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Homegrown Transplants: Procedural Borrowing in the New Ontario Class Proceedings Act

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Article abstract

The most controversial of the recent amendments to Ontario's Class Proceedings Act is the addition of two requirements to the certification test: to meet the preferable procedure criterion, s. 5(1.1) requires that common issues in the litigation must now "predominate" over individual issues, and a class action must be "superior" to all other forms of resolution. The importance of the interpretation of Ontario's new certification test to the continued viability of class actions in the province merits a thorough and rigorous analysis of s. 5(1.1). The language of predominance and superiority is strikingly similar to requirements that have long applied to US class actions for monetary damages. As courts in Ontario begin to grapple with the new predominance and superiority requirements, however, the authors caution against turning to American jurisprudence for guidance. Several important structural differences between the Ontario and American class action regimes, as well as different constitutional considerations and a variety of approaches within US case law diminish its utility. Instead, the authors examine the history and language of the amendments to propose an interpretation of the predominance and superiority requirements that is informed by Canada's own procedural and constitutional framework and that avoids the pitfalls of legal transplants.

Homegrown Transplants: Procedural Borrowing in the New Ontario *Class Proceedings Act*

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Adam Zimmerman[**]

The most controversial of the recent amendments to Ontario's Class Proceedings Act *is the addition of two requirements to the certification test: to meet the preferable procedure criterion, s. 5(1.1) requires that common issues in the litigation must now "predominate" over individual issues, and a class action must be "superior" to all other forms of resolution. The importance of the interpretation of Ontario's new certification test to the continued viability of class actions in the province merits a thorough and rigorous analysis of s. 5(1.1). The language of predominance and superiority is strikingly similar to requirements that have long applied to US class actions for monetary damages. As courts in Ontario begin to grapple with the new predominance and superiority requirements, however, the authors caution against turning to American jurisprudence for guidance. Several important structural differences between the Ontario and American class action regimes, as well as different constitutional considerations and a variety of approaches within US case law diminish its utility. Instead, the authors examine the history and language of the amendments to propose an interpretation of the predominance and superiority requirements that is informed by Canada's own procedural and constitutional framework and that avoids the pitfalls of legal transplants.*

La plus controversée des modifications récemment apportées à la Loi de 1992 sur les recours collectifs *de l'Ontario est l'ajout de deux exigences au critère de certification : pour répondre au volet du « meilleur moyen », le paragraphe 5 (1.1) exige que les questions communes soulevées dans le litige « l'emportent » maintenant sur les questions qui touchent uniquement les membres du groupe pris individuellement (la prédominance), et qu'un recours collectif soit « supérieur » à toutes les autres formes de règlement (la supériorité). L'importance de l'interprétation du nouveau critère de certification de l'Ontario pour la viabilité continue des recours collectifs au sein de la province mérite une analyse exhaustive et rigoureuse du paragraphe 5 (1.1). Cette question de prédominance et de supériorité est remarquablement semblable aux exigences qui s'appliquent de longue date aux recours collectifs américains en matière de dommages-intérêts pécuniaires. Les tribunaux de l'Ontario commencent maintenant à se débattre avec les nouvelles conditions de prédominance et de supériorité, mais les auteurs mettent toutefois en garde contre le fait d'utiliser comme guide la jurisprudence américaine. Plusieurs différences structurelles importantes entre les régimes de recours collectif de l'Ontario et des États-Unis, de même que des considérations constitutionnelles différentes et la diversité des approches suivies dans la jurisprudence américaine, en amoindrissent l'utilité. Les auteurs examinent plutôt l'historique et la formulation des modifications afin de proposer une interprétation des conditions de prédominance et de supériorité qui est éclairée par le propre cadre*

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procédural et constitutionnel du Canada et qui évite les pièges des transplantations juridiques.

I. INTRODUCTION

A new wave of law reforms around the world aims to make class action settlements more transparent and judicial oversight more rigorous.[1] Jurisdictions in Canada, Australia and Israel, for example, have introduced specific provisions to address commercial litigation funding, cy près distributions and overlapping class action lawsuits. In 2020, Ontario followed suit when it passed a suite of amendments to "modernize" class actions.[2] Unlike any of these other reform efforts, however, only Ontario changed the test for certifying a class action.

Under s. 5(1)(d) of Ontario's *Class Proceedings Act* [*CPA*],[3] a judge must find that a class proceeding "would be the preferable procedure for the resolution of the common issues."[4] The most controversial of the recent amendments to the *CPA* is the addition of two requirements to this inquiry. First, common issues in the litigation must now "predominate" over individual issues. Second, a class action must be "superior" to all other forms of resolution.[5] Initially described as introducing a stricter certification test, the amendments were decried by class counsel and applauded by defendant interest groups. Yet, their interpretation and impact remain uncertain. In light of the importance of the interpretation of Ontario's new certification test for the continued viability of class actions in the province, a thorough and rigorous analysis of s. 5(1.1) is in order.

Among the possible and arguably most complicated sources of statutory interpretation is American case law. The language of predominance and superiority is strikingly similar to requirements that have long applied to US class actions for monetary damages. US Federal Rule of Civil Procedure 23(b)(3) requires that, before a class is certified under that subsection, a district court must find that common factual or legal questions for class members "predominate" over those "affecting only individual members." The same provision goes on to say that a class action also must be "superior" to other available methods "for adjudicating the controversy." In light of these similarities in language, some commentators questioned whether Ontario was importing purportedly stricter American approaches to certification. As

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1 Jasminka Kalajdzic, "The State of Reform in First and Second Generation Class Action Jurisdictions" in A Uzelac & S. Voet, eds, *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer, 2020).

2 Ontario, Legislative Assembly, *Official Report of Debates (Hansard),* No 143 (19 February 2020) at 6969 (Hon Doug Downey) [*Hansard*, 19 February 2020], online: <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2020/2020-02/19-FEB-2020_L143_0.pdf>. The amendments to the *Class Proceedings Act* were introduced in omnibus legislation, Bill 161, *Smarter and Stronger Justice Act, 2020*, assented Bill <b161ra_e.pdf> ["Bill 161"].

3 *Class Proceedings Act, 1992*, SO 1992, c 6 [*CPA*].

4 *Ibid* at s 5(1).

5 Section 5(1.1) of the *CPA* states:

In the case of a motion under section 2 [plaintiff's class proceeding], a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

(a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

courts in Ontario begin to grapple with the *CPA*'s predominance and superiority requirements, does US case law provide any guidance?

Such "procedural borrowing" would not be new to Ontario. When Ontario courts interpreted the original certification test in the 1990s, they looked to American jurisprudence despite differences between the two systems, observing that "the American experience" could provide meaningful guidance.[6] Thirty years later, it is perhaps inevitable that American case law on predominance and superiority will be invoked again as Ontario courts build their own s. 5(1.1) jurisprudence. But the literature on so-called "legal transplants" would ask us to exercise caution in light of the frailties of relying on rules drawn from any foreign legal and institutional system.[7] To date, only three decisions have shed light on the new Ontario provisions, with no mention of US case law.[8]

In this paper, we explore how predominance and superiority in the new Ontario rule ought to be understood. Part II focuses on predominance, followed by superiority in Part III. Part II begins with an examination of the standard sources for statutory interpretation: reports by law commissions, Hansard debates and case law in other provinces. We then turn to the American jurisprudence and the various ways the predominance requirement is applied in the US and whether those interpretations could – or should – be transposed to Ontario's class action regime. While we focus on the *Tyson Foods v Bouaphakeo* decision, the most recent US Supreme Court treatment of the predominance requirement, we conclude that in the US trial and lower appellate courts that handle the overwhelming volume of class actions, there is, in fact, not one approach, but rather, a wide variety of approaches to predominance. In addition, we identify structural and constitutional differences between the Ontario and US Rule 23 regimes, which we believe may rule out treating predominance in the same way in the two jurisdictions. In the final section of Part II, we propose an interpretation of Ontario's predominance requirement informed by Canada's own procedural and constitutional framework and that avoids the pitfalls of legal transplants.

We begin Part III by identifying the differences between the American and Ontario superiority provisions. These differences are not accidental. They reflect varying degrees of trust in government agencies and private litigants, as well as distinct legal cultures and priorities. For these reasons, American case law on superiority is also of little value. Part III proposes a unique approach to superiority that is consistent with legislative intent and Supreme Court of Canada jurisprudence.

We conclude with brief reflections on the challenges of legal transplants and a recommendation that Ontario courts resist the urge to casually import American case law, despite the similarities in language between Rule 23 and recent amendments in Ontario. We instead propose definitions of predominance and superiority that are consistent with legislative intent and three decades of certification jurisprudence in Canada. In the end, it is not the new predominance requirement that will change old approaches to certification, but the textual differences in Ontario's superiority requirement that may make certification less likely in a subset of cases where the defendant's conduct has been rectified before certification. Notably, this outcome has little to do with American precedent at all.

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6 *Caputo v Imperial Tobacco Ltd.*, 1997 CarswellOnt 2401 at para 12, 1997 CanLII 12162 (Ct J (GD)).

7 "Legal transplants" refer to legal rules or institutions that develop in one jurisdiction and are then subsequently adopted in another, with varying degrees of success and often with unintended consequences. The term "transplants" goes back decades but has since been supplanted by terms such as "transfer" and "circulation of legal models" to more accurately capture the gradual diffusion and reception of law. For an excellent discussion of both terminology and the comparative study of the transplant phenomenon, see Michele Graziadei, "Comparative Law, Transplants, and Receptions" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law*, 2nd ed, (Oxford: Oxford University Press, 2019) at 442-473.

8 *Banman v Ontario*, 2023 ONSC 6187, *Grozelle v Corby Spirit and Wine Limited*, 2023 ONSC 7212, and *Ramanauskas v Bank of Montreal*, 2024 ONSC 782, were released just as this paper was being finalized.

II. UNDERSTANDING PREDOMINANCE: SOURCES & CONTEXT

When considering the new predominance test, the ordinary rules of statutory interpretation require that courts read them in their "entire context" and in their "grammatical and ordinary sense," consistent with the legislative scheme and intent of Parliament.[9] The Supreme Court of Canada has directed that class proceedings legislation should not be read narrowly, but instead, "construed generously to give full effect to its benefits."[10] Notably, none of the recent amendments to Ontario's *CPA* alter the foundational principle that the *CPA* should be examined through the lens of the three objectives of class actions: judicial economy, behaviour modification, and access to justice.[11]

Accordingly, we focus on four sources to understand the potential meaning of predominance in context and in keeping with legislative intent. First, we turn to the law reform studies that are heavily relied upon in class action jurisprudence. In the landmark 2001 decision, *Dutton*, the Supreme Court of Canada relied on the 1982 Ontario Law Reform Commission *Report on Class Actions*[12] when it articulated the three main goals of class proceedings.[13] In 2013, the Court invoked the same Report to define access to justice in the class action context,[14] and in 2016 to explain the importance of judges' broad management powers in class actions.[15] Courts interpreting the new predominance and superiority requirements also have the more recent Law Commission of Ontario's *Report on Class Actions* to rely upon.[16] Bill 161 was introduced within six months of the release of the LCO Report, and Hansard debates refer to that Report frequently. Second, the legislative debates regarding Bill 161 provide another potential source of guidance. The Attorney-General stated the amendments created a stricter certification test, but he also explicitly distanced the Ontario amendments from the American certification test and provided context for the new language.[17]

Third, other Canadian jurisdictions already have a body of case law on the meaning of predominance that is arguably more persuasive than American authorities. While the predominance requirement is permissive in British Columbia, rather than mandatory as in Ontario, how BC courts interpret predominance in the specific context of the preferable procedure analysis may be instructive.

Finally, we turn to American jurisprudence. Courts looking to American cases for guidance on the meaning of the new predominance requirement have an unenviable task. For one, there is no single interpretation. Beyond this practical reality, however, are the other challenges posed by legal transplants. Class proceedings in the two countries do not share identical constitutional foundations, policy goals, or statutory terms. Attorney-General Downey was cognizant of at least some of these differences when he stated that it will be up to Ontario judges to interpret "predominance" in the specific context of the *CPA*'s evidentiary standard.[18] Nevertheless, because Ontario's new predominance provision is lifted from

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9 Ruth Sullivan, *Statutory Interpretation,* 3rd ed (Toronto: Irwin Law, 2016) at 49.

10 *Hollick v Toronto (City)*, 2001 SCC 68 at para 14 [*Hollick*].

11 *Hansard*, 19 February 2020, *supra* note 2 at 6969 and 6971 (Hon Doug Downey).

12 Ontario Law Reform Commission, *Report on Class Actions*, vol II (Toronto: Ministry of the Attorney General, 1982) at 340-346.

13 *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at paras 27-29.

14 *AIC Limited v Fischer*, 2013 SCC 69 at para 27 [*Fischer*].

15 *Endean v British Columbia*, 2016 SCC 42 at para 34.

16 Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (2019), online: <https://www.lco-cdo.org/en/our-current-projects/class-actions/> [LCO Report]. As discussed below, the Commission rejected the predominance and superiority test at p. 46 of the Report.

17 *Hansard*, 19 February 2020, *supra* note 2 at 6971 (Hon Doug Downey).

18 *Ibid*.

Federal Rule 23, references to American case law are expected, and some useful insights can be gleaned from their experience with the provision.

A. The 1982 Ontario Law Commission Report [OLRC] & Judicial Embrace of the Two-Part Preferability Test

The 1982 Ontario Law Reform Commission Report, regarded as the impetus for Ontario's statute, recommended a certification test modelled on US Federal Rule 23, but without a predominance requirement. Predominance only applies to US class actions that seek monetary damages (and not those seeking injunctive, declaratory, or other relief under Rule 23(b)(1) and (2)).[19] For that reason, the OLRC believed that incorporating predominance in Ontario – where all class actions are treated similarly – would result in a class action procedure "considerably more restrictive in scope than Rule 23 of the United States Federal Rules of Civil Procedure, and perhaps narrower than even the present Ontario class action Rule."[20] After exploring the different (and often inconsistent) approaches to predominance in the American case law, the Commission concluded that only one commonality test should apply, regardless of the category of class action, and that a stringent predominance requirement would prevent class actions in the products liability and mass accident contexts.[21] Those types of claims would either be so significant that many individual lawsuits would be litigated, thus defeating the judicial economy justification for class actions, or so small that they would be not asserted at all, thus frustrating the access to justice objective of class proceedings.[22]

Nevertheless, the Commission did consider predominance relevant to the preferable procedure – what it called the "superiority" – stage of the certification test.[23] "Unquestionably, the superiority of a class action in any given case will depend, at least to some extent, upon the number and complexity of the individual questions to which the class action gives rise."[24] Importantly, however, the Commission was of the view that even where individual issues predominate, a class action could still be superior to other available methods of fairly resolving the controversy.[25] "In other words, despite the prevalence of individual questions, a class action may still compare favourably with 'other available methods' as a means of disposing of the particular dispute."[26] Where *no* other viable method of dealing with the dispute exists, therefore, predominance is to be given even less weight in the overall analysis.

The Supreme Court of Canada adopted the Commission's two-part approach to preferability in *Hollick v Toronto (City)*, stating that the term was meant to capture two ideas.[27] The first part focuses on whether the class action would be a fair and manageable method of advancing the plaintiff's claims. This question requires the court to consider the proposed common issues in the context of the claims as a whole. In so doing, the court must determine whether the resolution of the proposed common issues will "significantly advance the action".[28] The second part of the analysis is comparative in nature. The judge must determine if a class action is preferable "to other procedures such as joinder, test cases, consolidation and so on."[29]

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19 See discussion of limited issue certification below, part 1(e).
20 *Report on Class Actions*, *supra* note 12 at 338.
21 *Ibid* at 344-345.
22 *Ibid* at 345.
23 *Ibid* at 407.
24 *Ibid* at 407.
25 *Ibid* at 408.
26 *Ibid* at 408.
27 *Hollick*, *supra* note 10 at para 28.
28 *Ibid* at paras 28-32.
29 *Ibid* at para 28.

Both parts of the preferability inquiry are to be conducted through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice.[30]

The predominance criterion concerns the first part of the preferability analysis. Whether the common issues predominate over individual ones is relevant to the manageability of the action. In *Hollick,* Chief Justice McLachlan wrote that judges must "take into account the importance of the common issues in relation to the claims as a whole" when deciding if the action is manageable. She further explained that even though the drafters of the Ontario statute had rejected US Federal Rule 23's predominance requirement, "I cannot conclude […] that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context."[31] Because the common issue in *Hollick* was "negligible" in relation to the individual issues and would not "significantly advance the action", a class action was deemed not to be the preferable procedure, especially through the lens of judicial economy.[32]

On the second branch of the preferable procedure test, the Court concluded that the availability of an alternative compensation scheme meant that the goals of aggregate litigation—access to justice and behaviour modification—could be met without a class proceeding.[33] In 1983, the City of Toronto had established the Small Claims Trust Fund of $100,000, a no-fault scheme administered by the Ministry of the Environment, to which residents could apply for up to $5,000 to compensate for noise and physical emissions from the landfill. While more than 150 complaints had been filed with the Ministry over the years regarding the landfill, no claims had been made against the Small Claims Trust Fund. The Court viewed the Trust Fund as relevant to the preferability analysis: "the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action – even if the compensatory scheme promises to provide redress more quickly. The existence of such a scheme, however, provides one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns."[34]

Chief Justice McLachlan's analysis, repeated in hundreds of certification decisions over the past two decades, merits closer scrutiny. First, despite the absence of a predominance provision, she concluded that a comparison of common issues to individual ones was inherent in the preferability analysis. Explicit predominance language was unnecessary. Second, she only decided that a class action was not the preferable procedure *after* being satisfied of the availability of alternative compensation schemes. Accordingly, the importance of manageability—and therefore predominance—may be reduced if no other options to a class proceeding are reasonably available. In other words, assessing preferable procedure requires balancing two concerns; the less manageable a class action, the more likely an alternative will be preferred, and vice versa.[35]

The *Hollick* balancing approach makes sense in terms of both policy and statutory interpretation. A "preferable" procedure literally requires that a judge weigh the proposed class action against other methods of resolving the common issues. That means that the relative manageability of a class action is

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30 *Hollick*, *supra* note 10 at para 27.
31 *Ibid* at para 30.
32 *Ibid* at para 32.
33 *Ibid* at paras 33-34.
34 *Ibid* at para 33 (citations omitted).
35 As discussed below, Justice Perell came to a similar conclusion in *Banman* when he held that a class action will almost invariably be preferable where the monetary claims of class members are small and therefore unviable to pursue individually: *supra* note 8 at para 337.

relevant only when compared to other methods for compensation, including individual actions.[36] If assessing the common issues in context reveals that their resolution would not put the class members in a better position than if they simply pursued individual claims, a class action is not the preferable method for resolving class members' claims.[37] Indeed, the Supreme Court in *Fischer* emphasized that the preferable procedure analysis is a *comparative exercise,* adopting the language of an Eleventh Circuit decision of the United States Court of Appeals: "Our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs".[38] Moreover, courts are to assume that the plaintiff will wish to pursue some form of redress; the non-viability of individual actions or any other alternatives, therefore, favour the class action.[39]

Since *Hollick*, courts have consistently held that a class action will not be the preferable procedure if individual issues "overwhelm" the common issues. This language is ubiquitous in the case law.[40] The resolution of the common issues must "materially advance each class member's claim," and the court must be satisfied that the class proceeding "will ultimately be of some practical utility in resolving the class members' claims."[41] Courts at all levels and in all provinces have used this language, regardless of whether consideration of predominance is explicit in the statute.[42] As we discuss in Part 1(e) below, federal courts use nearly identical language when interpreting the United States predominance requirement. They similarly reject classes when individual questions "overwhelm" common ones, but will certify them when they find they "materially advance" the overall litigation.

B. The 2019 Law Commission of Ontario [LCO] Report

In 2017, the LCO embarked on a wholesale review of Ontario's *CPA*. For the first time in over 25 years, Ontario's class action regime would undergo a review to determine how the regime was fulfilling its three legislative objectives. Law professors Catherine Piché and Jasminka Kalajdzic were seconded to lead the research effort.

Over the course of approximately two years, the LCO conducted over 100 interviews with stakeholders from the plaintiff and defence bars, defendant interest groups, in-house counsel with corporations, community organizations and judges. There was also a public call for submissions, all of which were published on the LCO website.

Almost all defence-oriented submissions proposed a tightening of the certification test in order to weed out 'unmeritorious' class actions. When pressed, these organizations provided varying definitions of an action that lacked merit. Most submitted that the solution to the perceived problem of 'too many' class actions was raising the evidentiary standard to be met on certification from 'some basis in fact' to a

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36 McLachlin CJC explained the relevance of manageability this way: "The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals": *Fischer*, *supra* note 14 at para 23.

37 Winkler et al, *The Law of Class Actions in Canada* (Canada Law Book, 2014) at 130-131 [Winkler]; *Hoy v Medtronic*, 2003 BCCA 316 at para 54 [*Hoy*].

38 *Fischer*, *supra* note 14 at para 23, citing *Klay v Humana, Inc*, 382 F (3d) 1241 (11th Cir 2004) at 1269 (parenthesis in original).

39 In *Markson v MBNA*, 2007 ONCA 334 at paras 72-73, Rosenberg JA held that the question of judicial economy in the s. 5(1)(d) analysis must be resolved on the assumption that the plaintiff will pursue some form of redress: "Arguments that no litigation is preferable to a class proceeding cannot be given effect."

40 Winkler et al, *supra* note 37 at 130, and cases cited at note 18.

41 *Ibid* at 131 and cases cited at notes 20-23.

42 See, e.g., *Hoy*, *supra* note 37.

'balance of probabilities' and/or a preliminary merits test. The US Chamber of Commerce, for example, argued for both amendments, stating that a merits test at certification was needed "to weed out proposed class actions that are doomed to fail if they proceed to trial",[43] and that a higher evidentiary standard in line with the US Supreme Court's approach in *Wal-Mart* was necessary to resolve cases sooner.[44]

The LCO ultimately did not recommend changing the certification test in any of the ways proposed in defendant-oriented submissions. The chapter devoted to the question of certification was the lengthiest of the final report precisely because of the complexity and importance of the issue to all stakeholders. The LCO rejected importing certification criteria akin to those in US Federal Rule 23 for a number of reasons, including the concern that the Ontario and US class actions systems were different in important ways and that 'plucking one element in isolation' irrespective of the different costs, damages, and discovery rules, would create an imbalance between plaintiff and defendant interests.[45]

The LCO did, however, recommend that courts give greater weight to alternative options under the preferable procedure analysis.[46] The Canadian Vehicle Manufacturers' Association [CVMA] had submitted that s. 5(1)(d) should be amended to specify that certification must be denied if the class has been provided with a "reasonable alternative means of redress" such as a product recall.[47] The LCO agreed that the "existence of robust recall programs or regulatory action can weigh heavily against the utility of a class action" but concluded that "judges already have the authority to prefer alternate remedies over a class proceeding."[48] As a result, the LCO recommended that courts interpret the preferable procedure criterion "more rigorously".[49]

The vast majority of the LCO's recommendations were adopted by the Ontario Government in Bill 161, some verbatim. Nevertheless, the Government did not accept the LCO's recommendation that no legislative changes be made to s. 5 of the *CPA*. Although the Attorney-General rejected both options proposed by the majority of defendant-oriented stakeholders—the merits test and a higher evidentiary burden—Bill 161 introduced a middle ground between those proposals and the status quo preferred by all other stakeholders. In what the Attorney General called a "nuanced change", the legislation amended the certification test by requiring the court to consider whether common issues "predominate" over individual ones.[50]

The new predominance requirement at certification was proposed by only two stakeholders in the LCO consultation process. The Bankers Association and the Life and Health Insurance Association made a joint

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43 US Chamber Institute for Legal Reform, "Submission" (undated) at 15, online (pdf): <https://www.lco-cdo.org/wp-content/uploads/2018/06/U.S.-Chamber-Institute-for-Legal-Reform-CA-Submission.pdf>.

44 *Ibid* at 17. Long before *Wal-Mart Stores, Inc v Dukes*, 564 US 338 (2011) [*Wal-Mart*] United States courts recognized that judges would often have to "probe behind the pleadings" to decide whether or not to certify a class action, *General Telephone Co of Southwest* v *Falcon*, 457 US 147, 156 (1982), and that certification is proper only if "the trial court is satisfied, after a rigorous analysis," that the prerequisites for a class action have been met. *Ibid* at 161. *See also Coopers & Lybrand v Livesay,* 437 US 463, 469 (1978). But the US Supreme Court has also made clear that courts still must take care to assess class certification issues separately from the merits. *Amgen Inc v. Conn Ret Plans & Tr Funds*, 568 US 455, 468 (2013) (a putative class "need not, at that threshold, prove that the predominating question will be answered in their favor").

45 LCO Report, *supra* note 16 at 47.

46 *Ibid* at 49.

47 Mark Nantais, "Canadian Vehicle Manufacturers' Association, Submission" (31 May 2018), online (pdf): <https://www.lco-cdo.org/wp-content/uploads/2018/06/Canadian-Vehicle-Manufacturers-Association-CA-Submission.pdf> at 3.

48 LCO Report, *supra* note 16 at 49.

49 *Ibid* at 52.

50 *Hansard*, 19 February 2020, *supra* note 2 at 6970 (Hon Doug Downey).

submission in which they stated that the prevailing certification test was too lax and that it "failed to bar actions that are unsuited to resolution in a class proceeding."[51] They relied, however, on only one case to illustrate this claim: the *Webb v Kmart* case, decided in 1999, which became mired in endless individual damage assessments following a successful summary judgment motion.[52] This notorious action is considered an outlier; courts and lawyers have become far more sophisticated in the 25 years since in designing proper litigation plans for resolving individual issues.[53]

On a close reading, however, the Joint Submission did not only seek to prevent unmanageable outliers like *Webb v Kmart*. It also challenged the propriety of many other successful class actions, including institutional abuse cases like Indian Residential Schools, because they were certified on a single issue.[54] The Bankers Association and the Life and Health Insurance Association argued that courts had taken an increasingly lax approach to certification, allowing cases to proceed that would require individual trials to determine class members' damages. As a result, they proposed "a presumptive requirement that common issues predominate over individual issues, at least in terms of their significance to the determination of each class member's entitlement to relief."[55] In other words, only cases where most issues could be resolved at the common issues trial should be certified.

If adopted by the courts, the approach reflected in the Joint Submission would trigger a paradigm shift in Ontario class actions and would even depart from how courts have applied the predominance requirement in other jurisdictions, like the United States. To limit certification to those actions where all or most elements of liability and damages can be determined on a common basis is to eliminate a broad range of cases that are currently certified on common legal and factual issues that only partially resolve the defendant's liability but still substantially move the litigation forward. The proposal is also inconsistent with the bifurcated nature of class proceedings contemplated by the *CPA*, which contains specific provisions for the adjudication of individual issues following the common issues trial, and with statutory provisions that state individual damages issues do not preclude certification.[56] The proposal by the banking and insurance industries to change the preferable procedure test, therefore, is normatively different from the proposal by the CVMA; the latter wanted courts to give greater weight to alternative remedies already conferred on class members (product recalls and the like), while the former effectively sought to make class certification available only where class members' entitlement to relief could be resolved at the common issues trial, irrespective of the existence of any alternative procedures. Finally, as set out in Part 1(e) below, this restrictive approach is not even consistent with the US Supreme Court's approach to predominance, which has made clear that common issues will predominate in a class action even when "other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."[57]

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51 Canadian Bankers Association and Canadian Life and Health Insurance Association, "Joint Response to Consultation Paper on Class Action Reform" (31 May 2018), online: <https://www.lco-cdo.org/wp-content/uploads/2018/06/CBA-CLHIA-CA-Submission.pdf> ["Joint Submission"].

52 *Webb v K-Mart Canada Ltd,* 1999 CanLII 15076 (ON SC).

53 See e.g., the innovative design of individual issues adjudication in *Brazeau v Canada (Attorney General),* 2020 ONSC 7229.

54 "Joint Submission," *supra* note 51 at 10.

55 *Ibid* at 10.

56 See e.g., *Cloud v Canada (Attorney General),* 2004 CanLII 45444 (ON CA) at paras 48-72 [*Cloud*], and s 6, CPA.

57 *Tyson Foods, Inc v Bouaphakeo*, 577 US 442, 453 (2016) [*Tyson*].

C. Hansard Debates

Legislative history plays a limited role in the interpretation of legislation. Despite their limitations,[58] since the late 1990s, Hansard debates have been admitted by courts as an extrinsic aid to statutory interpretation.[59] It is relevant, though not determinative, to consider what elected officials said about the new predominance requirement during Bill 161's legislative process.

Bill 161 was introduced by the Conservative government on December 9, 2019.[60] It was debated at second reading on February 19, 2020.[61] The Attorney-General explained that many amendments to the "outdated" *CPA* were needed to "ensure the legislative framework reflects today's realities."[62] He also reaffirmed the three statutory objectives of class actions: access to justice, deterrence and judicial economy.[63] On the addition of the predominance requirement, Attorney-General Downey stated:

> So why make these changes to certification? It makes no sense to me to give potential plaintiffs a door to the court system through a class action on behalf of hundreds or thousands of people, when we know most of those people don't know they are even part of a class, but the process to get any relief takes years upon years or does not result in anything at all, yet those hundreds or thousands of people will be bound by the decision. It just isn't fair. A class action can be a powerful tool for ensuring access to justice, but only if it results in a practical outcome for plaintiffs.[64]

The Attorney-General's justifications for the amended certification test do not explicitly adopt either the CVMA's critique of the preferable procedure criterion or the Joint Submission view that class actions should not be certified if they cannot be resolved at the common issues trial. The desire for litigation to achieve a "practical outcome" loosely mirrors the access to justice goal of class actions, and to get relief without waiting "years upon years" is consistent with judicial economy but does not explain how adding predominance to the certification test would do so. The Attorney-General appeared to invoke the Joint Submission when, later in his speech, he offered that cases with "daunting individual issues" that needed to be resolved after the common issues trial may be best resolved in joinder actions.[65]

Opposition critics and the Executive Director of the LCO himself argued the proposed changes were regressive and would make many important class actions impossible to certify.[66] Fears that predominance may render certification of some personal injury class actions impossible are not entirely misplaced.

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58 *R v Morgentaler*, [1993] 3 SCR 463 at p. 484 (observing that although "the main criticism of such evidence has been that it cannot represent the 'intent' of the legislature … it should be admitted as relevant to both the background and the purpose of legislation").

59 John James Magyar, "The Evolution of Hansard Use at the Supreme Court of Canada: A Comparative Study in Statutory Interpretation" (2012) 33:3 Stat L Rev 364.

60 Bill 161, *supra* note 2.

61 *Hansard*, 19 February 2020, *supra* note 2.

62 *Ibid* at 6969.

63 *Ibid* at 6969 and 6971.

64 *Ibid* at 6970.

65 *Ibid* at 6971. The Joint Submission referred generally to cases where individual issues may take 'decades' to resolve (at 10). Suzanne Chiodo has observed that there is in fact a rising phenomenon of mass torts/joinder as a legitimate alternative to class actions, especially in those cases where there are significant individual issues of causation and damages: "Safety in Numbers or Lost in the Crowd? Litigation of Mass Claims and Access to Justice in Ontario" (2023) 39 WYAJ 48.

66 *Hansard*, 19 February 2020, *supra* note 2 at 7001-7002 (Gurratan Singh). Letter from Aneurin Thomas to the Honourable Doug Downey (22 January 2020) [on file with authors].

Certainly, the US experience gives some reason to be concerned; many product liability class actions involving personal injury are not litigated as class actions in the US but rather as individual actions that are then case managed by a single judge in the Multi-District Litigation process.[67] There are at least two reasons, however, why this outcome is not a foregone conclusion.

First, section 6 of the *CPA*, which remains in full effect after Bill 161, makes clear that certification cannot be refused solely because "the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues."[68] Section 6 was enacted precisely to avoid the perceived harshness of the US predominance requirement: "While American cases are helpful, it is important to realize that Rule 23 of the U.S. Federal Rules differs from the Ontario Act. Rule 23(b)(3) talks of common questions of fact and law to members of the class that predominate over any questions affecting only individual members. In that sense the Federal Rule is more restrictive. […] Section 6 of the Act, supra, was designed to address some of the problems that had troubled American courts." [69] Thus, while it is true that predominance makes the certification test more restrictive, it could be argued that s. 6 neutralizes its most extreme interpretations.

Second, the Attorney-General directly addressed and rejected the U.S. model. While defendant-oriented stakeholders were not shy to invoke the American certification regime in aspirational terms, Attorney-General Downey was quick to distance the amended certification test from its American counterpart. In response to a concern that the changed certification test would prevent the worthiest cases from being certified, he gave four reasons the amendments would not have a chilling effect.[70] The American class action system arose in a "different legal context," without the same overriding focus on increasing access to justice, modifying wrongful behavior, and improving judicial economy as the Canadian legal system. The original certification test in Canada already required that "common issues" constitute a substantial part of the test for certifying a class. The evidentiary standard in Ontario for certifying a class action is lower than in the United States. And related, unlike American cases, which often require some evaluation of the underlying merits of the class litigation to assess predominance, Canadian jurisprudence discourages conflicting evidence at the class certification stage.

What is clear about legislative intent as discerned from the Hansard debates, therefore, is that legislators were aware of the restrictive American approach to certification and explicitly rejected it. Predominance was offered as a statutory version of the LCO's call for a more robust analysis of alternatives to class actions under s. 5(1)(d).[71] The Attorney-General's justifications for the amendment are most consistent with the rationale put forward by the CVMA – to give more weight to reasonable alternatives to redress

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67 The availability of this class action alternative is unique to the United States system. Indeed, the authors of the US class action rule made clear their preference for what would become the US Multidistrict Litigation statute in official advisory committee notes that explained how to interpret US Rule 23's predominance and superiority requirements. See US Rule 23 adv committee note sub, 23(b)(3) (describing the "Coordinating Committee on Multiple Litigation in the United States District Courts" efforts to create a class action alternative for "expediting such massive litigation"). See also Andrew D Bradt, "Something Less and Something More: MDL's Roots as a Class Action Alternative" (2017) 165 U Pa L Rev 1711.

68 *CPA*, *supra* note 1, s 6(1).

69 *Bendall et al v McGhan Medical Corp et al* [1993] OJ No 1948. *Banman* confirms that the need for an individual issues phase is not an obstacle to certification (*supra*, note 8 at para 321).

70 *Hansard*, 19 February 2020, *supra* note 2 at 6971 (Hon Doug Downey).

71 LCO Report, *supra* note 16 at 49. Although the LCO recommended that courts "consider proportionality and give significant weight to alternative options under the preferable procedure analysis", the LCO expressly rejected any legislative amendments of s. 5(1)(d) on the basis that "judges already have the authority to prefer alternate remedies over a class proceeding."

such as product recalls – but also suggest that cases should not be certified if there are "daunting" individual issues that must be addressed, a scenario invoked in the Joint Submission.

D. BC Case Law

Although the word "predominance" originated in US Federal Rule 23, it was imported into British Columbia's class action statute in modified form over 25 years ago.[72] The BC *CPA* requires the certification judge to consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members" when determining preferable procedure. How B.C. courts interpret predominance can be instructive.

British Columbia enacted its class action statute in 1996. Its certification provision is nearly identical to that of Ontario's *CPA* with one notable exception: BC enumerates a list of factors to be considered when assessing the preferable procedure criterion. The Hansard debates in British Columbia confirm that these factors were included as a result of Ontario's own experience with the certification test.[73] Unlike the new predominance requirement in Ontario's *CPA*, however, BC courts need only *consider* predominance; certification is still possible if individual issues predominate.[74]

Nevertheless, BC courts have rejected certification where common issues "overwhelm" individual ones,[75] or where the common issues were "intrinsically individualistic" and would not generally advance the litigation.[76] Individual issues predominate when common issues are "negligible in terms of the individual issues" and do not "significantly advance" the action.[77] This approach to predominance is consistent with Ontario cases that emphasize assessing common issues "in context" to determine if their resolution will significantly advance the action.[78] When might individual issues predominate? In *Ewert v Nippon Yusen Kabushiki Kaisha*, the British Columbia Court of Appeal noted that the answer "will often depend on whether loss on a class-wide basis can be considered a common issue, which would support certification, or whether loss will have to be established individually for the class members, which will likely make a class proceeding unmanageable."[79] In *Sharp*,[80] the Court maintained this distinction between common and individual loss-based issues. Put simply, the court held that if *causation* of loss is an individual issue, individual issues predominate. But if *quantification* of loss is an individual issue, individual issues do not predominate.

The distinction between causation and quantification, however, is elusive. So long as a class action designed to determine liability is defined clearly, it would seem a court could obtain the benefits of class-wide treatment regardless of whether it later employed a separate process to assess *whether* a class member

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72 *Class Proceedings Act*, RSBC 1996, c 50, s 4(2)(a) [BC *CPA*]. The *Uniform Class Proceedings Act* of the ULCC included predominance language and may have informed BC's approach, online: <https://www.ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-1996/Uniform-Class-Proceedings-Act.pdf>.

73 Referring to the Ontario case *Abdool v Anaheim Management Ltd*. (1995), 121 DLR (4th) 496 (Div Ct), the Honourable C. Gabelmann said: "we have taken advantage of the experience with the Ontario law, which was not clear on that issue, and we have expressed some clarity. So are the common issues dominating? That's one of the factors that gets considered." British Columbia, *Debates of the Legislative Assembly (Hansard),* 35-4, Vol 20, No 23 (8 June 1995) at 15228-15229.

74 *Campbell v Flexwatt Corp*, 1997 CarswellBC 2439, 44 BCLR (3d) 343 (CA).

75 *MacKinnon v National Money Mart Co*, 2006 BCCA 148.

76 *Reid v The British Columbia Egg Marketing Board*, 2003 BCSC 69. A revised set of common issues was later submitted and the case was certified: 2003 BCSC 985. The class was unsuccessful at the common issues trial: 2007 BCSC 155.

77 *Baker v Rendle*, 2017 BCCA 72 at para 50.

78 *Hollick*, *supra* note 10 at para 30.

79 2019 BCCA 187 at para 117, leave to appeal ref'd [2019] SCCA No 311 [*Ewert*].

80 *Sharp v Royal Mutual Funds*, 2021 BCCA 307 [*Sharp*].

was hurt (causation) or *the degree* to which a class member was hurt (quantification). To date, no Ontario court has explicitly adopted the distinction between causation and quantification made in *Sharp*, and at least one B.C. court has restricted the rationale of *Sharp* to the facts of the case.[81] Moreover, a plain reading of the statute reveals that loss need not be capable of class-wide determination to achieve certification. Even in *Sharp*, the BC Court of Appeal confirmed that "the availability of statutory mechanisms within the *CPA* to address individual issues should be considered in assessing predominance."[82] These flexible mechanisms include the power to appoint independent experts and to create special rules of evidence.[83]

Class proceedings statutes also state that the need to determine damages on an individual basis does not preclude certification. Section 7 of the BC *CPA* and s. 6 of the amended Ontario statute include this provision.[84] Courts have consistently held that a common issues trial need not resolve the litigation in order to certify an action. Even if resolving common issues leaves work to be done at individual issues trials, these trials "themselves provide access to justice" and "would not be possible without the efficiencies and economies achieved by the determination of the common issues."[85] Indeed, the statutes contemplate individual issues trials in a number of ways.[86]

Absent an adoption of the view expressed in a few BC decisions[87] that causation of loss must be determinable on a common basis for common issues to predominate, BC case law on preferability is entirely consistent with Ontario authorities. In both jurisdictions, when common issues are "negligible" compared to individual issues, or do not "significantly advance the litigation", a class action is not preferable. The language of predominance adds little.

There is one other possible source for understanding the effect of 'predominance' on the preferability analysis, and it is the one critics pointed to when Bill 161 was announced: US Federal Rule 23. In damages class actions, the Federal Rule requires that common issues predominate over any individual ones. Is there an American approach to predominance that may inform judicial interpretations of s. 5(1.1) *CPA*? It is to that question that we now turn.

E. American Approaches to Predominance

In the United States, predominance plays an important role in money damage class actions. To certify *any* class action in a US federal court, one must first satisfy four threshold requirements: numerosity, commonality, typicality and adequacy. The class must be (1) sufficiently "numerous" (often, involving

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81 *0790482 BC Ltd v KBK No 11 Ventures Ltd*, 2022 BCSC 226 at paras 106-115.

82 *Sharp*, *supra* note 80 at para 188.

83 BC *CPA*, *supra* note 72, s 27. The United States Supreme Court has even suggested that defendants may be at fault when they fail to make use of such techniques to assess individual questions of loss or damages. See, e.g., *Tyson*, *supra* note 57 at 461-62 ("Respondents proposed bifurcating between the liability and damages phases of this proceeding for the precise reason that it may be difficult to remove uninjured individuals from the class after an award is rendered. It was petitioner who argued against that option and now seeks to profit from the difficulty it caused.")

84 *Abdool v Anaheim Management Ltd*, 1995 CanLII 5597 (ON SCDC). In his reasons, Moldaver J. explained that while it was "not the intention of the legislature to incorporate a 'predominate' issue test into s. 5(1)(d) of the *CPA*", "neither […] did the legislature intend that individual issues should be completely ignored. Had that been the case, there would have been no need for s. 6 of the Act, which, on its face, clearly relates to five separate individual issues." In *Sharp*, *supra* note 80, however, the Court concluded that if causation (as opposed to quantification) of loss is an individual issue, individual issues predominate and are not 'saved' by s. 7 of the BC *CPA*. To date, no Ontario court has adopted the causation vs quantification distinction when interpreting s. 6 of the *CPA*.

85 Winkler et al, *supra* note 37 at 108.

86 See e.g. *CPA*, *supra* note 3, ss 24(4), 25 and 30(6). See also *Eisenberg v Toronto (City),* 2019 ONSC 7312 at para 74 ["the inevitability of individual issues trials is not an obstacle to certification."].

87 See *Ewert*, *supra* note 79 and *Sharp*, *supra* note 80.

more than 40 people); (2) raise a common question of "law or fact"; (3) be represented by a lead plaintiff with "typical" claims; and (4) afforded "adequate representation" by the class representative and counsel.[88] Then, if the class seeks monetary damages, a court must make two more, sometimes overlapping, findings. First, the court must find that common questions of law or fact "predominate" over lingering individual issues. Second, the court must find the class action is "superior" to other forms of litigation.[89]

Like Canadian courts, US courts also consider whether or not the class action is "manageable" as part of that same analysis.[90] But importing the US "predominance" requirement to another justice system presents particular challenges. As set forth in more detail below, this is because the predominance inquiry in US class action law is necessarily pragmatic, case-specific, highly discretionary, and often informed by questions unique to the US constitution and legal system.

First, the US predominance inquiry involves a pragmatic evaluation of common questions that already overlaps with existing Canadian approaches to class actions. "Predominance" does not require that a certain percentage of class members be identical to one another.[91] Nor must parties assert the same exact claims, defenses, or show that they are entitled to receive identical damages.[92] Rather, by its own terms, the text of US Rule 23 reflects that there often will be individual issues in damage class actions and, accordingly, calls for judges to weigh "the questions of law or fact common to the class members" against "any questions affecting only the individual members."[93] The United States Supreme Court has thus made clear that predominance will be met "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."[94]

For that reason, the United States' predominance inquiry only requires a federal judge to engage in a form of pragmatic balancing that closely resembles and overlaps with the inquiry in Canadian courts. Influential organizations like the American Law Institute and the United States Judicial Conference have used similar words to determine when the balance of common issues tips in favour of certifying a class action. They also ask whether resolving the common question would "materially advance" a litigation or whether individual issues instead "overwhelm" common questions.[95] The idea of "material advancement"

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88 US, Fed R Civ P, 23(a)(1)-(4).

89 *Ibid*, 23(b)(3).

90 *Ibid*, 23(b)(3)(D).

91 William B Rubenstein, *Newberg on Class Actions*, 5th ed (Thomson-Reuters, 2018) at § 20:51 [Rubenstein, *Newberg*] ("The predominance analysis is a pragmatic one. It is not a numerical test…").

92 *Butler v Sears, Roebuck & Co*, 727 F 3d 796, 801 (7th Cir 2013) (Posner J.) ("It would drive a stake through the heart of the class action device … to require that every member of the class have identical damages.").

93 US Fed R Civ P 23(b)(3). As future Supreme Court justice Sonia Sotomayor once noted, the predominance requirement calls "only for predominance, not exclusivity, of common questions." *In re Visa Check/MasterMoney Antitrust Litig*, 280 F 3d 124, 140 (2d Cir 2001) (Sotomayor, J.), overruled on other grounds by in *re Initial Pub. Offerings Sec. Litig*, 471 F 3d 24 (2d Cir 2006).

94 *Tyson*, *supra* note 57, at 453-454, citing 7AA CA Wright, AR Miller & MK Kane, *Federal Practice and Procedure* § 1778, Vol 7, 3rd ed (Thompson-Reuters, 2005), at 123–24.

95 American Law Institute, *Principles of the Law of Aggregate Litigation*, § 2.02 cmt. a (American Law Institute, 2010) ("In exercising this discretion, courts should consider whether aggregate treatment of a common issue by way of a class action will materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives …"); Federal Judicial Center, *Manual for Complex Litigation*, Fourth § 21.24 (Federal Judicial Center, 2004) at 273 (courts may certify common issues that "materially advances the disposition of the litigation"); Barbara J Rothstein & Thomas Willging, *Managing Class Action Litigation: A Pocket Guide*, 2d ed, (Federal Judicial Center, 2009) at 10 ("The test is whether the common issues advances the litigation as a whole, as opposed to leaving a large number of issues for case-by-case adjudication.").

arguably comes from the US Supreme Court's instruction in *Wal-Mart v Dukes* that class actions "generate common answers apt to *drive* the resolution of the litigation."[96]

Second, for these reasons, predominance has been - and often is - applied in as many ways as there are federal and state causes of action. In fact, the US Supreme Court has cautioned against "broad and categorical rules"[97] to govern predominance and encouraged courts to adopt more case-specific approaches tailored to "the underlying cause of action."[98] For example, in US securities class actions, the generic presumption that investors will rely on a material representation often means that plaintiffs can establish predominance when liability is a common question, even though plaintiffs suffer different damages.[99] In antitrust cases, the plaintiff instead must show that the defendant engaged in some uniform anticompetitive conduct - including "monopolization, tying arrangements, vertical restraints, and price discrimination"—and offer a model to assess individual damages.[100] Notably, even in antitrust cases, class members need not show they have the same damages (or damages at all). Just as in Canadian courts, the fact that there may be "thousands or millions of such damage calculations does not defeat the conclusion that common issues predominate; it is black-letter class action law that such damage calculations do not render the common liability issue non-predominant."[101]

In US wage-and-hour cases, plaintiffs establish predominance with common evidence of liability and representative evidence, including statistics. For example, in the most recent decision involving predominance, the United States Supreme Court in 2016 held that three thousand plaintiffs could pursue a class action against Tyson Foods after the company systematically failed to compensate workers for time spent donning heavy protective gear at its pork processing plants.[102] To be entitled to recovery, each employee ordinarily would have to prove that the amount of time, when added to his or her regular hours, amounted to more than forty hours in a given week. But the Court rejected the defendant's argument that those kinds of individual inquiries would overwhelm the common questions raised by workers' claims. The Court instead held that, under existing US labor law, "representative evidence" could be used to assess the average amount of overtime owed by defendants, while leaving individual damage questions for a later time in a separate proceeding.[103]

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96 *Wal-Mart*, *supra* note 44, at 349-350, citing Richard A Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 NYU L Rev 97 at 132. To be sure, the United States decision in *Wal-Mart*, a putative class involving more than one million women challenging different hiring and promotion practices in nearly 2,000 stores, was not decided on predominance grounds under R.23(b)(3) but instead on "commonality" grounds under Rule 23(a)(2). See *ibid*. ("We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* '[e]ven a single [common] question.' And there is not here.") (emphasis in original). Nevertheless, this practical approach has been frequently used to determine both commonality and predominance. Judges in the United States frequently assess both questions at the same time in damage class actions.

97 *Tyson*, *supra* note 57 at 1049.

98 *Erica P John Fund, Inc v Halliburton Co*, 563 US 804, 809 (2011).

99 *Ibid.*

100 Rubenstein, *Newberg*, *supra* note 91, at § 20:52 (collecting cases); see, also e.g., In re *High-Tech Employee Antitrust Litig*, 985 F Supp 2d 1167, 1206 (ND Cal 2013) (noting that the plaintiff's expert provided a statistical model that "followed a roadmap widely accepted in antitrust class actions that use evidence of general price effects plus evidence of a price structure to conclude that common evidence is capable of showing widespread harm to the class.").

101 Rubenstein, *Newberg*, *supra* note 91, at § 20:62; *Kohen v Pacific Inv Mgmt Co LLC*, 571 F 3d 672, 677 (7th Cir 2009) (Posner J.) ("[A] class will often include persons who have not been injured by the defendant's conduct...Such a possibility or indeed inevitability does not preclude class certification.").

102 *Tyson, supra* note 57 at 1045.

103 *Ibid* at 1049.

Predominance also often turns on the US trial court judge, who is vested with substantial discretion over the class action certification decision. Accordingly, even in similar kinds of cases, US judges frequently reach different conclusions over when and which common issues predominate. Courts have split over predominance in antitrust class actions when a small percentage of the class continued to purchase the defendant's product at an unlawfully inflated price.[104] A similar story can be told about a wide range of class actions - from those involving consumer privacy to class actions against cities for homeless sweeps.[105]

One final factor has also contributed to the shifting and elusive quality of the US predominance inquiry: unique questions of United States constitutional law. Defendants may object to class actions of plaintiffs on the grounds that certification may compromise their rights under the Due Process Clause of the United States constitution to contest each plaintiff's injury under applicable state law.[106] They may argue the possible inclusion of some plaintiffs without an injury violates Article III of the US constitution, which requires that courts only adjudicate real "cases and controversies."[107] Most recently, the US Supreme Court has even suggested that permitting unharmed plaintiffs to sue defendants in class actions would "infringe" on the Executive Branch's separate authority to enforce the law under Article II of the US Constitution.[108] Each of these (still evolving) constitutional questions can raise individualized questions relevant to whether common issues predominate. Emerging US constitutional requirements that require parties to identify all class members, produce more evidence, or allege specific or unique injuries, in turn, may force a court to consider new individual questions that undermine the benefits of a common class wide proceeding.[109]

Together, all of these different factors—pragmatic balancing tests, case-specific inquiries, discretionary implementation, and evolving constitutional questions—complicate any attempt to rely on the US predominance standard to define, import, or restrict the use of class actions. Most predictions concerning the future of the US class action *in the United States* have generally missed the mark. In the most comprehensive empirical examination to date, for example, Professors Stephen Burbank and Sean Farhang mapped the extent to which US courts have limited the use of class actions after the US Supreme Court denied certification in *Wal-Mart v Dukes*. Despite dire warnings to the contrary, they found a

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104 Compare *In re Asacol Antitrust Litig*, 907 F 3d 42, 57-58 (1st Cir 2018) (no predominance when as much as ten percent of the class may not have been injured because they continued to purchase defendant's drug at inflated price) with *In re Nexium Antitrust Litig*, 777 F 3d 9, 21 (1st Cir 2015) (predominance satisfied under virtually same facts) and *Olean Wholesale Grocery Coop Inc v Bumble Bee Foods*, LLC, 31 F 4th 651 (9th Cir 2022) (en banc) (predominance satisfied).

105 Compare *Lyall v Denver* (D COL 2017) (certifying class against City of Denver for homeless sweeps of city parks) with *Hooper v Seattle* (WD WA 2017) (denying class certification under identical practice.)

106 See e.g. *Robinson v Texas Automobiles Dealers Ass'n*, 387 F 3d 416, 426 (5th Cir 2004) ("[P]arties have an interest in ensuring that the jurors will have a reasonable chance of remembering which party presented which evidence."); *Murry v Griffin Wheel Co,* 172 FRD 459, 462 (ND ALA 1997) ("'[D]ue process' ... requires manageability as well as fairness.").

107 *Clapper v Amnesty Int'l USA*, 568 US 398 (2013).

108 *See TransUnion v Ramirez*, 594 US 413 (2021).

109 This need not be the case. For years, courts have certified classes raising common liability questions while protecting defendants' right to assert individualized defenses. One approach that US courts have taken is, like Canadian courts, to bifurcate issues that are the same, or common, to each class member from those issues that are unique for each individual class member. See e.g. *Tyson*, *supra* note 57 at 1050 (remanding to the district court to determine whether defendant's failure to accept class proposal to bifurcate liability and damage phases in FLSA trial "invited" error). Another approach, more unique to US courts, is the "issue class action," where class certification may be granted solely on the question of liability, leaving damages to be determined in another proceeding. Fed R Civ P 23(c)(4). See e.g. Rubenstein, *Newberg*, *supra* note 91, at § 20:62 (recommending certifying issue class for "nuanced" damage questions in antitrust cases).

marked *increase* in the certification of US class actions in the decade following the historic ruling in *Wal-Mart*.[110] Similar surprises have been found in class actions targeting unlawful government misconduct.[111]

F. Does 'Predominance' Codify Existing Law?

In the Attorney General Office's press release announcing Bill 161, the amended certification criteria are described as imposing a "more stringent test to determine whether a class action is the preferable procedure as opposed to other available alternative dispute mechanisms or compensation schemes".[112] Reactions to the proposed changes to the certification test largely confirmed the view – and fear – that certification would be more difficult to achieve.[113] Others noted that, while the intention behind the provisions was undoubtedly to create a more stringent bar for certification, "it remains to be seen the extent to which 5(1.1)(b) will in fact raise the bar all that much."[114] The caution expressed in the latter view was appropriate. Whatever the stated intentions by the Attorney-General, the courts are obligated to interpret the provisions as an exercise in statutory interpretation. They are not bound by the views or intentions of the Attorney-General.

Upon closer examination and having regard to the standard sources of interpretation – from a plain language reading to Hansard to BC, and even, US precedent – Ontario's predominance requirement codifies, rather than changes, existing preferable procedure case law. When determining preferable procedure, Ontario courts have long considered whether individual issues "overwhelm" common ones,[115] whether common issues do not "significantly advance the litigation",[116] and whether causation of loss can be determined on a class-wide basis.[117] This is the very same language, in some cases verbatim, used in BC and under Federal Rule 23 when assessing predominance. It is also the language used by the Attorney-General when he introduced the legislative changes.

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110 Stephen Burbank & Sean Farhang, "Class Certification in the U.S. Courts of Appeals: A Longitudinal Study*"* (2021) 84 Law & Contemp Probs 73 ("Our findings show that, contrary to conventional expectations, in the period since *Wal-Mart,* plaintiffs have been winning certification appeals more frequently than they were formerly.").

111 See David Marcus, "The Persistence & Uncertain Future of the Public Interest Class Action" (2020) 24:2 Lewis & Clark L Rev 395.

112 Ontario, Office of the Attorney General, Backrounder, "Better, More Affordable Justice for Families and Consumers" (9 December 2019), online: <https://news.ontario.ca/en/backgrounder/55020/better-more-affordable-justice-for-families-and-consumers>.

113 One of the authors of this article was among those who opined that the changes might make certification more difficult: Jasminka Kalajdzic, "Ontario the Outlier: How Changes to the Class Proceedings Act Might Make Certification More Difficult in Ontario than Anywhere Else" (6 July 2020), online (blog): *Class Action Clinic* <https://classactionclinic.com/ontario-the-outlier-how-changes-to-the-class-proceedings-act-might-make-certification-more-difficult-in-ontario-than-anywhere-else/>. The Executive Director of the LCO argued against the provisions on the assumption that they created a stricter test: Letter from Aneurin Thomas to Hon Doug Downey (22 January 2020), online: <https://policycommons.net/artifacts/1927213/re/2678983/>.

114 Paul-Erik Veel, "Bill 161: Much Needed Modernization for Class Actions in Ontario" (10 December 2019), online: (blog): *Litigate.com* <https://litigate.com/OnTheDocket#/bill-161-much-needed-modernization-for-class-actions-in-ontario>. Suzanne Chiodo similarly wrote that alarm about a potentially stricter test was "unwarranted" and "premature": "'Keep Calm and Stay Classy': Bill 161 and Proposed Changes to the Ontario *Class Proceedings Act*" (2020) 39:2 CJQ 180 at 189.

115 See e.g., *Lipson v Cassels Brock & Blackwell LLP*, 2013 ONCA 165 at paras 106-107; *1291079 Ontario Limited v Sears Canada Inc*, 2014 ONSC 5190 at para 70; *2038724 Ontario Ltd. v Quizno's-Canada Restaurant Corp*, 2008 CanLII 8421 (ON SC) at para 115, rev'd 2009 CanLII 23374; *Defazio v Ontario (Labour),* 2007 CanLII 7403 at para 20; and *Heward v Eli Lilly & Company*, 2007 CanLII 26607 (ON SC) at paras 36-40.

116 *Hollick*, *supra* note 10 at para 32.

117 *Cassano v The Toronto-Dominion Bank*, 2007 ONCA 781.

The second proposed amendment with respect to whether the common issues predominate is designed to ensure that if a class action does proceed to trial on the common issues, *the common issues meaningfully advance the cases of the class members*. We want the court to consider whether the determination of the issues that can be resolved on a class wide basis won't leave the class members with daunting individual issues to be resolved.[118]

The Attorney-General also confirmed[119] that the predominance test is a qualitative, not quantitative, assessment, consistent with Ontario precedent.[120] It is the importance of the common issues, not their number, that matters.

What of the rule of statutory interpretation that the legislature does not speak in vain?[121] Is there a presumption that the addition of a predominance provision actually *adds* something to the certification test? Not necessarily. The majority of the amendments to the *CPA* in 2020 were codifications of existing case law.[122] While some amendments – such as the new dismissal for delay provision or the elimination of appeals to the Divisional Court – are significant departures from existing law, the sources of interpretation canvassed above all suggest that the predominance requirement merely captures the essence of the "common issues in context" exercise first described in *Hollick*: "it would be impossible to determine whether the class action is preferable in the sense of being a 'fair, efficient and manageable method of advancing the claim' without looking at the common issues in their context."[123]

In the leading decision to date interpreting the new provisions, Justice Perell stated that it was arguable both predominance and superiority essentially codified existing factors in the preferability analysis.[124] Nevertheless, he concluded that the purpose of the amendment was to "make more rigorous the challenge of satisfying the preferable procedure criterion."[125] His subsequent test, however – that "common issues as a whole must predominate" and that a class action is not preferable if "claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action" – does not add anything to existing factors in the case law. Indeed, he cites in support of this formulation much older case law.[126]

III. UNDERSTANDING SUPERIORITY: SOURCES & CONTEXT

Section 5(1.1)(a) of Ontario's *CPA* also says that a judge may only certify class action if "it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant." The provision includes a non-exhaustive list of examples. The provision is also disjunctive; the class proceeding must be superior to other ways of

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118 *Hansard*, 19 February 2020, *supra* note 2 at 6971 [emphasis added].

119 *Ibid*.

120 *Cloud*, *supra* note 54 at para 84.

121 Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82 Can Bar Rev 51 at 60. The author cites the following presumption in analyzing legislative texts: "No tautology ('the legislature does not legislate in vain'): there are no superfluous words in legislation; every feature of the text has an identifiable role in the legislative scheme."

122 Almost all amendments to the *CPA* were based on recommendations by the Law Commission of Ontario that Suzanne Chiodo described as largely formalizing existing practice: "Law Commission of Ontario Report: Class Actions: Objectives, Experiences and Reforms" (2019) 38:4 CJQ 491.

123 *Hollick, supra* note 10 at para 28.

124 *Banman*, *supra* note 8 at para 317. In *Grozelle*, *supra* note 8, Justice Akbarali adopted Justice Perell's approach to predominance (at paras 77-82).

125 *Ibid*.

126 *Banman*, *supra* note 8 at footnote 151 (citing *RG v The Hospital for Sick Children*, 2017 ONSC 6545, aff'd 2018 ONSC 7058 (Div Ct); *Fantl v Transamerica Life Canada*, 2016 ONCA 633).

determining entitlement to relief *or* addressing the impugned conduct. A plain reading of the provision makes clear that all alternatives, both litigation and non-litigation in nature, must be compared to the proposed class action, whether such alternatives lead to compensation or other ways of addressing the defendant's conduct.

Unlike the predominance requirement, superiority is not mentioned in any of the other provinces' class action statutes. The language is inspired by U.S. Federal Rule 23 but with an important difference: Federal Rule 23 demands that a class action be superior to "other available methods for fairly and efficiently *adjudicating* the controversy".[127] And, as discussed in section b, below, most American courts have interpreted "available methods" to mean just that: other forms of "adjudication." In contrast, s. 5(1.1) of the *CPA* enumerates a variety of both adjudicative and non-litigation alternatives. In section c, we suggest that the difference in language represents different values and varying levels of trust in administrative agencies. Despite the general similarities between the Canadian and American class action regimes, they follow different contemporary civil justice norms. The dangers of 'legal transplants' cannot be avoided. In the final section, we offer possible interpretations of the superiority provision and suggest both that it is a more onerous requirement than its American counterpart, and that it will have a bigger impact on certification than the new predominance provision. The difference in language between the American and Ontario superiority provisions may not be accidental. As we discuss, they instead reflect broader differences in legal culture between the two countries—specifically, the different respect each jurisdiction affords government bodies and private parties to promote public deterrence and private compensation.

A. Plain Reading

Section 5(1.1) provides that "a class proceeding is the preferable procedure for the resolution of common issues under clause (1)(d) only if, at a minimum,

> (a) it is superior to *all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct* of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding […]. [Emphasis added.]

To better understand the superiority provision, it helps to focus on its three components. The class action is compared to:

i. all available means of determining entitlement to relief
ii. all available means of addressing the impugned conduct
iii. quasi-judicial or administrative proceedings, case management of individual claims or any remedial scheme or program outside of the proceeding.[128]

1. Means of Determining Relief

Section 5(1.1)(a) specifies that the class action must be superior to "all available means of determining entitlement to relief." This provision is reminiscent of language found in a long line of cases considering the second branch of the preferable procedure test: whether a class action is preferable to any alternative method of resolving the class members' claims. In *Hollick*, McLachlan C.J. stated that "the preferability

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[127] US Rule 23(b)(3) (emphasis added).
[128] *CPA*, *supra* note 3, s 5(1.1)(a).

analysis requires the court to look at all reasonable available means of resolving the class members' claims."[129] In contrast, the American rule requires that a class action be "superior to other available methods for fairly and efficiently *adjudicating the controversy*". In the majority of cases in the U.S., reference to adjudication has been interpreted to mean that the class action must be superior only to other forms of judicial dispute resolution. If there is no other form of adjudication available, then the class action is typically considered superior.[130] Conversely, the Canadian approach to preferability has always required the court to look at all alternatives, including "other potential court procedures (such as joinder, test cases, consolidation and so on) and non-court proceedings."[131] The Supreme Court of Canada has distinguished Ontario's preferable procedure analysis from its American counterpart on this basis.[132]

Recall that under s. 5(1)(d), a class proceeding must be "the preferable procedure for the resolution of the common issues". It could be argued that the new language - "determining entitlement to relief" - and its US counterpart - "adjudicating the controversy" - impose a higher burden since s. 5(1)(d) only speaks to resolution of the issues that are common to the class, not resolution of their claims as a whole. If relief (i.e., damages) is not a common issue, does the new superiority language then require the plaintiff to prove the class action will not only resolve common issues but will also resolve the entire dispute? The answer is no for three reasons.

First, a class action has two stages: a common issues trial followed by the determination of individual issues. Thus, even if class members' entitlement to damages can only be resolved at the individual issues stage, 'relief' is still being determined within the class action. Second, the disjunctive 'or' is used in s. 5(1.1), so a class action need only be superior to other means of determining entitlement to relief or addressing the impugned conduct.[133] And third, since at least 2001, courts have acknowledged that the preferable procedure analysis requires a consideration of the common issues in the context of the entire dispute, not in isolation. [134]

Thus, on a plain reading of the new language, superiority to "*all reasonably available means of determining the entitlement of the class members to relief*" in s. 5(1.1)(a) does not alter existing law on preferability.

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[129] *Hollick*, *supra* note 10 at para 31.

[130] There are some notable exceptions in United States case law, but they remain the exception rather than the rule. See, e.g., *In re Aqua Dots Prods. Liab Litig,* 270 FRD 377, 385 (ND Ill. 2010) (refusing to certify class of consumers who purchased toys that produced comas when swallowed because of following government investigation and a voluntary recall program); 7AA Charles Alan Wright et al, *Federal Practice and Procedure*, 3d ed (New York: Thomson-Reuters, 2005 & Supp 2014) at § 1779 (collecting cases); Steven B Malech & Robert E Koosa, "Government Action and the Superiority Requirement: A Potential Bar to Private Class Actions" (2005) 18 Geo J Lal Ethics 1419 at 1421–28 (collecting cases); Andrea Joy Parker, Note, "Dare to Compare: Determining What "Other Available Methods" Can Be Considered Under Federal Rule 23(b)(3)'s Superiority Requirement" (2010) 44 Ga L Rev 581 at 595–598 (collecting and summarizing cases evaluating private refund programs when determining whether to certify a class action).

[131] *Fisher supra*, note 14 at para. 35.

[132] *Ibid* at para 20 ("This understanding of the role of non-litigation alternatives in the comparative analysis under the *CPA*'s preferable procedure criterion is different from its American counterpart under the U.S. federal class action regime.").

[133] One author has suggested that the disjunctive 'or' in s. 5(1.1)(a) means that a class action will only be preferable if it is the best means of *both* "determining the entitlement of class members to relief" *and* "addressing the impugned conduct of the defendant", because the alternative need only address one of these branches to be preferable: M. Rosenberg, "Certification" in Janet Walker, Michael Rosenberg & Jasminka Kalajdzic, eds, *Class Actions in Canada*, 3rd ed (Emond Montgomery, 2023). Such a reading is inconsistent with *Hollick*'s generous approach to statutory interpretation and is grammatically abstruse. A plain reading suggests that a class proceeding must be compared to all alternatives, whether they determine entitlement to relief or address the impugned conduct, not that the class proceeding must do both.

[134] *Hollick*, *supra* note 10 at para 29 [citations omitted].

2. Means of Addressing Impugned Conduct

Unlike "entitlement to relief", "addressing impugned conduct" is language unique to Ontario, vague in its scope, and not analogous to the language of other class action statutes. If the defendant has not compensated class members but has changed the impugned policy or has been subject to regulatory proceedings, is there an argument that the unilateral change or regulatory proceeding has "addressed the impugned conduct" sufficiently to deny certification?

The Supreme Court of Canada's decision in *AIC v Fischer* [135] would suggest the answer is no. There, the Court affirmed that alternative methods of resolving class members' claims must be examined through the lens of the three goals of class actions.[136] In that case, there was no dispute that the prior regulatory action by the Ontario Securities Commission was the preferable method of advancing behaviour modification. Nevertheless, the Court found that the regulatory proceeding may not have fully compensated class members, and a class action was thus superior in addressing the access to justice deficit. Similarly, courts must interpret the new language in s. 5(1.1)(a) through the lens of the three statutory objectives. An alternative that "addresses the impugned conduct" of the defendant, therefore, must better promote both deterrence and compensation objectives to be preferable to a class proceeding.

3. Quasi-Judicial or Administrative Proceedings, Case Management of Individual Actions & Remedial Schemes

In his remarks during legislative debate of Bill 161, the Attorney-General emphasized that superiority requires the court to "consider all potential mechanisms of resolution, including inside and outside of the courts", such as product replacements and other relief voluntarily offered by defendants.[137] The reference to product replacements and voluntary programs is unsurprising given the concerns expressed by stakeholders in the Law Commission of Ontario's Class Action Project. The Canadian Vehicle Manufacturers' Association argued that such defendant-led alternatives were superior to class action litigation and that pursuing a class action after a recall and replacement program is duplicative and serves only to generate fees for counsel. [138]

Recall that one of the most consequential class action appeals ever decided by the Supreme Court of Canada was *Hollick*, an environmental class action that was not certified because it was not the preferable procedure.[139] The preferred alternative was not a judicial process but the Small Claims Trust Fund, administered by the Ministry of the Environment, to cover individual claims of up to $5,000 arising out of "off-site impact".[140] Since then, Canadian courts have consistently held that alternatives to a class action can be of either a judicial or non-judicial nature, both formal and informal.

This willingness to accept a wide range of procedures in preference to class action litigation can be explained in at least two ways: one is that it is consistent with a long-standing policy goal of improving access to justice by adopting alternative modes of dispute resolution, in recognition that litigation can be too expensive and time-consuming.[141] Much of the last half century in Canadian civil justice has been devoted to overcoming barriers to justice, including finding less formal, more efficient ways to solve legal problems. Of course, Canada is not alone in what Cappelletti and Garth called the 'third wave' of access

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135 *Fischer*, *supra* note 14.

136 *Ibid* at para 16. The Court later noted at para 22 that this approach "does not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized."

137 *Hansard*, 19 February 2020, *supra* note 2 at 6971 (Hon Doug Downey).

138 Nantais, *supra* note 47 at 2.

139 *Hollick*, *supra* note 10.

140 *Ibid* at para 3.

141 *Hryniak v Mauldin*, 2014 SCC 7 at paras 1-3.

to justice initiatives, which focused on developing a range of alternatives to litigation to resolve disputes and justice problems.[142]

A second explanation for the many alternatives to litigation specified in s. 5(1.1) is that deference to the expertise of administrative agencies and government bodies is very much part of Canadian legal culture. On multiple occasions, the Supreme Court of Canada has recognized "the unique and valuable role of administrative decision-makers within the Canadian legal order", reflecting a "breaking away from court-centric theories of years past."[143] It stands to reason, therefore, that because courts are not automatically viewed as the only legitimate venue for resolving legal disputes, all forms of dispute resolution could potentially be superior to class litigation.

B. Superiority under Federal Rule 23

The US legal system, by contrast, has long embraced what Professors Harry Kalven, Jr. and Maurice Rosenfield in 1941 called the "contemporary function" of the class action lawsuit—a vital private supplement to the rise of administrative agencies and government regulation in the United States. In their seminal account, Kalven and Rosenfield characterized the burgeoning US administrative state as only a *partial*-means to deal with harm caused to large, dispersed constituencies and interest groups. In their view, the rise of the administrative state during the American New Deal eliminated "the obstacles of insufficient funds and insufficient knowledge by shifting the responsibility for protecting the interests of the individuals comprising the group to a public body which has ample funds and adequate powers of investigation."[144] But, as many today in the United States today recognize,[145] they also noted that agencies would only rarely be in a position to provide retrospective relief to aggrieved groups of people. Thus, they turned to "revitalizing private litigation to fashion an effective means of group redress" through class action procedures.[146]

US Courts formally adopted Kalven and Rosenfield's view of the class action in the 1966 Amendments to Federal Rule of Civil Procedure 23, which modernized US class actions to recover money damages for large groups of people so long as they were "superior" to other forms of individual adjudication.[147] According to the reporter for the 1966 Amendments, the Rules were amended to help vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[148] After their adoption, the US Supreme Court would come to associate "the policy at the very core of the class action" with traditional public enforcement goals - deterring misconduct by enabling

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142 Mauro Cappelletti & Bryant Garth, "Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report" in M Cappelletti and B Garth, eds, *Access to Justice* (Milan: Sijthoff and Noordhoff, 1978).

143 *Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at para 198; *CUPE, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227. See also Sheila Wildeman, "Pas de Deux: Deference and Non-Deference in Action" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2017) 323; and David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M Taggart, ed, *The Province of Administrative Law* (Hart, 1997) 279 at 286. The authors thank Professor Sujith Xavier for the authorities on this point.

144 Harry Kalven Jr & Maurice Rosenfield, "The Contemporary Function of the Class Suit" (1941) 8 U Chicago L Rev 684 at 686 ("Administrative law removes the obstacles of insufficient funds and insufficient knowledge by shifting the responsibility for protecting the interests of the individuals comprising the group to a public body which has ample funds and adequate powers of investigation."). See also Sergio J Campos, "Class Actions All the Way Down" (2013) 113 Colum L Rev 20.

145 *Associated Indus v Ickes*, 134 F 2d 694, 704 (2d Cir.) vacated, 320 U.S. 707 (1943); William B Rubenstein, "On What a "Private Attorney General" Is - and Why It Matters" (2004) 57 Vand L Rev 2129 at 2148.

146 Kalven & Rosenfield, *supra* note 144 at 687.

147 US, *Amendments to Rules of Civil Procedure*, 39 FRD 69 (1966) (Advisory Committee's note).

148 Benjamin Kaplan, "A Prefatory Note" (1969) 10:3 Boston College L Rev 497 at 497.

claims where the damages in each individual case are too small to justify the costs of litigation.[149] Perhaps it is for that reason that US courts have only very sparingly - and recently - been willing to even consider administrative compensation as a superior alternative to the kind of relief offered in class actions.[150] But, to the extent US courts continue this trend, they will be following the lead of their Canadian counterparts, rather than vice versa.

C. Hansard and Law Commission Report

The differences in language between Ontario's superiority provision and its Rule 23 counterpart are significant, and as the preceding sections argued, probably not accidental. If superiority in the context of Ontario's *CPA* is not what the requirement entails in the U.S., what does it mean? Here again, legislative intent can be discerned from Hansards and the Law Commission's Class Action Report.

In reviewing the certification test, the LCO concluded that amendments were not required, rejecting proposals by various defendant organizations that sought, for example, to create a presumption that "a reasonable alternative means of redress or remedial response by regulatory action, a product recall, a remedy program or through any other procedure" would be preferable to a class proceeding.[151] Nevertheless, the LCO agreed that courts had taken a narrow approach to alternative procedures, stating that "an alternative […] remedial response need not be a complete remedy in law."[152] As a result, the LCO recommended that judges give more weight to the existence of recall programs and defendant compensation schemes. It stressed that the language of the preferable procedure criterion was, in the words of the Supreme Court of Canada, "broad enough to take into account all reasonably available means of resolving the class members' claims including avenues of redress other than court actions."[153]

The Attorney-General justified the addition of the superiority clause on the basis that the LCO's exhortation that judges "give more weight" to recall programs would not effect change – only a statutory amendment would do so.[154] At the same time, he explicitly rejected the adoption of the restrictive American approach to certification.[155] He denied that the new provisions would have a chilling effect on class actions by stating, in part, that:

> [T]he Supreme Court of Canada has long recognized that the fundamental goal of class actions and class-action legislation in Canada is to promote access to justice, judicial economy and behaviour modification. The American class action regime arose in a different legal context. When the courts consider Ontario's proposed amendments to the

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149 Robert Kagan, *Adversarial Legalism: The American Way Of Law* (Cambridge MA: Harvard University Press, 2001); *Amchem Prods Inc v Windsor*, 521 US 591, 617 (1997) ("A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."); and *Deposit Guar Nat'l Bank v Roper*, 445 US 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.")

150 See *supra* note 130 and accompanying text.

151 LCO Report, *supra* note 16 at 49 [quoting Submissions by Canadian Vehicle Manufacturers' Association].

152 *Ibid* [quoting Submissions by Canadian Vehicle Manufacturers' Association].

153 LCO Report, *supra* note 16 at 49, citing *Fischer*, *supra* note 14 at para 19.

154 *Hansard*, 19 February 2020, *supra* note 2 at 6970.

155 *Ibid* at 6971 ("Some have commented that our proposed change to certification will shift the certification stage strongly in favour of defendants and move toward the approach to certification in the United States under rule 23 of the Federal Rules of Civil Procedure. […] There are a number of key reasons why I believe proposed changes will not have this chilling effect.")

> preferable procedural analysis, they will continue to have these three paramount considerations in mind.[156]

The Attorney-General's reference to the long-standing three goals of class actions echoes the Supreme Court of Canada's instruction in *Fischer*.[157]

We can discern from these legislative debates two competing goals. One is to give more 'weight' to alternative remedial programs, even if full compensation was not achieved in the alternative process. The other is not to import the 'overly restrictive' American approach to certification. The nuanced change, therefore, may be to depart from *Fischer* in situations where class members have already received a remedy. Where an alternative process has already been completed, as it had in the *Fischer* case, the Court held that it need only determine "whether the access to justice barriers that may be addressed by a class proceeding remain even after the alternative process has run its course."[158] In other words, so long as the class members had not been fully compensated in the alternative procedure, access to substantive justice concerns remained and the class action was preferable to other procedures. The Attorney-General's comments in Hansard suggest that the calculus need not be so rigid; compensation need not be perfect for a court to conclude that alternative procedure is superior.

D. Does "Superiority" Codify Existing Law?

Recall that we broke s. 5(1.1)(a) into three parts for purposes of analysis. A class action must be superior to all available means of *determining entitlement to relief*; must be superior to all available means of *addressing the impugned conduct*; and *all available means include* quasi-judicial or administrative proceedings, case management of individual claims and any remedial scheme outside of the proceeding. The non-exhaustive list of alternative proceedings emphasizes that class actions must be compared to both adjudicative and non-adjudicative alternatives and, in this way, s. 5(1.1)(a) of the *CPA* is distinct from the superiority analysis under Federal Rule 23. The obligation to consider informal procedures, however, is not new to Ontario or to any Canadian jurisdiction. The Supreme Court of Canada has long held that "*all* reasonable available means of resolving the class members' claims" must be considered.[159] Subsequently, Ontario courts have considered and at times preferred statutory or private alternatives.[160] Moreover, the inclusion of "any remedial scheme" mirrors the recommendations of the Law Commission, which questioned the utility of class certification in instances of product recalls in which consumers are made whole.[161] These aspects of the amendments, therefore, are a codification of existing law.

The other two elements of the superiority provision – references to "determining entitlement to relief" and "addressing the impugned conduct" – are unique to Ontario, and now Prince Edward Island, which modelled its new statute on the amended Ontario *CPA*.[162] The other provinces' statutes state that a class proceeding must be preferable to alternative means of either resolving "the common issues"[163] or "the

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156 *Hansard*, 19 February 2020, *supra* note 2 at 6971 (Hon Doug Downey).

157 *Fischer*, *supra* note 14 at para 16. The court in *Banman*, *supra* note 8 utilized the same approach at para 313.

158 *Ibid* at para 46.

159 *Hollick*, *supra* note 10 at para 31. See Winkler et al, *supra* note 37 at 133-142 for examples of judicial and non-judicial alternatives.

160 See e.g., *Grace v Fort Erie (Town)*, 2003 CanLII 48456; *Penney v Bell Canada*, 2010 ONSC 2801.

161 LCO Report, *supra* note 16 at 49.

162 Prince Edward Island, *Class Proceedings Act*, SPEI 2021, c 30.

163 British Columbia, *Class Proceedings Act*, RSBC 1996, c 50, s 4(1)(d); Alberta, *Class Proceedings Act*, SA 2003, c C-16.5, s 4(1)(d); Saskatchewan, *The Class Actions Act*, SS 2001, c C-12.01, s 6(1)(d); Manitoba, *Class Proceedings Act*,

dispute".[164] Here too, courts have confirmed that this difference in wording is without a distinction.[165] Both formulations require that courts "take into account the importance of the common issues in relation to the claims as a whole."[166]

The meaning of "addressing impugned conduct" in s. 5(1)(a), however, is less obvious. Both the LCO[167] and the Attorney-General[168] discussed regulatory or voluntary recall programs where defective products are replaced free-of-charge. While putative class members might claim entitlement to nominal damages in these situations (for example, for the inconvenience of bringing their car to the dealership), a court could still decide that the recall program sufficiently "addresses the impugned conduct" of the manufacturer, making a class proceeding redundant (i.e.: not superior to the recall). Or as the LCO put it: "in theory a remedial program that largely makes class members whole ought to be preferred over the more cumbersome, lengthy and expensive class litigation process." But this idea is also not new to Canadian class action jurisprudence. As noted by Rady J. in *Richardson v. Samsung*, the law of class actions "does not demand perfect compensation. Indeed, perfect compensation is unlikely even if pursued by way of class action."[169]

In the end, the LCO was not persuaded that a legislative amendment to s. 5(1)(d) was warranted since judges already had the obligation to conduct a cost-benefit analysis. However, the LCO did "encourage judges to give more weight to alternative remedies"[170] and ultimately recommended that "courts interpret the existing elements of s. 5(1)(d) of the certification test more rigorously".[171] In response, the Attorney-General said:

> Courts cannot simply ignore [25 years of] precedent to make certification more rigorous without amendments to the statutory language, no matter how many people encourage them to do so. So we decided we needed to propose very measured amendments to the language in the certification text to achieve this goal.[172]

The largest impact of the superiority provision, therefore, could well be in a subset of class actions where the wrongdoing has been rectified to a significant degree before the class action has been certified. In addition to product recall programs, the Attorney-General also referred to data breach cases where "credit

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CCSM c C130, s 4(1)(d); Newfoundland and Labrador, Class Actions Act, SNL 2001, c C-18.1, s 5(1)(d). The Federal Court Rules similarly refer to the "just and efficient resolution of common questions of law or fact": *Federal Courts Rules*, SOR/98-106, s 334.16(1)(d).

164 Nova Scotia, *Class Proceedings Act*, SNS 2007, c 28, s 7(1)(d); New Brunswick, *Class Proceedings Act*, RSNB 2011, c 125, s 6(1)(d).

165 As McLachlin CJC stated in *Hollick*, *supra* note 12 at para 29: "I would not place undue weight, however, on the fact that the Act uses the phrase 'resolution of the common issues' rather than 'resolution of class members' claims'." This seems consistent with the text of the *CPA*. On a plain reading, "determining entitlement to relief" is substantially similar to "resolving the dispute"; both envision that liability will be resolved at the common issues trial. The continued existence of s. 6 of the *CPA* refutes the more extreme interpretation that all questions of liability and damages must be resolvable on a common basis.

166 *Ibid* at para 30.

167 LCO Report, *supra* note 16 at 49-50.

168 *Hansard*, 19 February 2020, *supra* note 2 at 6971.

169 LCO Report, *supra* note 16 at 49, citing *Richardson v Samsung*, 2018 ONSC 6130 at para 78.

170 *Ibid* at 50.

171 *Ibid* at 52.

172 Hansard, 19 February 2020, *supra* note 2 at 6970.

monitoring and identity theft protections are offered by the defendant".[173] Even without the addition of superiority, however, some judges have been reluctant to certify cases in this very context.[174]

IV. CONCLUSION

The changes to Ontario's certification test were controversial when they were first adopted. Immediate reaction to the amendments echoed the Attorney-General's view that the certification test was now more stringent. That some of the language in the amendments - like "predominance" and "superiority" - appeared to track the language of US Federal Rule 23 understandably raised the possibility that Ontario's new test might produce the same restrictive certification standard used in American federal class actions. We find that the assumption a "stringent" test had been introduced as expressed in *Banman*[175] and in various blogs[176] is not supported by the text, purpose, and history of Ontario's *CPA* as well as US case law. The predominance and superiority requirements are more homegrown than actual "legal transplants" from the United States. Our analysis suggests that Ontario's predominance requirement codifies, rather than changes, existing preferable procedure case law. The Ontario predominance requirement mirrors a routine part of a test long used in Ontario to certify class actions when courts ask whether a class proceeding is manageable. When determining preferable procedure, Ontario courts have long considered whether individual issues "overwhelm" common ones or whether common issues do not significantly advance the litigation, concepts that BC and US courts also will employ when assessing predominance. Evaluating the common issues "in context" does not dictate that no individual issues can remain following the common issues trial. The Legislature could have rescinded s. 6 of the *CPA* but did not do so.[177] Individual issues trials remain an expected feature of the class action process.

The question of whether a class proceeding is "superior" to any alternative is also a well-established part of Canadian class actions, but it is a somewhat more demanding test for plaintiffs to meet than the test used in the United States. Unlike the US, all non-adjudicative alternatives must be compared to the class action. However, both the LCO and the Attorney-General referred to the need for a more rigorous preferable procedure analysis in only a specific subset of cases in which the damage caused by the defendant has already been addressed through regulatory or other means - like product recalls and defendant-funded remedial programs that make the class essentially whole. In those cases, pursuing slightly more compensation through a class action may not be proportionate to the costs of the proceeding.[178]

Examining class actions across jurisdictions offers broader lessons about the nature of legal transplants.[179] Commentators have long debated the extent to which laws spread from one country to

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173 Hansard, 19 February 2020, *supra* note 2 at 6971.

174 See e.g., *Maginnis and Magnaye v FCA Canada et al*, 2020 ONSC 5462.

175 *Banman*, *supra* note 8. As discussed in section 1(f) above, however, the actual test set out in *Banman* was not operationally more stringent than the previous preferable procedure test.

176 See e.g., Cheryl Woodin, Charlotte Harman & Katrina Crocker, "Bill 161's Predominance Test to Alter the Landscape on Class Proceedings in Ontario" (13 December 2019) online: (blog): Bennett Jones <https://www.bennettjones.com/Blogs-Section/Bill-161-Predominance-Test-to-Alter-the-Landscape-on-Class-Proceedings-in-Ontario>.

177 Recall that under s 6, the need for individual assessment of damages is not a bar to certification.

178 In privacy breaches, the courts have already found that the annoyance of applying for new credit cards is either not compensable or negligible: *Li c Equifax inc*, 2019 QCCS 4340 at para 31.

179 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2d ed (Athens, GA: Georgia University Press, 1993).

another are based upon colonial history and international power relationships,[180] shared political and economic commitments,[181] competitive pressure from non-governmental organizations and private actors,[182] or more simply, the costs saved when countries borrow legal innovations rather than create them anew.[183] Accordingly, even as an increasing number of countries have adopted class actions with features that resemble those in the United States,[184] commentators have expressed doubt that such schemes will take hold with the same effect, given differences in their legal traditions, professional norms, regulatory authorities, and constitutional orders.[185]

As discussed above, some of those forces explain why we believe changes to Ontario class actions are unlikely to replicate the American experience. But the recent Ontario reforms also demonstrate how—even when countries share a common legal traditions and procedures, like class actions—policymakers still must pay exacting attention to the formal features of the rules borrowed from other countries, how they interact within that formal legal system, and the amount of discretion those laws vest in judges and others charged with interpreting and applying them. In the context of US class actions and the Ontario *CPA*, the meaning of open-textured language that vests judges with broad authority to certify class actions for a wide variety of substantive areas is not self-evident. Canada's interpretive legal traditions offer the most important guide for how class action reforms will continue to fulfill the deterrence, judicial economy, and access to justice goals of the Canadian class action device.

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180 Vanessa Casado Pérez & Yael R Lifshitz, "Natural Transplants" (2022) 97 NYU L Rev 933 at 944 (observing that the "choice of former colonies is often constrained, such that their adoption of Western regulatory examples is not necessarily due to their perceived value but due to their increased availability.")

181 Pierre Legrand, "European Legal Systems Are Not Converging" (1996) 45 ICLQ 52 at 62 (observing that, only after a host country's customs and manners change themselves can the "laws and institutions of a nation, through experience, learning and reason, be accommodated ...")

182 Nuno Garoupa & Anthony Ogus, "A Strategic Interpretation of Legal Transplants" (2006) 35 J Leg Stud 339 at 340; William Magnuson, "The Race to the Middle" (2020) 95 Notre Dame L Rev 1183 at 1205.

183 See Jonathan M. Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process" (2003) 51 Am J Compar L 839 at 845; Jonathan B Wiener, "Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law" (2001) 27 Ecology LQ 1295 at 1354 (describing efficiency gains from legal transplants).

184 Deborah R Hensler, "From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally" (2017) 65 U Kan L Rev 965 at 968 (collecting and analyzing class action "transplants" adopted in 35 jurisdictions outside the United States); Deborah R. Hensler, "The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding" (2011) 79 Geo Wash L Rev 306 at 307 (describing the rapid spread of US style class action regimes as a "remarkable change").

185 See e.g., Samuel Issacharoff & Geoffrey P. Miller, "Will Aggregate Litigation Come to Europe?" (2009) 62 Vand L Rev 179 at 180 ("And, yet, one need spend only a few minutes in conversations with European reformers before the proverbial 'but' enters the discourse: 'But, of course, we shall not have American-style class actions.'")