 23 and its predecessors of the *Federal Rules of Civil Procedure*, makes no mention of behaviour modification as a grounding principle or pillar of the American class action system. One American author put it as follows:

...[M]odern Rule 23 – operative throughout the federal court system, and adopted by most states – has its deepest roots in English equity practice. Equity as implemented under the class action rules, however, has evolved to embody three distinct and distinctly American principles: (1) efficiency and economy in judicial administration; (2) universal access to civil justice; and (3) empowerment of small claimants to achieve equality between humans and corporate entities.^{xi}

What the American class action is grounded on is the concept that it provides a system of self-regulation through the use of deterrence. The concept of deterrence is central to American class action thinking, including a recognition that the deterrent factor must be balanced against the

need not to over deter, resulting in restriction of commerce or removing needed products from the market. Behaviour modification outside the deterrence framework appears to be a foreign idea and a consideration of it does not form part of the certification process in individual cases as it does in Canada.

It is often asserted, particularly by those who oppose adoption in their jurisdictions of class action procedures on the American model, that more regulated societies do not need such procedures in the same way as does the United States. In other words, behaviour modification as a justification for class actions was not acceptable in some countries, either because there were adequate regulatory regimes or it was not perceived to be an appropriate function for the courts. Such arguments have been largely accepted by England, Scotland and the members of the European Union.^{xii} Perhaps the strongest statement rejecting behaviour modification as a justification for class actions came from the Scottish Law Commission:

We reject this view of a public element in multi-party actions....A claim for damages should not be used as a pretext for what essentially amounts to a public inquiry; the sole proper object of such claims is to obtain compensation.^{xiii}

It is apparent from the foregoing that the discomfort with the behaviour modification objective is greatest in those countries who have highly regulated societies, such as the European Union, and those which do not see tort law as an instrument for social change, such as England and Wales. The debates on the subject in the various jurisdictions have been at a high level, addressing the question in terms of the purpose of and need for class actions per se. It is when the focus shifts to the application of the goal of behaviour modification in a particular certification proceeding that the inherent problems become apparent.

Under the class proceedings legislation in Canada, the applicant for certification must demonstrate that the preferable procedure for dealing with the instant case is as a class action. What constitutes the preferable procedure has become identified with what the OLRC described as the “three major advantages” of class actions when the recommendation was made that an expanded class action procedure should be adopted.^{xiv} Somehow, over the years since the report was written, the OLRC’s justifications for a new procedure; judicial economy, access to justice

and behaviour modification became the goals to be addressed in each certification application when determining if a class action was the preferable procedure. This has occurred despite the clear warning by the OLRC that the behaviour modification “advantage” was problematic.^{xv} The OLRC has turned out to be correct; behaviour modification as an objective in particular cases has turned out to be a problem. To better understand why that is so, one needs to examine the circumstances of a certification application but before doing so it is important to consider the implications to the parties of the feature unique to class actions: the certification process.

It is a feature of class actions that they seldom go to trial. The late Brian Morgan identified the reason as follows:

The availability of class proceedings increases the likelihood of falsely manufactured litigation. The core of this problem is the pressure placed on defendants in class actions to settle, regardless of the merits of the action. While a defendant is likely to take a case to trial where there is one plaintiff and a low chance that the plaintiff will succeed, a class action with the same low chance of liability still represents a significant threat to the defendant and therefore a high likelihood of settlement. Parties generally try to avoid even a low risk of a very costly result. In addition, the high rate of settlements in class proceedings is caused by the large costs associated with class proceedings. Litigating large class actions is very expensive and it is often financially more attractive to settle even the meritorious cases.^{xvi}

All class actions are, in a very real sense, “manufactured” and are intended to be so. The engine of an entrepreneurial plaintiff’s bar is harnessed to create a means to resolve claims which would otherwise go without redress. It should not be a pejorative term. All claims involve the risk that the result will not be the one anticipated or hoped for. The difference in class actions is that the consequences of the risk are raised by the collective of the class, often many thousand fold. Thus the significance of certification; if the class is created, the whole risk profile is elevated. Added to that is the fact that there will be a judicial finding that there is a cause of action, a requirement for certification in all Canadian jurisdictions. This is not a helpful finding for a defendant to go to trial with. The stakes for both sides in the certification process are extremely

high. Certification will probably result in settlement. The class members will usually get some redress and their lawyers will receive a significant court approved payment for their efforts.

On the defendant's side, certification brings the probability of having to make a significant settlement payment to avoid the risk of having to make a much larger one after a trial. In effect, in many cases, the decision on the certification application effectively dictates the result of the litigation. It is therefore of the greatest importance that the process in the certification application be a fair one; one in which there is no presumption of misbehaviour. Chief Justice McLachlan in *Hollick v. Toronto* stated:

Notwithstanding the recommendation of the [OLRC], Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim “disclose a cause of action.” Thus the certification stage is decidedly not meant to be a test of the merits of the action (internal citations omitted).^{xvii}

If a class is certified in whole or in part based on a presumption of misbehaviour, the case has been prejudged and the result is unfair. The question is whether in applying the objective of behaviour modification in the certification process are the courts prejudging the merits. It would seem that in some instances they are.

Where a proposed class proceeding would provide access to justice to the plaintiff class as well as result in judicial economy, the added consideration of behaviour modification adds very little to the analysis. However, difficulties arise when behaviour modification becomes an independent or determinative consideration in the certification analysis. An example of this occurred in *Chadha v. Bayer* when the motions court judge held:

If the present action is to be certified, among these three objects, the primary one to be served would be behaviour modification. Certification would provide access to the courts in circumstances where the claims might not otherwise be asserted. However, it is apparent from the nature and size of the claim of any individual that the goal of providing a procedure to ensure that victims of

wrongdoings are actually compensated is secondary. Similarly, as it is unlikely that any claim would come before the court absent a class action, judicial economy would not be significantly enhanced.^{xviii}

But how did the motions court judge know there was behaviour that needed to be modified. He wasn't writing in the abstract about modifying the behaviour of those who might enter into criminal conspiracies to fix prices. He was addressing the certification application before him and was prepared to, and did, certify the action based on the unexpressed premise that Bayer's behaviour needed to be modified. That is to say he made a preliminary finding against Bayer on the merits, something class action judges are expressly not allowed to do.^{xix}

In *Chadha*, the Divisional Court and the Court of Appeal both dealt with the behaviour modification point by finding that the availability of another procedure, provided by the *Competition Act*, was better suited to achieving the goal of behaviour modification.^{xx} Thus the question of the propriety of the presumption by the motions court judge that there was behaviour that needed to be modified was not examined.

It should not be thought that a finding that there is another procedure available to deal with behaviour modification is the obverse of a finding that the class should be certified on the ground of behaviour modification. It is not for two reasons. First, there is no implicit finding on the merits against the defendant which grounds the decision. Second, a finding that there is another procedure available is, in effect, a finding that access to justice may be had by other means. That is, a class action is not the preferable procedure for that reason, which is unrelated to behaviour modification.

The *Chadha* case is a good illustration of the behaviour modification problem, largely because the motions court judge was intellectually rigorous in making it clear on what basis he was certifying the action. In later cases, the courts have confirmed the behaviour modification objective by reference to the perceived merits of the case before them. This is something Justice Sharpe did not do. A singular example is the decision of Winkler J. (as he then was), who is widely acknowledged to be one of the pre-eminent class action judges, in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*^{xxi}.

In that case, Winkler J's recitation of the procedural nature of a certification motion is dead on, as is his statement that such a proceeding is, as a matter of law, decidedly not a merits analysis. He states clearly that: "..... the goal of behavioural modification must be considered in the procedural context." That is to say, without regard to the merits of the case; without making a finding, preliminary or otherwise, that the defendant has done wrong and behaviour modification is needed. However, he then goes on to explain how he applied the behaviour modification criteria:

The foregoing provides a useful guide through which to determine whether behavioural modification can be achieved in this class proceeding. Here there are allegations of misconduct of A & P that if proven, would entitle the class members to a recovery. Moreover, there is evidence that A & P has consistently failed to produce proper records to the franchisees despite repeated requests and A & P's obligations to do so in accordance with its duty of utmost good faith as franchisor (emphasis added).^{xxii}

It is difficult to read the foregoing paragraph in any other way than as an assessment of the defendant's behaviour. True, it is not a direct finding on the merits of the litigation, but it is a finding of misconduct made to justify certification and such a finding is not consistent with it being strictly a procedural motion. It seems highly unlikely that Winkler J. was not alive to what he was doing when he referred to the obduracy of A&P as a reason the behaviour modification criterion had been met. It seems likely, inasmuch as he had found access to justice and judicial economy were present, that the behaviour modification element was insignificant in his analysis and he was merely paying lip service to it. This seems to be a common occurrence in certification cases; the behaviour modification requirement is of negligible importance when the other two objectives are met.

This modest role for behaviour modification does not find favour with those who see it as a surrogate regulator and which provides a means to implement a strong social policy function for class actions. One of the clearest examples of this view is that of Justice Cumming expressed in *Wilson v. Servier*:

Finally, the policy objective of behaviour modification is fostered through a class proceeding. If a drug is defective and liability attaches to a manufacturer or seller, a significant incidental result is that the pharmaceutical industry is more likely to take greater care in the development and testing of new products to ensure their safety before marketing them....The [*Class Proceedings Act*] serves to assist in regulating the pharmaceutical industry for an important public policy objective through class proceedings commenced in the private sector.^{xxiii}

Thus behaviour modification is turned on its head and becomes regulation.

Under this line of thinking, social policy objectives, as perceived by the court, will justify certification without regard to the existing regulatory regime or whether it has been established that the defendant's behaviour is in need of modification. This cannot be correct. It ignores the history and principles underlying the class proceeding as it has developed in Canada and it offends the basic principles of fairness and justice. Why should a defendant be forced into a class action simply because a judge thinks it would foster regulation of an industry? The answer is, it shouldn't. It shouldn't for the same reason that a defendant shouldn't be forced into a class action because the motions court judge thinks there is behaviour that needs to be modified. In both instances, the case has been incorrectly prejudged on the merits. Where the defendant has accepted responsibility for the acts pleaded against it and is merely asserting that a class action is not the preferable procedure, as occurred in *Pearson v. Inco* and the recent *Markson v. MBNA* cases^{xxiv}, then behaviour modification clearly has a role to play in the preferable procedure analysis. However, this exception is supportable because there is no predetermination on the merits. It is not acceptable if there has been no similar admission by the defendant.

The question is what part behaviour modification plays in the class action process. As it should be apparent, it must be a general one as opposed to a consideration to be applied in the certification analysis, if that entails an explicit or implicit assumption of misbehaviour. A finding that behaviour modification is not needed because there are alternate procedures available is acceptable. The converse is not. Behaviour modification can be an additional

explanation why certification is justified but it cannot be dispositive of the issue whether or not to certify. That power should rest with access to justice and judicial economy alone.

ⁱ Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982) ("OLRC Report").

ⁱⁱ Jones and Boyer, "Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies" (1971 – 72), 40 *Geo. Wash. L. Rev.* 357 at 361.

ⁱⁱⁱ OLRC Report, *supra* note 1 at 142.

^{iv} *Ibid.*

^v OLRC Report, *supra* note 1 at 143, quoting K. E. Scott; "Two Models of the Civil Process" (1975), 27 *Stan. Law Review* at 937.

^{vi} *Ibid.* at 145.

^{vii} *Ibid.* at 145-146.

^{viii} *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 29.

^{ix} Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003) at 29.

^x Janet Walker, "Cross-Border Class Actions: A View from Across the Border" (2004) *Michigan State L. Rev.* 755 at 781.

^{xi} Elizabeth J. Cabraser, "Symposium on Mass Torts: Life After Anchem: The Class Struggle Continues" (1998), 31 *Loy. L.A. L. Review* 373 at 379.

^{xii} For a most interesting discussion of this topic, see Christopher Hodges, "Multi-Party Action: A European Approach" (2001), 11 *Duke J. Comp. & International L.* 321.

^{xiii} Scottish Law Commission, Report 154, *Final Report on Multi Party Actions* (1996) at para. 2.23, quoted in Walker, *supra* note 10 at 781.

^{xiv} OLRC Report, *supra* note 1 at 117.

^{xv} *Ibid.* at 145.

^{xvi} Brian Morgan, "Legislative Aims of Class Actions: Access to Justice v. Manufactured Litigation", paper presented to Advocates' Society, May 2000, unpublished.

^{xvii} *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

^{xviii} *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29 at para. 17 (S.C.J.)

^{xix} *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(5).

^{xx} *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 41; (2003), 63 O.R. (3d) 22 at paras. 63-65 (C.A.), leave to appeal refused by the S.C.C., [2003] S.C.C.A. No. 106.

^{xxi} *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2004) 70 O.R. (3d) 182 (Div. Ct.).

^{xxii} *Ibid.* at para. 58.

^{xxiii} *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 at para. 126 (S.C.J.).

^{xxiv} *Pearson v. Inco Ltd.* (2005), 261 D.L.R. (4th) 629 (Ont. C.A.), leave to appeal refused by S.C.C., [2006] S.C.C.A. No. 1; *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), application for leave to appeal to the S.C.C. filed July 31, 2007, [2007] S.C.C.A. No. 346.