

# ACCESS TO A JUST RESULT: REVISITING SETTLEMENT STANDARDS AND *CY PRÈS* DISTRIBUTIONS

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It is by now axiomatic that increased access to justice is a key objective of class proceedings.<sup>1</sup> Certification decisions invariably refer to the three-part justification for class actions first articulated by McLachlin C.J. in *Dutton*.<sup>2</sup> According to Chief Justice Winkler, improving access to justice, including by way of class proceedings, has become “a mantra” with judges, government officials, and the bar, a phrase so commonplace that its meaning has become “blunted.”<sup>3</sup> Although ubiquitous, there is little consensus between judges, lawyers, and commentators as to what the term means. Is the access to justice imperative met when class members are able to litigate claims that would otherwise be too costly to prosecute individually?<sup>4</sup> Or is a procedurally and substantively just result a necessary component of the access to justice equation?<sup>5</sup>

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- 1 *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 15. Judicial economy and deterrence of wrongful behaviour are, of course, the other two objectives [*Hollick*].
- 2 *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at paras. 27–29 [*Dutton*].
- 3 Hon. Warren Winkler, “Professionalism and Proportionality” (2009) 27 *Advocates’ Soc. J.* 6.
- 4 *Hollick*, above note 1 at para. 28 (“class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own”).
- 5 Among others, Mauro Cappelletti and Bryant Garth have so argued: “Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report”

This paper engages the access to justice paradigm by exploring one of the key stages of a class action: the settlement approval process. In Part A, I first briefly survey the various meanings ascribed to the term “access to justice,” and offer a more complete conceptualization in order to reinvigorate that well-worn phrase.<sup>6</sup> In Part B, I evaluate the prevailing approach to assessing the fairness of proposed settlements. I will argue that access to justice requires that the policy favouring settlement of litigation must be tempered in the class action context, and that two factors in the standard test for settlement approval — the presumption of fairness and a lack of objectors — are not valid determinants of a just result. In Part C, I focus on a particular form of settlement that brings into sharp relief the considerations canvassed in Part B. *Cy près* distributions of settlement proceeds are increasingly common, and illustrate why both the policy favouring settlement and the criteria contained in the usual test for settlement approval should be revisited in order to better promote meaningful access to justice.

## A. ACCESS TO JUSTICE — DEFINITIONS & ASPIRATIONS

Judges, lawyers, and scholars have varying visions of access to justice, particularly when contemplated in the context of class actions. For some, class actions further access to justice because they permit the aggregation of small claims that would otherwise not be litigable. For others, the class action is more than the sum of its parts — it serves the ends of social justice better than even a multitude of individual claims. While both of these are legitimate in their own right, the approach one takes to the access to justice imperative will ultimately affect how one assesses the success of class actions in meeting their legislative objectives. Scholars and judges both have had much to say about the concept.

Mauro Cappelletti’s ambitious Florence Access to Justice Project marked the beginning of serious academic treatment of access to justice.<sup>7</sup>

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[Cappelletti & Garth, “General Report”] in Mauro Cappelletti & Bryant Garth, eds., *Access to Justice, Vol. 1* (Holland: Sijthoff and Noordhoff, 1979) 1 at 8 [Cappelletti & Garth].

- 6 A more detailed examination of case law and academic scholarship on meanings of access to justice is contained in Jasminka Kalajdzic, “Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario” (LL.M. Thesis, University of Toronto, 2009) [unpublished].
- 7 Professor Cappelletti, a leading comparative lawyer, took stock of a massive amount of information about access to justice and law reform initiatives around the world, and ultimately “codified a broadened notion of access beyond the

Cappelletti examined the range of access to justice initiatives; from *judicare* for the poor, to public law models designed to advance collective rights; from alternative dispute resolution, to plain language movements. Three decades later, the Project's conclusion, with its emphasis on moving from formal rights to substantive justice, remains apposite:

[T]he main conclusion arrived at is not so much that we need more rights — or more statements of rights (important as these may be for constitutional lawyers or political symbolism) — rather the on-going challenge is to find new ways and means of making the rights citizens already possess both “effective” and “enforceable.”<sup>8</sup>

In this way, academic commentators see access to justice as focusing on the two main purposes of any legal system: “First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just.”<sup>9</sup>

With respect to class actions specifically, some access to justice scholarship ascribes to the mechanism a decidedly “social mission.” In the US, commentators have emphasized how class actions serve the societal need to redress wrongs. For these supporters of class actions, “the goal, consistently, is ready, meaningful justice for the (relatively) disempowered in contemporary, massified societies.”<sup>10</sup> In Canada, Shaun Finn has characterized class proceedings in a very similar way:

Class actions have arisen, in part, to help right the balance in favour of the consumer or ordinary citizen. From this vantage point, the class action can be described as the New Equity of our time. It has stepped outside the boundaries of ordinary procedure by pursuing a mission that no other civil

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lack of lawyers and beyond courts as the site of justice-seeking.” Marc Galanter, “Access to Justice as a Moving Frontier” in Julia Bass, W.A. Bogart, & Frederick Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada/Irwin Law, 2005) 147 at 147–48 [Bass, Bogart, & Zemans].

8 Kim Economides, “2002: A Justice Odyssey” [2003] V.U.W.L.R. 1, online: [www.austlii.edu.au/nz/journals/VUWLRev/2003/1.html](http://www.austlii.edu.au/nz/journals/VUWLRev/2003/1.html). See also Cappelletti & Garth, “General Report,” above note 5 (“Indeed, the right of effective access is increasingly recognized as being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication.”).

9 Cappelletti & Garth, above note 5.

10 Francisco Valdes, “Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective” (2008) 24 Ga. St. U. L. Rev. 627 at 648.

mechanism is able to fulfil . . . . More than a tool of convenience, however, it is entrusted with an explicitly social mission: to protect consumer rights, ensure access to justice, and sanction illicit institutional behaviour.<sup>11</sup>

Other scholarly writing on access to justice has been more ambivalent toward class actions and their ability to provide access to both a court process and a just result, let alone fulfill their social mission. Rod Macdonald, for example, acknowledges the distributive justice function of class actions in a modern consumer society; at the same time, however, he notes that many commentators have argued class actions “merely facilitate . . . the instrumental pursuit of money or a like remedy for a collection of individual litigants who otherwise have little in common,” rather than induce social solidarity.<sup>12</sup> There is skepticism that class action litigation improves access to justice for the poorest in society; as Professor (now Judge) Calabresi observed, class actions, “though certainly of some use to protect the very poorest in society, have commonly been employed to further environmental and consumer interests which. . . are more typical of the suburbanite than of the ghetto dweller.”<sup>13</sup> Deborah Rhode has been equally ambivalent. On the one hand, she notes that individual litigation has permitted some defendants to resolve minor disputes without altering future conduct, and that this pattern of behaviour then forces public interest organizations to squander scarce resources in enforcing the same laws for different claimants — a state of affairs that is avoided if class actions are available.<sup>14</sup> On the other hand, Rhode is emphatic that, in her view (based on empirical studies), litigation is a very expensive way to compensate victims.<sup>15</sup> From an access to justice perspective, one of the serious flaws in class action litigation no less

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- 11 Shaun Finn, “In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission” (2005) 2:2 *Can. Class Action Rev.* 333 at 371–73. The language is reminiscent of the famous passage in Justice Douglas’ dissenting opinion in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974), where, after recounting the ways in which society has grown in complexity, he wrote: “The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth” (at 186).
  - 12 Roderick A. Macdonald, “Access to Justice in 2003 — Scope, Scale, Ambitions” in Bass, Bogart, & Zemans, above note 7 at 63–64.
  - 13 Guido Calabresi, “Access to Justice and Substantive Law Reform: Legal Aid for the Lower Middle Class” in Cappelletti & Garth, above note 5 at 171.
  - 14 Deborah Rhode, *Access to Justice* (New York: Oxford University Press, 2004) at 114.
  - 15 *Ibid.* at 33. Rhode reports that by contrast, in Japan experts estimate that legal fees consume only about 2 percent of compensation payments due to a greater reli-

than any other kind, she writes, is that victims are undercompensated and lawyers are overcompensated.<sup>16</sup>

Whether Rhode's view bears out in the Canadian context is unknown — and unknowable, given the dearth of empirical studies evaluating actual outcomes of class proceedings. Have defendant corporations changed business practices as a result of class proceedings (or the threat of them)? How many class actions act as catalysts for government compensation schemes and public apologies, as occurred in the Residential Schools case? Are class members getting less in real dollars than their individual litigant counterparts? Are class counsel paid too much relative to the risk borne and the service delivered? Unlike the more developed empirical scholarship in the US, there is an almost complete absence of an evidentiary basis on which to assess whether and how Canadian class actions advance their access to justice objective. Nevertheless, unquestioned notions of class actions righting the balance in favour of the disempowered, of class counsel filling the gaps of lax regulatory supervision, and of widespread illicit behaviour being curbed, repeatedly appear in judicial discussions of class actions as an access to justice mechanism.

Access to justice as a phrase is repeated in virtually every class action decision on certification.<sup>17</sup> Such decisions invariably refer to the three-part justification for class actions first articulated by McLachlin C.J. in *Dutton*.<sup>18</sup> There, the Chief Justice set out what has become the definitive conceptualization of access to justice:

[B]y allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to

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ance on official investigations and non-litigious dispute resolution mechanisms (at 34).

16 *Ibid.* at 31.

17 A search of the Quicklaw database on 4 June 2009 for cases with the terms “access to justice” and “class actions(s)” yielded almost 600 decisions. I recognize that access to justice has also been the subject of judicial consideration in contexts other than class actions. For example, the Supreme Court of Canada codified access to justice as an element of the rule of law in *B.C. Government Employees' Union v. B.C. (Attorney-General)*, [1988] 2 S.C.R. 214 at paras. 24–25, but rejected general access to a lawyer as a constitutional principle in *B.C. (Attorney-General) v. Christie*, [2007] 1 S.C.R. 873. A detailed exploration of these other lines of cases is outside the scope of this paper.

18 *Dutton*, above note 2.

some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.<sup>19</sup>

Here we see access to justice articulated in a number of ways. Class actions are designed to capture diffuse interests, overcome economic barriers to courts and lawyers, and promote the role of the private attorney general who will ensure wrongs are not left unremedied. The Supreme Court has explicitly accepted that the class action has a social dimension,<sup>20</sup> though unlike a few lower courts,<sup>21</sup> it has not officially acknowledged a specific role for class actions to fill gaps left by lax regulatory intervention.

Three variations of the access to justice theme thus emerge from the case law. The first and most predominant idea is that barriers to “access” are primarily economic. To similar effect, there is a conflation of “justice” with “litigation”; access to justice is perceived largely as access to a court procedure. That is, so long as the plaintiffs are given the opportunity to litigate their dispute, access to justice has been achieved even if it is only procedural in nature. The procedural advantages of class proceedings over ordinary litigation, including the availability of case management and discovery rights (which are not available in simplified procedures or small claims court actions) are said to further access to justice.<sup>22</sup> Second, and far less often, access to justice is perceived in non-economic terms, as overcoming psychological and social barriers to obtaining redress.<sup>23</sup> Third, the courts periodically articulate a social dimension — that class actions are vehicles for vindicating the public interest.<sup>24</sup>

In its primary judicial conceptualization, therefore, access to justice is purely procedural. Yet even procedural access to justice, at least as it has

19 *Ibid.* at para. 28 (citation omitted).

20 *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at para. 106 (“It is accepted that the class action has a social dimension . . . . From this perspective, the class action is clearly of public interest.”).

21 *Alfresh Beverages Canada Corp. v. Hoescht AG* (2002), 16 C.P.C. (5th) 301 at para. 16 (Ont. S.C.J.) [*Alfresh*]: “the private class action litigation bar functions as a regulator in the public interest for public policy objectives.”

22 *Lavier v. MyTravel Canada Holidays Inc.* (2009), 248 O.A.C. 378 at para. 62 (Div. Ct.). See also *Scott v. TD Waterhouse* (2001), 94 B.C.L.R. (3d) 320 at paras. 115–16 (S.C.), where Justice Martinson lists the practical advantages of a class, including the ability to attract “sophisticated lawyers” by way of contingency fees, and the insulation of class members from adverse costs.

23 See *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, where the Court recognized that the particular vulnerabilities faced by the class members as a result of their physical and psychological injuries were significant barriers to justice.

24 *Alfresh*, above note 21.

been conceived by scholars and law reformers, is much more than access to a procedure. As Professor Macdonald writes,

Procedural access to justice implies careful attention to every decision-making step within the civil justice system. In every situation involving the attempt to reach decisions with generalized impacts, the process must be understandable to users and must be responsive to their sense of fairness. *A process that is efficient and expeditious, but is either a mystery to those who participate in it, or leaves them with a sense of not having been treated fairly, is not a process that enhances access to justice.*<sup>25</sup>

Such fundamental notions of fairness speak to a richer understanding of access to justice, one that is perhaps assumed by the judiciary to be inherent to the proper functioning of the justice system. Yet, the requirements of fairness bear emphasizing. Class actions must be about more than giving people an opportunity to litigate. The mechanism must also be designed and implemented in a way that promotes fairness — indeed, justice — in terms of process *and* result. Failing this, class actions cannot fulfill the social mission ascribed to the procedure by many commentators and some courts.

In the end, therefore, the definition of access to justice adopted in this paper incorporates four basic, but fundamental, attributes gleaned from both literature and case law. First, in the context of class proceedings, access to justice necessarily means an *opportunity to litigate a claim* that would otherwise not be litigable for reasons of economic impracticality, social condition, or psychological barriers. Second, given the full panoply of considerations canvassed in this part, a progressive understanding of access to justice would also include more than simply access to a court procedure. The procedure must be *fair and as transparent as possible*. Third, in light of the limited involvement of class members, their *participation rights must be meaningful*. A right to object or to opt out that is rendered hollow due to the same barriers that prevent access to the ordinary court procedure is no right at all. And finally, a *substantively fair result* must also define access to justice. For example, settlements should not under-compensate class members, and claims processes must be designed in a way that ensures the greatest take-up rate possible in the circumstances.

All four components of this more complete conceptualization of access to justice are engaged at the settlement approval stage of an action. It is to this analysis that I now turn.

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25 Macdonald, above note 12 at 105 [emphasis added].

## B. SETTLEMENT APPROVAL THROUGH THE LENS OF ACCESS TO JUSTICE

The ultimate question posed in access to justice literature is whether access to courts leads to access to just outcomes; it is a vital question to be posed in the class action context where the vast majority of certification hearings results in certification, and over 90 percent of all certified actions result in negotiated settlements.<sup>26</sup> The question has both doctrinal and empirical dimensions, and gives rise to any number of subsidiary questions: How are courts determining a “just” outcome in class proceedings? Are there other considerations that ought to be brought to bear in approving or rejecting class action settlements? How are settlements distributed and what percentage of class members is actually receiving the award?

While it must be true that access to a just result is an inextricable component of any access to justice program, evaluating whether class actions, on the whole, are giving rise to “just” results, is a daunting undertaking. It would first require consensus on what constitutes a “just” outcome. As a normative matter, is justice to be gauged vis-à-vis the compensatory objectives of class proceedings legislation, or is behaviour modification to be given primacy in the justice calculus? The two objectives are not necessarily consistent with one another, and such inconsistency comes to a head in settlements that involve significant *cy près* distributions.<sup>27</sup> Moreover, whatever the normative underpinnings of “justice,” evaluating how well class members are being compensated, or wrongful corporate or government

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26 Determination of the number of cases commenced and certified as class proceedings remains an imprecise art, with law firms not consistently reporting the initiation and status of claims to the Canadian Bar Association’s National Class Action Database, online: [www.cba.org/ClassActions](http://www.cba.org/ClassActions). Ward Branch, however, has estimated that as of September 2008, there have been 240 certification hearings in Ontario (both contested and on consent), of which 54 (22 percent) did not result in certification: Ward K. Branch, *Class Actions in Canada*, looseleaf (Aurora, ON: Canada Law Book, 2008) at § 4.1960. Chief Justice Winkler has observed that the settlement rate in class actions is consistent with that of ordinary civil litigation, which currently stands at approximately 96 percent. See Warren Winkler, “Civil Justice Reform — The Toronto Experience” (12 September 2007) online: [www.ontariocourts.on.ca/coa/en/ps/speeches/civiljusticereform.htm](http://www.ontariocourts.on.ca/coa/en/ps/speeches/civiljusticereform.htm).

27 As will be explored in more detail in part III below, if deterring the defendants from engaging in the impugned conduct by way of a large damage award is paramount, then it matters little to whom the damages are paid. From an access to justice perspective, however, prospective relief does not fully address the nature of the wrong suffered and the compensatory function that substantive justice demands.

conduct deterred, is immensely complex. It is extremely difficult to measure the quality of settlements.<sup>28</sup> Few attempts have been made to empirically measure the quality of settlements in Canadian class actions,<sup>29</sup> and none has attempted to assess the impact of class action litigation on corporate or government behaviour. Studies in the US suggest that class actions tend to settle for too little, resulting in both under-compensation and under-deterrence.<sup>30</sup> Whether the same trends exist in Canada is largely unknown.

Admittedly, a comprehensive audit of class action settlements nationally or in Ontario alone would require significant resources and is beyond the scope of this paper. I take a narrower approach to evaluating settlements in an access to justice framework by focusing on a critical analysis of the standards used by the courts in determining what is a fair and reasonable settlement. As will be seen, the application of these standards in recent cases has been less than robust. Whether the current judicial approach to settlement approval *actually* leads to approval of settlements that ought not to be approved is unknown, and unknowable; without access to all settlement documents tendered at a fairness hearing, it is impossible for a commentator to challenge whether the settlement was truly in the best interests of the class.<sup>31</sup> Theoretically, the adversarial process functions to ensure that opposing viewpoints and weak evidence are ferreted out. Therefore, in the class action context, the relevant question is whether the adversarial process

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- 28 Marc Galanter & Mia Cahill, “Most Cases Settle’: Judicial Promotion and Regulation of Settlements” (1993–1994) 46 *Stan. L. Rev.* 1339, as cited in John Kleefeld, “Class Actions as Alternative Dispute Resolution” (2001) 39 *Osgoode Hall L.J.* 817 at n. 10 [Kleefeld].
- 29 Michael Carabash, “Shareholder Class Actions in Ontario: Putting John C. Coffee, Jr.’s Findings to the Test” (2008) 4:2 *Can. Class Action Rev.* 329 (empirical study of shareholder actions in Ontario, concludes that “Ontario shareholder class actions have not recovered a significant ratio of shareholder losses, and shareholders have ended up paying high transaction costs in the process” [at 397]).
- 30 Benjamin Alarie, “Rethinking the Approval of Class Counsel’s Fees in Ontario Class Actions” (2007) 4:1 *Can. Class Action Rev.* 15 at 42 and works cited therein.
- 31 In any event, proof of unfair settlements, corrupt lawyering, or inadequate judicial oversight is not a prerequisite to engaging in rigorous debate and critical commentary. Doctrinal legal scholarship is valid in and of itself if only to ensure abuses do not occur in the future. The US experience with class actions also acts as a cautionary tale; how did abuse occur there, and what can we do here to guard against the same experience? For another academic’s analysis of American and Canadian approaches to class action settlement fairness, see Catherine Piché, “A Critical Reappraisal of Class Actions Settlement Procedure in Search of a New Standard of Fairness” (2010) 41 *Ottawa L. Rev.* [forthcoming].

functions in the same way. If not, is the appropriate level of scrutiny brought to bear on the proposed settlement as a matter of institutional design?

## 1) Approach to Settlement Fairness

There is little, if any, divergence of approach with respect to the role of the court, and the standards to be applied, in assessing the fairness, reasonableness, and adequacy of a proposed settlement. Courts have consistently applied the following framework of analysis, first enunciated by Sharpe J. (as he then was) in *Dabbs*,<sup>32</sup> expanded by Cumming J. in *VitaPharm*,<sup>33</sup> and described succinctly by Winkler J. (as he then was) in *Gilbert v. CIBC*:

There is a *presumption of fairness* when a proposed class settlement negotiated at arms length by class counsel is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

The test to be applied is whether the settlement is fair and reasonable and in the best interests of the class as a whole. This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give and take. It is a question of weighing the settlement in comparison to the alternative of litigation with its inherent risks and associated costs.

There are a number of factors, not all to be given equal weight, which are to be considered in determining whether to approve a settlement. *These include likelihood of success, degree of discovery, the terms of the settlement, recommendation of counsel, expense and duration of litigation, number of objectors, presence of arms length bargaining, extent of communications with the class and the dynamics of the bargaining.*<sup>34</sup>

Two important concepts emerge from the framework for settlement approval evident in the case law. First, there is a “strong” presumption that

32 *Dabbs v. Sun Life Assurance Co.* (1998), 40 O.R. (3d) 429 at 444 (Gen. Div.), Sharpe J. [*Dabbs*].

33 *Vitapharm v. F. Hoffman-LaRoche Ltd.* (2006), 74 O.R. (3d) 758 at paras 110–18 (S.C.J.) [*Vitapharm*]. Justice Cumming set out a long list of factors and principles which he distilled from earlier authorities, including *Dabbs*, *ibid.*

34 (2004), 3 C.P.C. (6th) 35 at paras. 9–11 (Ont. S.C.J.) [*Gilbert*] [emphasis added]. The same test is described in dozens of other cases; see *Nunes v. Air Transat A.T. Inc.* (2005), 20 C.P.C. (6th) 93 (Ont. S.C.J.), Cullity J. [*Nunes*]; and *Bilodeau v. Maple Leaf Foods Inc.*, [2009] O.J. No. 1006 at para. 47 (Ont. S.C.J.), Perell J. [*Bilodeau*]. In BC, a slightly different formulation of essentially the same factors is summarized in the “Jeffery four questions,” referring to *Jeffery v. Nortel Networks Corp.* (2007), 68 B.C.L.R. (4th) 317 at para. 28 (S.C.).

the proposed settlement is fair and reasonable.<sup>35</sup> Second, the nature and number of objectors are to be considered, and therefore class members have the right to be heard. Each of these themes implicates access to justice, and will be considered in turn.

## 2) Presumption That Settlement Is Fair

As mentioned above, standard criteria applied by courts in determining whether a settlement should be approved include a “strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm’s-length by counsel for the class, is presented for court approval.”<sup>36</sup> Courts have displayed considerable deference to the opinion of class counsel, especially where settlement flows from mediation.<sup>37</sup> In support of the “strong” presumption, courts routinely rely on Sharpe J.’s decision in *Dabbs*.<sup>38</sup> Yet a careful reading of *Dabbs* does not support this deferential approach. While Sharpe J. did refer to the recommendation by experienced class counsel as a significant factor favouring approval,<sup>39</sup> he did not, strictly

35 *Nunes, ibid.*; *Vitapharm*, above note 33 at para. 110. In the interest of full disclosure, I point out that I was counsel for the plaintiffs in *Vitapharm* on the carriage motion, but had minimal, if any, involvement with the case thereafter, and none at the time Cumming J. granted certification and settlement approval.

36 *Vitapharm, ibid.* at para. 113. The court also commented that the “overwhelming majority of proposed settlements are approved when the court is satisfied that arms-length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement” (at para. 143).

37 See *Garland v. Enbridge Gas Distribution Inc.* (2006), 38 C.P.C. (6th) 70 at para. 28 (Ont. S.C.J.) [*Garland*], where the judge held that, on the basis of the material filed, “it is not necessary to delve deeply into the course of the negotiations between the parties and their counsel. On this question, and in the circumstances of this case, I believe I should give considerable deference to the recommendation of class counsel and the supporting affidavit sworn by one of their solicitors.”

38 Above note 32. See *Vitapharm*, above note 33; *Nunes*, above note 34; *Gilbert*, above note 34; *Martin v. Barrett* (2008), 55 C.P.C. (6th) 377 (Ont. S.C.J.) [*Martin*]; *Vivendi Universal Canada Inc. v. Jellinek*, [2006] O.J. No. 4841 (S.C.J.); *CSL Equity Investments Ltd. v. Valois*, [2007] O.J. No. 3932 (S.C.J.); *Kuptana v. Canada (A.G.)*, [2007] N.W.T.J. No. 1 (S.C.); *Burnett Estate v. St. Jude Medical, Inc.*, [2009] B.C.J. No. 133 (S.C.) [*Burnett*], all of which refer to *Dabbs*, *Vitapharm*, or both for this proposition. Other cases refer to the “strong presumption” without citing any authorities: see *Sauer v. Canada (A.G.)*, [2008] O.J. No. 3419 at para. 89 (S.C.J.), and *Gould v. BMO Nesbitt Burns Inc.*, [2007] O.J. No. 1095 at para. 27 (S.C.J.) [*Gould*].

39 In an earlier decision on a procedural motion, Sharpe J. put it even lower by referring to the opinion of counsel as “evidence worthy of consideration,” but “only one factor to consider” (*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 at para. 16 (Gen. Div.) [*Dabbs* No. 2]).

speaking, create a “strong presumption” of fairness. Indeed, referring to the large number of individuals not before the court who would be affected, he wrote that he was required to scrutinize the proposed settlement “closely.” He agreed with Garry Watson that settlements “must be seriously scrutinized by judges” and “viewed with some suspicion.”<sup>40</sup> While the benchmark for a fair settlement was not perfection, the *process* of scrutiny was to be exacting nevertheless.

The process of review ultimately employed by Sharpe J. in *Dabbs* belies the view that a presumption of fairness operates in the context of class actions. He heard three days of cross-examination of deponents on affidavits filed in support of the settlement. He asked questions of counsel that required further information to be provided. Only after this vetting process did he reach the conclusion that the settlement should be approved.<sup>41</sup> By contrast, based on a reading of over a dozen leading cases, few if any fairness hearings since *Dabbs* have involved the calling of *viva voce* evidence (at least as reflected in reasons for judgment). It is difficult to reconcile a “strong presumption of fairness,” as subsequently articulated by the courts in reliance on *Dabbs*, with Sharpe J.’s approach in that case.

Courts have also relied on a statement made by Callaghan A.C.J. in *Sparling v. Southam Inc.* for the presumption of fairness.<sup>42</sup> Reliance on *Sparling*, however, may be misplaced. This case involved the approval of a settlement of a derivative action proposed by the Director. In response, the court held that it should neither function as a rubber stamp nor substitute its own judgment for that of the parties. Importantly, the court referred to the Director’s authority as “*parens patriae* under the [Business Corporations] Act not only to institute actions but also to compromise them.” It was in this context that Callaghan A.C.J. stated that “[s]ettlements proposed by the Director . . . run with a strong initial presumption that they are reasonable and fair.”<sup>43</sup>

There are, of course, significant differences between a settlement proposal proffered by a public officer and one put forward by private litigants. While a Director has various motives to settle a case before trial, financial self-interest is not one of them. For this reason, the Ontario Law Reform

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40 *Ibid.* at para. 30, referring to Garry Watson, “Is the Price Still Right? Class Proceedings in Ontario” (Paper presented to Canadian Institute for Administration of Justice Conference, Toronto, October 1997).

41 *Ibid.* at para. 32.

42 *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.J.) [*Sparling*]. The case is referred to in *Vitapharm*, above note 33 at para. 116.

43 *Sparling*, *ibid.* at para. 21.

Commission, while very supportive of class actions, expressed the view that settlements had to be carefully scrutinized by courts because “class members’ interests could be sacrificed for lawyers’ fees.”<sup>44</sup> This is not to say that the financial self-interest inherent in all class proceedings inevitably leads to “legal blackmail” or “sweetheart deals.” I do argue, however, that a presumption of fairness that operates in a proceeding like the one before Callaghan A.C.J. is not comfortably transposed to a class action.

A strong presumption of fairness, even where there is no evidence of collusive behaviour, is inconsistent with the careful scrutiny that courts in the United States have repeatedly stated is the proper approach at settlement approval hearings. The US Supreme Court stated definitively in the infamous *Amchem* case that the rights of absent class members must be “the dominant concern” of the court, and that courts should provide “undiluted, even heightened attention in the settlement context” to certain Rule 23 requirements in order “to protect absentees.”<sup>45</sup> Other courts have even described the reviewing court’s function as that of “a fiduciary who must serve as a guardian for the rights of absent class members.”<sup>46</sup> This role is fundamentally at odds with a presumption that the settlement is fair and adequate.

A judge tasked with assessing the fairness of a class action settlement is charged with a unique — and I argue, onerous — task. The judge who is asked to approve a settlement guards the interests of the absent class members. Though they have an interest in the action, class members are not parties to the litigation.<sup>47</sup> Those class members who are given effective notice of the proposed settlement and who do not agree with its terms can either object (a process discussed in section 3 below) or “vote with their feet,” by opting out of the class proceeding. An individual’s ability to opt-out of an unacceptable settlement and retain the right to sue the defendants, however, is only available in those cases where certification and settlement are sought at the same time. That is, in cases of contested certification, the opt-out window expires long before a settlement is negotiated and submitted for approval.<sup>48</sup> Thus, class members who do not agree with the terms of

44 Ontario Law Reform Commission, *Report on Class Actions, Vol. III* (Toronto: Ontario Law Reform Commission: 1982) at 806 [OLRC Report].

45 *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 at 621 (1997).

46 *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation*, 55 F.3rd 768 at 783 (3d Cir. 1995). See also *In re Cendant Corp. Sec. Litig.*, 404 F.3rd 173 at 187 (3d Cir. 2005).

47 *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. dismissed, [1998] S.C.C.A. No. 372 [*Dabbs* C.A.].

48 Section 9 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [CPA] gives class

the settlement in such cases can choose not to claim a share of the settlement fund, but nevertheless, they are bound by the terms of the settlement agreement and are precluded from commencing their own litigation against the same defendants. Access to justice in such a scenario is turned on its head; the binding nature of the representative proceeding denies dissatisfied class members formal access to the courts. Concerns about access to justice, therefore, strongly favour careful scrutiny of the settlement before approving it and thereby barring class members from pursuing any further relief — a feature of class actions that is not usually present in other civil litigation, where settlement binds only the parties to the proceeding.<sup>49</sup>

There is a further reason why strict scrutiny and, as a corollary, the absence of a strong presumption of fairness, is the preferable approach to settlement approval. Unlike judges who approve settlements on behalf of infants or a party under disability, class action judges do not have the assistance of counsel charged only with protecting the interests of absent class members. That is, while an infant's interests may be represented by the Office of the Children's Lawyer, or those of a party under disability by the Public Guardian and Trustee,<sup>50</sup> absent class members do not have a representative to closely scrutinize the proposed settlement free of any vested interests. Courts and commentators alike have recognized that class counsel's neutrality in this regard is compromised by an inherent conflict of interest.<sup>51</sup> Both plaintiff and defence counsel seek to have the settlement

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members the right to opt out of the proceeding "in the manner and within the time specified in the certification order" [emphasis added]. The settlement approval provisions of the Act (s. 29), however, do not contemplate a second opt-out opportunity; rather, an approved settlement "binds all class members" (s. 29(3)). In contrast, the American Federal Rules specifically provide that a court may refuse to approve a settlement unless a second opt-out opportunity is provided: Fed. R. Civ. Proc. 23(e)(4).

49 US courts have repeatedly highlighted the need for careful scrutiny of class action settlements precisely because of the "profound differences" between them and ordinary civil settlements: "[C]lass members, unlike individual litigants in traditional lawsuits, are bound by the settlement even though they do not individually consent to its terms. Instead, consent is given by class representatives, who derive authority to represent members not by obtaining their consent, but by obtaining a court order designating them the representatives." *Epstein v. MCA, Inc.*, 50 F.3d 644 at 666-67 (9th Cir. 1995), rev'd on other grounds *sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996).

50 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 7.

51 *Dabbs*, above note 32 at para. 32 ("The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved."). See also OLCR Report, above note 44, vol. I at 168 (recognizing that because "class lawyers, acting out of self-interest,

approved, and there is a risk that the interests of the absent class members, and the deficiencies of the proposed settlement, will not be fully presented. This dynamic creates an adversarial void that a judge alone will find difficult to fill. Indeed, some judges fundamentally disagree that it is a judge's role to fill the void at all, relying instead on class counsel to abide by their obligation to make full and frank disclosure of material information.<sup>52</sup> And legal scholars have opined that the void created by settlement simply can never be filled.<sup>53</sup> Among others,<sup>54</sup> John Kleefeld has queried whether courts are "up to the task":

In an adversarial system, effective dispute resolution is premised on the concept of zealous partisans advocating their best opposing arguments to the judge, who in turn picks the most persuasive ones, or perhaps more accurately, the ones that accord with the judge's view of the facts, the law, and the application of one to the other. Whatever the merits of that concept, it is absent when a high-stakes, intensively negotiated settlement is jointly presented to the court for approval. Would Solomon have been as wise had the two harlots simply presented him with a settlement agree-

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may occasionally attempt to make a settlement that is unfair to class members," the judiciary must be given effective discretion to supervise all settlements).

- 52 Compare Winkler J.'s (as he then was) statement in *McCarthy v. Canadian Red Cross Society*, (2001), 8 C.P.C. (5th) 349 at para. 21(S.C.J.) [*McCarthy*] ("The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination.") to that of Sharpe J. (as he then was) in *Dabbs* No. 2, above note 39 at para. 21 (decision denying motion by objectors for leave to cross-examine affiants supporting proposed settlement) ("In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings.") [emphasis added]. Justice Sharpe's approach mirrors that of some American courts, including the Ninth Circuit Court of Appeals, which stated in *Epstein*, above note 49, that "[I]n order to protect the rights of absent class members, the court must assume a far more active role than it typically plays in traditional litigation."
- 53 John Bronsteen & Owen Fiss, "The Class Action Rule" (2002–2003) 78 *Notre Dame L. Rev.* 1419 at 1448 (stating that a judge who adjudicates a case will hear arguments and evidence on both sides in order to choose a remedy that justice requires, while a court reviewing a settlement defers to the parties' choices in the bargaining process and only looks to see if settlement manifestly unjust).
- 54 Deborah Hensler *et al.*, *Class Action Dilemmas* (Santa Monica: Rand, 2000) at 86–93 [Hensler].

ment on how to divide the contested baby? One suspects he would have needed some assistance.<sup>55</sup>

What “assistance” is available to a judge before approving a settlement? Few Canadian empirical studies that systematically document and evaluate settlement arrangements are available for comparative purposes. Furthermore, our judges may not be comfortable importing the results of empirical studies abroad. For example, one such American study was presented to the motion judge in *Lawrence v. Atlas Cold Storage Holdings*,<sup>56</sup> in support of the plaintiffs’ argument that the settlement provided a recovery for the class that was six times greater than the average recovery in US securities class action settlement; Lax J. dismissed the study as “irrelevant.”<sup>57</sup> The Court of Appeal agreed.<sup>58</sup>

Other than objectors, and (in those cases where funding was received) the Class Proceedings Committee, no other participants have standing at the settlement approval hearing. While various models of third party monitors have been discussed in academic literature,<sup>59</sup> the concept has not been given any serious consideration by the bar or the courts. Unlike the United States, Canada has no tradition of public interest legal service firms who intervene in class action litigation. One such American organization called Public Justice, for example, is comprised of eight full-time attorneys and four fellows, and is supported by a not-for-profit foundation “dedicated to using plaintiffs’ and other attorneys’ skills and resources to advance the public good.”<sup>60</sup> The firm has intervened in a number of class actions in order

55 Kleefeld, above note 28 at para. 31 [citations omitted].

56 *Lawrence v. Atlas Cold Storage* (12 February 2009), Toronto 04-CV-263289CP (Ont. S.C.J.) [*Atlas*]. I had minimal involvement in this file while in private practice.

57 *Ibid.* at para. 59.

58 *Sutts, Strosberg LLP v. Atlas Cold Storage Holdings Inc.*, 2009 ONCA 690 at para. 21 [*Sutts*].

59 See Alon Klement, “Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers” (2002) 21 Rev. Litig. 25 [Klement]; G. Donald Puckett, “Peering into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements” (1999) 77 Tex. L. Rev. 1271; and Garry Watson & F. Au, “Notes for Settlement Paper” in Osgoode Hall Class Action Course Book [unpublished], all as summarized in Cara Faith Zwibel, (2004) “Settling for Less? Problems and Proposals in the Settlement of Class Actions” 1:2 Can. Class Action Rev. 165.

60 According to its website, Public Justice (formerly Trial Lawyers for Public Justice) engages in “precedent-setting and socially significant individual and class action litigation designed to enhance consumers’ and victims’ rights, the environment, workers’ rights, public health and safety, civil rights and civil liberties, access

to object to proposed settlements. As Deborah Hensler documented in the Rand Study, in response to Public Justice's objections to a proposed \$1.3 million settlement of an insurance class action, the parties increased the funds allocated to class members to \$7.7 million, reduced counsel fees from \$5.4 million to \$1.9 million, substituted directed payment for a claims-based approach, and required that any residual amounts be distributed *cy près* rather than be returned to the defendants.<sup>61</sup>

American and Canadian judicial culture also differs regarding the participation of non-parties at fairness hearings. In the US, the Federal Judicial Center's Handbook for judges entitled "Managing Class Action Litigation" advises judges to allow non-profit entities, government bodies, and state attorneys-general to actively participate in fairness hearings to provide assistance to the court.<sup>62</sup> In contrast, the Ontario Court of Appeal has taken a restrictive view of the propriety of objectors who are not class members.<sup>63</sup> In these circumstances, it is unlikely intervention by a consumer group or an advocacy group, or government body, would be welcome here absent a significant change in the jurisprudence. The intervention of the Class Proceedings Committee might be more likely given the Fund's pecuniary interest in maximizing the recovery to the class members (by minimizing the portion of a common fund to be paid to class counsel), on which its 10 percent levy is calculated in funded cases. To my knowledge, however, such an intervention has never been attempted.

The approval process, therefore, hinges entirely on the judge, full disclosure by counsel and in a minority of cases, the intervention of objectors. While proactive judges may be capable of probing the fairness of the proposed settlement, current judicial culture makes it unlikely that all judges would willingly take on an inquisitorial role. Yet, in light of the adversarial void, that is precisely the role that judges ought to take, much as they do currently on *ex parte* motions. For this reason, a presumption of fairness is misplaced, and the role of absent class members who object to the proposed settlement becomes all the more critical.

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to justice, and the protection of the wronged, the poor and the powerless." In 1995, the organization also commenced a Class Action Abuse Prevention Project, designed to represent objectors or to file amicus briefs challenging "highly objectionable" settlement proposals. Online: [www.tlpj.org](http://www.tlpj.org).

61 Hensler, above note 54 at 461–62.

62 Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (Washington DC: Federal Judicial Center, 2009) at 15.

63 *Dabbs CA*, above note 47.

### 3) Objectors Matter . . . But Not Often

There is no question that objectors have a well-established right to be heard at settlement hearings. Class proceedings legislation authorizes judges to give one or more class members the right to participate at a hearing,<sup>64</sup> and the “number of objectors and nature of objections” are among the criteria used by courts at fairness hearings.<sup>65</sup> Although the fairness of a proposed settlement is to be judged by reference to the best interests of the class as a whole and not vis-à-vis the interests of any one class member,<sup>66</sup> the views of class members are “certainly relevant and entitled to great weight.”<sup>67</sup>

Objectors are typically asked to file written objections. They have the right to adduce evidence, but only as it relates to the issues raised in the objection. They have no right to oral or documentary discovery, but in principle, may cross-examine deponents at the fairness hearing itself.<sup>68</sup> In some cases, class counsel voluntarily provide relevant documents to objectors.<sup>69</sup> A lack of voluntary disclosure renders it highly unlikely any objector could mount a serious, substantive argument in opposition to the terms of settlement.

Since *Dabbs* first settled the scope and procedure for objection described above, objectors have appeared at settlement hearings fairly regularly. There is no data on the frequency of objection. Moreover, not all settlement decisions are reported, and of those that are, the frequency of objections is not easily retrievable from keyword searches in electronic databases.<sup>70</sup> Based on a non-scientific sampling of cases involving objectors, some preliminary observations can be made. First, a significant proportion of objectors are not represented by counsel. Second, only rarely are their objections validated by the motion judge. And third, it appears highly unlikely that substantive, evidence-based challenges to proposed settlements can be made in the existing institutional framework.

64 *CPA*, above note 48 at s. 14.

65 *Vitapharm*, above note 33 at para. 117.

66 *Dabbs* No. 2, above note 39 at para. 11.

67 *Vitapharm*, above note 33 at para. 179.

68 *Dabbs* No. 2, above note 39 at paras. 18–27.

69 As occurred in *Atlas*, above note 56, according to counsel for one of the objectors: Telephone interview with Brian Foster (16 July 2009) (notes on file with author).

70 An electronic search of reported decisions will not yield a precise number since all reasons for judgment pursuant to a settlement hearing would contain the key term “objector” in light of the standard list of criteria for assessment. Each decision, therefore, would have to be reviewed individually to determine whether objections were actually made, or if objectors appeared at the hearing.

Three objectors appeared at the *Atlas* settlement hearing, but were not represented by counsel and did not file written arguments.<sup>71</sup> Similarly, unrepresented objectors appeared in person or made written submissions in *Vitapharm*,<sup>72</sup> *Gould v. BMO Nesbitt Burns*,<sup>73</sup> and *Gilbert v. CIBC*.<sup>74</sup> In contrast, the eleven objectors who appeared before Sharpe J. in *Dabbs* were represented by counsel, and these lawyers made oral submissions and cross-examined deponents at the three-day fairness hearing. Objectors in three other cases previously referred to in this paper also retained lawyers for the purposes of the fairness hearings.<sup>75</sup> Based on this small sample, a significant proportion of objecting class members do not retain counsel.

The most successful objection in an Ontario action appears to have occurred in *McCarthy v. Canadian Red Cross Society*, one of the three known cases in the province in which a proposed settlement was rejected.<sup>76</sup> The “objector,” however, was the Children’s Lawyer, whose argument that the treatment of the derivative claims in the proposed settlement was “inherently unfair” was accepted by Winkler J. and was one of two bases on which he rejected the settlement. The parties subsequently revised the settlement in light of the objection, and the settlement was eventually approved. The three class members who objected to the proposed counsel fee in *Atlas* were also successful; Lax J. found the objections to be “valid,” and subsequently reduced the base fee by 25 percent.<sup>77</sup>

Objectors represented by counsel in *Nunes* and *Bilodeau*, however, were not as effective. In both cases, objections were made as to the sufficiency of the settlement fund; in both cases, the motion judges determined that the funds were within a zone of reasonableness.<sup>78</sup> Similarly, in *Gould*, the objector was an unrepresented class member, whose “objections were help-

71 In the lower court, the objectors provided letters outlining their concerns. At the argument of the appeal brought by class counsel of Lax J.’s decision regarding the counsel fee, the objectors intervened and were represented by counsel.

72 Above note 34 (five objectors, all made written and/or oral submissions without counsel).

73 Above note 38 (two objectors, both made written and oral submissions; one of the objectors was successful in obtaining an adjournment of original fairness hearing in order to “expand on his concerns”).

74 Above note 34 (fourteen written objections, only one objector appeared at hearing and made submissions).

75 *Nunes*, above note 34; *Bilodeau*, above note 34; and *Martin*, above note 38. Note that some of the objectors in the latter case were self-represented.

76 The other two cases are *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.) and *Gould*, above note 38.

77 *Atlas*, above note 56 at paras. 49 and 71.

78 *Nunes*, above note 34 at para. 22; *Bilodeau*, above note 34 at para. 59.

ful in focusing attention on a number of issues as well as the extent to which information about the settlement had been communicated to class members and the adequacy of the notice of the settlement approval hearing.”<sup>79</sup> The objector’s substantive concerns about the settlement, however, were not accepted by the judge. Nor were the objectors in *Gilbert*, *Dabbs*, and *Vitapharm* successful in their arguments regarding the sufficiency of the settlement. Instead, the objectors in all of these cases were met with a rather common response: “If their claims involve substantial amounts, such persons may opt out and pursue their claims individually.”<sup>80</sup>

In light of the barriers to justice — especially the high cost of litigation and the small individual recoveries at issue in most class actions — the option of opting out and commencing litigation is, most likely, no option at all. Moreover, the option is not available to objecting class members where the settlement and certification are not obtained concurrently. These consequences do not render unmeritorious objections valid, but they should be important considerations in the overall analysis. Indeed, in a recent British Columbia case rejecting settlement on the basis of submissions by a very sophisticated, represented objector, the motion judge did not accept class counsel’s submission that the objector could simply opt out if he felt the settlement did not adequately address all potential damages, including psychological injuries.<sup>81</sup>

There is reason to doubt that either the frequency or the strength of objector participation in fairness hearings will increase. Apart from the possibility that class members do not receive effective notice of the hearing,<sup>82</sup>

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79 *Gould*, above note 38 at para. 36.

80 *Gilbert*, above note 34 at para. 19. Similar wording was used in *Stewart v. General Motors of Canada Ltd.*, [2008] O.J. No. 4426 at para. 30 (S.C.J.) [*Stewart*]; *Gould*, above note 38 at para. 36; *Dabbs*, above note 32 at para. 38; and *Vitapharm*, above note 33 at para. 169. The Court of Appeal has also referred to the opportunity to opt out as “important,” and a basis on which to dismiss a motion for leave to appeal the judgment approving a settlement: *Dabbs* CA, above note 47.

81 *Burnett*, above note 38 at para. 213.

82 Apart from the substantive elements of access to justice engaged by a consideration of class action settlements, the settlement approval process raises a further critical procedural issue: the notice of settlement to the class is a necessary precondition both to the ability to object to the terms of settlement, and to make a claim for a class member’s share of the settlement fund. Moreover, an approved settlement has *res judicata* effect and prevents the class members — whether or not they participated in the claims process or even knew about the action — from bringing subsequent actions against the defendants with respect to the same legal dispute. Although beyond the scope of this paper, it must be noted that the standards used by the bench in approving notice campaigns are worthy of careful attention.

there are other significant barriers to successful participation. Class members have few incentives to monitor class counsel or invest their own money to carefully vet the proposed settlement, or more costly, to retain counsel to do so on their behalf.<sup>83</sup> In addition, depending on the detail of class counsel's motion record, objectors may have too little information, too late, to make a comprehensive argument about the adequacy or structure of the settlement. Very few settlements are rejected at a fairness hearing, and the successful objectors are often atypical.<sup>84</sup> Finally, the very nature of the legal wrong which necessitates representative proceedings — the diffuse and widespread harm caused by the defendants' actions — also makes it highly unlikely that class members with concerns about the settlement will be able to locate each other and consolidate resources and efforts.<sup>85</sup>

While objectors have access to a procedure — the fairness hearing — it is far from clear, based on a sampling of cases, that, in the majority of cases, such access alters the approval process in any meaningful way. Further empirical research is needed for a more comprehensive understanding of this issue, and in order to recalibrate, if necessary, judicial approaches to objections and the resources provided to objectors who face considerable barriers to justice.<sup>86</sup>

A particular kind of settlement unique to class action litigation provides an interesting, and timely, case study for testing the more robust understanding of access to justice developed in this paper. *Cy près* distributions of settlement proceeds appear to increasingly prevalent in Ontario, and have

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83 Klement, above note 59 at 51. Even when successful, there are significant cost barriers. The successful objectors in *Atlas* sought costs of on a full indemnity scale of over \$200,000; the Court of Appeal awarded them \$10,000 inclusive of fees, disbursements, and tax: *Sutts*, above note 58 at paras. 41–43.

84 A public officer was successful in *McCarthy*, above note 52, while there are indications that rival class counsel assisted in challenging the settlement in *Burnett*, above note 38.

85 John Coffee, Jr. comes to a very similar conclusion in “Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation” (2000) 100 Colum. L. Rev. 370 at 417, where he writes: “Small claimants have little incentive to vote. Thus, not only will these small claimants be hard to identify or contact, but they have little reason to respond to any solicitation . . . objectors lack both the organization or [sic] incentives to match the expenditures that the settling parties will predictably incur to achieve a favorable vote.”

86 It may be desirable, for example, to establish a fund similar to the Class Proceedings Fund to pay court-appointed counsel with expertise in class actions to represent the interests of objecting class members. Such a mechanism would represent a modest incremental cost, engender greater transparency in the settlement approval process, and thereby increase public confidence in the justice system.

been the subject of limited critical analysis. In the next and final part of the paper, I explore why *cy près* settlements challenge the access to justice objectives of class actions; in essence, these settlements illustrate why policies favouring settlement must be infused with substantive justice concerns; why a lack of objectors should be given little, if any, weight; and why the presumption of fairness is particularly problematic in this form of settlement.

### C. *CY PRÈS*: SETTLING FOR MORE OR LESS

The nature of mass wrongs necessarily creates barriers in distributing judgments or settlement funds. Class members may not be known to either party, as in the case of purchasers of defective consumer products or indirect purchasers in price-fixing conspiracies. Or, it may be prohibitively expensive to administer a distribution of nominal damages to a large class, as occurred in *Sutherland v. Boots Pharmaceuticals PLC*.<sup>87</sup> In the face of these barriers, class counsel rely on provisions of the CPA that permit the aggregation of damages and *cy près* distributions.<sup>88</sup> *Cy près* awards figure in settlements in two ways: settlement agreements often include a *cy près* provision for any unclaimed settlement monies to assure that those monies will not revert to the defendant; or the distribution scheme envisions the whole or a significant portion of the settlement fund going to charitable organizations in place of direct compensation to class members.

The use of *cy près* to dispose of unclaimed funds, what I call *residual cy près*, is usually consistent with access to justice objectives, as it does not substitute for direct compensation of class members. The *ex ante* use of *cy près*, however, as the primary method of allocating settlement funds, is worthy of greater scrutiny, particularly from an access to justice perspective. This kind of *cy près* distribution, which I call *fixed cy près* (because the quantum of the fund paid to the *cy près* recipients is fixed at the time of settlement approval) raises two important questions: first, *when* is it appropriate to permit *cy près* distributions in place of direct compensation; and second, *to whom* should these distributions be paid?

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87 (2002), 21 C.P.C. (5th) 196 (Ont. S.C.J.) [*Sutherland*] (case involving misrepresentation of benefits of drug; compensation per class member of \$30–\$70 deemed uneconomical to distribute to 520,000 class members).

88 CPA, above note 48, ss. 24 and 26. For an overview of basic *cy près* concepts in Canadian class actions, see Rachel Mulheron, *The Modern Cy près Doctrine: Applications & Implications* (London: UCL Press, 2006) at 232–36.

## 1) When are Fixed *Cy près* Awards Consistent with Access to Justice?

*Cy près* distributions are clearly appropriate in two situations: where class members are not identifiable, or where the costs of distributing the award approaches or exceeds the benefit. In these two scenarios, *cy près* distributions are consistent with access to justice: they ensure that defendants disgorge ill-gotten gains or pay damages for wrongful conduct and in this way are called to account for their misconduct, even if these payments do not correspondingly compensate class members.

Such was the reasoning with the first *cy près* distribution in a Canadian class action. *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Co.*<sup>89</sup> was a price-fixing case in which class members included manufacturers, distributors, and indirect purchasers. In a seven-paragraph endorsement, Winkler J. (as he then was) approved a \$6-million settlement that was to be distributed directly to the manufacturer-class members, and *cy près* to the indirect purchaser-class members. Justice Winkler expressly referred to the deterrence function of the *cy près* award in stating that the distribution scheme was intended to ensure that “no profits from any wrongdoings will remain undisgorged.”<sup>90</sup> The rationale for making a fixed *cy près* award, though not stated, is assumed to be based on the usual difficulties of identifying intermediaries and indirect purchasers in price-fixing cases.<sup>91</sup>

While the use of *cy près* to punish defendants is not universally accepted as an appropriate use of the remedial mechanism,<sup>92</sup> behaviour modification is a legitimate goal of class proceedings in Canada, and the punitive function performed by fixed *cy près* is thus not necessarily objectionable. Indeed, the use of *cy près* to deter wrongful behaviour was expressly endorsed in one of the first settlements involving fixed *cy près*.<sup>93</sup> Furthermore, if administrative

89 [2001] O.J. No. 6028 (S.C.J.).

90 *Ibid.* at para. 4.

91 For a discussion of price-fixing and other *Competition Act* class actions, and the incidence of *cy près* settlements in those cases, see Rachel Mulheron, “Competition Law Cases under the Opt-Out Regimes of Australia, Canada and Portugal” (10 October 2008) [unpublished], online: [www.berr.gov.uk/files/file49008.pdf](http://www.berr.gov.uk/files/file49008.pdf).

92 Judge Richard Posner has argued that *cy près* is a misnomer when used in this context because there is no indirect benefit to the class members and there is therefore no parallel with any of the trusts concepts normally associated with *cy près*: *Mirfahisi v. Fleet Mortgage Corp.*, 356 F.3d 781 at 784 (7th Cir. 2004) [Mirfahisi], as quoted in Theodore H. Frank, “*Cy près* Settlements” *Class Action Watch* (March 2008) at 21.

93 In *Alfresh*, above note 21, after referring to the significant difficulties in identifying indirect purchasers of the products at issue in the price-fixing scheme

costs are so great that they significantly dissipate the settlement fund, a *cy près* distribution enhances access to justice by ensuring the full amount of the award is spent on initiatives that benefit the class indirectly.

Where class members are identifiable, however, and can reasonably be compensated for the harm suffered, access to justice dictates that they be paid directly. It follows that *cy près* awards should only be permitted in those cases where it is impossible to identify class members, even by way of a robust notice program, or where the costs of distribution far outweigh the amounts being compensated.<sup>94</sup>

The difficulty, however, is that there is little clear guidance in the *CPA* as to how courts ought to approach this threshold issue, and the criteria for assessing whether a fixed *cy près* is appropriate is not well developed in the case law. *Cy près* distributions are contemplated by section 26 of the *CPA*, which gives the court the authority to “direct any means of distribution of amounts awarded under section 24”;<sup>95</sup> section 24 permits aggregate assessments of damages, which may be applied in such a way that class members share on a proportionate or average basis.<sup>96</sup> In deciding whether to make an aggregate assessment under section 24, “the court shall consider whether it would be *impractical or inefficient to identify the class members* entitled to share in the award *or to determine the exact shares* that should be allocated to individual class members.”<sup>97</sup> This language of “impracticality” and “inefficiency” will be seen repeatedly in decisions permitting fixed *cy près* awards. The importance of section 24, however, has received far too little attention in the settlement hearings involving fixed *cy près*. Taken seriously, this provision, which is specifically designed to overcome problems associated with individual calculation of damages, and instead speaks to “average” or “proportionate” damage amounts, obviates the need for fixed *cy près* in a large number of cases.

In two recent cases, the Ontario Court of Appeal relied on section 24 to defeat arguments by defendants who stated that difficulties determin-

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and describing the *cy près* beneficiaries as “surrogates” for the unidentified class members, Cumming J. stated: “Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives” (at para. 16).

94 The OLRC adopted the same approach, stating that “all feasible efforts” must be made to compensate class members directly before making any *cy près* distribution: OLRC Report, above note 44 at 581.

95 *CPA*, above note 48, s. 26(1).

96 *Ibid.*, ss. 24(1) & (2).

97 *Ibid.*, s. 24(3) [emphasis added].

ing individual damage awards were fatal to certification. *Markson*<sup>98</sup> was an action involving charges on cash advances that allegedly violated the criminal interest provisions of the Criminal Code. The defendant bank argued that it would have to manually track over eight million cash advance transactions in order to determine which cardholders had paid interest at an effective annual interest rate exceeding 60 percent, and to calculate the amounts overpaid. The plaintiff's forensic accountant disputed this contention, claiming that it would be possible to devise an automated system by which the individual overpayments could be determined.<sup>99</sup> The certification judge ultimately agreed with the defendant; in his judgment, there was "insufficient evidence of the likelihood that an appropriate electronic system can be developed — and of the cost of doing this — to justify certification of the restitutionary issues."<sup>100</sup>

The Court of Appeal agreed with the certification motion judge that if millions of individual transactions had to be reviewed in order to determine both the identity of, and the extent of liability towards, each class member, then the time and cost of doing so overwhelmed the benefits of certification.<sup>101</sup> Sections 23 (statistical sampling) and 24 (aggregate damages) of the CPA, however, were held to overcome these problems of identification and calculation. That is, statistical sampling can be employed to determine the aggregate or part of the defendant's liability without proof of individual claims.<sup>102</sup> Moreover, section 24 specifically "contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient."<sup>103</sup>

In the result, some cardholders may not be compensated for the precise amount of the damages suffered, and some may receive a windfall. The Court of Appeal acknowledged the rough justice meted out by the CPA:

Section 23 can be used to calculate the global damages figure. Section 24 can be used to find a way to distribute the aggregate sum to class members. It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) because "it would be

98 *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) [*Markson C.A.*].

99 *Ibid.* at paras. 9–10.

100 *Markson v. MBNA Canada Bank* (2004), 71 O.R. (3d) 741 at para. 55 (S.C.J.).

101 *Markson C.A.*, above note 98 at para. 37.

102 *Ibid.* at para. 45.

103 *Ibid.* at para. 48.

impractical or inefficient to identify the class members entitled to share in the award.<sup>104</sup>

Thus, difficulties in identifying who was entitled to compensation, and distributing monetary awards in a cost-effective manner, are not barriers to certification.

Very similar arguments about the impossibility or impracticability of determining damage amounts were made and rejected by the court in *Cassano v. TD Bank*.<sup>105</sup> Again in the context of certification of an action involving alleged criminal interest charges, the Bank argued that it would take 1,500 people about one year to identify and record the relevant transactions, at a cost of \$48.5 million. Rejecting this economic argument, the Court of Appeal again relied on section 24 of the CPA to find that establishing the extent of the bank's liability did not require making individual inquiries of cardholders; rather, the aggregate of the bank's liability could be determined by looking at its records of the amount of fee income collected over the class period. The judge could then fashion a remedial order that avoided potential costs and inefficiencies associated with determining the quantum of damages on an individual basis.<sup>106</sup>

This interpretation of sections 23 and 24 of the CPA is sound. It is curious, therefore, that the very same economic arguments and difficulties of identification proffered by defendants — and contested vigorously by class counsel, and ultimately rejected by our courts — at the certification stage, are resurrected at the settlement approval hearing by *both* parties — and accepted by the court — as a justification for a *cy prè*s distribution. Several recent cases illustrate missed opportunities for resorting to sections 23 and 24 in addressing the threshold question of whether a *cy prè*s payment is necessary at all.

In the eight years since the first *cy prè*s distribution was approved in *Alfresh Beverages Canada v. Archer Daniels*, at least twenty-eight other settlements have been approved in Canada (almost all in Ontario) involving fixed *cy prè*s awards — eight between 2008 and the first half of 2009 alone.<sup>107</sup> In

104 *Ibid.* at para. 49, quoting s. 24.

105 (2007), 87 O.R. (3rd) 401 (C.A.) [*Cassano C.A.*].

106 *Ibid.* at paras. 45–51.

107 In 2009: *Skopit v. Merrill Lynch Canada Inc.* (6 August 2009) Windsor 09-CV-13357CP (S.C.J.); *Meretsky v. Bank of Nova Scotia* (23 January 2009) Windsor 97-CV-128599 (S.C.J.); *Georghiades v. Scotia Capital Inc.* (23 January 2009) Windsor 03-CV-1982 (S.C.J.) [*Scotia Capital*]; *Cassano v. Toronto-Dominion Bank*, [2009] O.J. No. 2922 (S.C.J.) [*Cassano S.C.J.*]; and *Walker v. Union Gas Ltd.*, [2009] O.J. No. 536 (S.C.J.). In 2008: *McColl v. Whitehall-Robins Inc.*, [2008] O.J.

all cases, the fairness hearing judge refers simply to the prohibitive expense of identifying the class members and distributing compensation to them directly as the justification for approving a *cy prè*s payment to third parties.<sup>108</sup> There is no indication in the various reasons for judgment as to what evidence, if any, led to attempts to locate class members, nor is there discussion as to why an average award could not be calculated.<sup>109</sup> In *Garland v. Enbridge*, for example, the court accepted that direct payments to Enbridge customers was not possible, but gave no reasons for this conclusion beyond the observation that the “class is too large and the settlement amount too small to make a distribution of even an equal amount to each class member a reasonable, and economically viable, alternative.”<sup>110</sup> It is not immediately obvious why a direct payment could not be made; damages for each customer undoubtedly varied, but for some totalled approximately \$100.<sup>111</sup> Unlike retail purchasers of consumer goods, gas customers are identifiable. Moreover, the makeup of the class may remain more constant over time than, for example, a particular bank’s credit card customers. While it may have been expensive to calculate the specific amount each class member in *Garland* paid in criminal interest, the same difficulty did not prevent direct payments being made to the class members in *Gilbert v. CIBC*,<sup>112</sup> where approximate calculations were held to be sufficient — the “rough justice” contemplated by section 24.

In a more recent case<sup>113</sup> involving allegedly improper charges on foreign securities purchases, the court approved a \$3.4-million settlement, comprised of \$915,000 in counsel fees, and a combination direct payment/*cy*

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No. 5311 (S.C.J.); *Joachim Laferrrière Électricien inc. c. Cascades Groupe papiers fins inc.*, 2008 QCCS 3219; 799376 *Ontario Inc. (Trustee of) v. Cascades Fine Papers Group Inc.*, [2008] O.J. No. 2671 (S.C.J.).

108 See *McCull v. Whitehall-Robins Inc. Canada*, [2008] O.J. No. 5311 (S.C.J.), where Lax J. states, in response to the objection of one class member, that “[d]istribution of the settlement amount would have been prohibitively expensive and impractical” (at para. 4). The settlement funds at issue were approximately \$200,000.

109 *Alfresh*, above note 21, is one of the exceptions. In that case, the expert evidence of three economists was admitted on the question of the impracticability of locating class members.

110 *Garland*, above note 37 at para. 30.

111 *Ibid.* at para. 29.

112 *Gilbert*, above note 34 at para. 15 (“The amount of individual payments to class members ranges from 72 cents to \$14.32. These amounts are arbitrary and minor in amount. They do not purport to compensate class members in terms of actual amounts owing nor do they compensate only class members with valid claims.”)

113 *Scotia Capital*, above note 107 (judgment certifying action and approving settlement).

*près* settlement fund. Unlike the situation in *Garland*, the defendant in the *Scotia Capital* class action was able to produce a spreadsheet containing the names of eligible class members and the precise amount each was entitled to recover. Class members whose recoveries were more than \$25 and who were current accountholders would get their award (less counsel fees) deposited directly into their account. Class members owed \$25 or more who were no longer accountholders with the defendant would have to make a claim; failure to make a claim would result in their damage amounts being paid *cy près* to one of the charities chosen by counsel. Finally, any class member with less than \$25 in damages would receive no compensation; a letter sent directly to each such member notified them that their settlement awards were being donated to charity.<sup>114</sup> As no written reasons for judgment were released, it is not immediately apparent why \$25 was chosen as the threshold at which it was not feasible to provide direct compensation. Moreover, if mailing addresses for class members were known to the defendants, access to justice would be enhanced by simply sending the payments directly to the class members (who did not opt out) without the need for a claims application.

Finally, a \$29.2-million *cy près* scheme was approved last year in *Cassano*.<sup>115</sup> In lengthy reasons, Cullity J. considered the propriety of the proposed *cy près* recipients, and ultimately rejected a proposed payment to law schools on the basis that there was no method of supervising or controlling the expenditure of the funds on projects that would benefit members of the public.<sup>116</sup> On the threshold question of whether a *cy près* payment was necessary at all, the judge's reasons are brief and can be reproduced here in their entirety:

Before finalising their proposals for the division between direct and indirect benefits to class members, counsel devoted considerable time and energy in considering different alternatives. The task of identifying cardholders who had engaged in foreign currency transactions — as well as the

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114 *Ibid.* at Schedules B, C, and D.

115 *Cassano S.C.J.*, above note 107. The overall settlement figure of \$55 million will be distributed as follows: \$29.2-million *cy près*; \$10.17 million directly to cardholders whose cards were issued before certain dates included in the class definition and who remained active cardholders; \$4.3 million to the Law Foundation's Class Proceedings Fund; \$11.46 million to counsel fees; and the remainder to administrative costs.

116 *Ibid.* at paras. 20–22. Justice Cullity subsequently recommended and approved a \$14.6-million payment be made to a trust fund to be administered by the Law Foundation of Ontario for the purpose of advancing public access to justice in Canada.

amounts involved — was hampered by the absence of records including some that had been destroyed inadvertently during the course of the proceeding. The various alternatives were discussed at case conferences prior to the hearing before counsel agreed on a final proposal.

I am satisfied that, in the light of these difficulties and when compared with the other alternatives, the proposed division between direct and indirect benefits strikes a reasonable balance between reimbursing class members and applying funds *cy pres* and should be approved. Although, as a general rule, *cy pres* distributions should not be approved where direct compensation to class members is practicable, the allocation of \$10.75 million to be paid directly to cardholders is on the generous side as proof that one subgroup of them engaged in foreign currency transactions — and, in consequence, were within the class definition — will not be required [sic].<sup>117</sup>

Absent from the court's reasoning is the argument that ultimately prevailed when this action was certified by the Court of Appeal: the aggregate of the Bank's liability could be determined by resort to its records of the amount of fee income collected over the class period, and then distributed to class members pursuant to section 24 of the *CPA*.<sup>118</sup> In a further irony, less than two months later the Quebec Superior Court granted judgment in favour of the class in the trial of the same action against TD Bank and eight others banks, and ordered the defendants to pay damages ranging from \$69 to \$92.50 to each class member.<sup>119</sup>

There is no principled reason why both certification and judgment after trial can be granted in cases involving difficult calculations of monetary loss in respect of a large class, but direct compensation cannot be achieved economically by way of settlement. Instead, courts routinely approve settlements involving large *cy pres* distributions on the basis that calculating individual monetary loss cannot be done economically. Aggregate assessments of global damages can surely be made at all three stages of an action (certification, trial, and settlement), and statistical sampling used to determine an average or approximate amount to be paid to class members. Put differently, the principles behind sections 23 and 24 are as relevant in devising an appropriate settlement distribution plan as they have been in justifying certification of a class action.

117 *Ibid.* at paras. 16–17.

118 *Cassano C.A.*, above note 105 at paras. 45–51.

119 *Marcotte c. Banque de Montreal* (11 June 2009), Montreal 500-06-000197-034 (Que. C.S.). The decision is under appeal: Email from J. Pariseau, Trudel & Johnston, to author dated 18 November 2009 (on file with author).

Quite apart from reliance on section 24 to achieve rough justice in the settlement context, closer attention ought to be paid to counsel arguments that calculating individual losses is not economical. Determining when it is no longer “economical” to compensate class members directly varies from case to case. American commentators have been unable to agree on when relief to the class is too small and distribution too inefficient to justify a *cy præs* distribution, though at least one consumer organization has suggested that recovery of between \$10 and \$20 per class member may be the triggering amount.<sup>120</sup> Where the settlement award is capable of being directly deposited into the bank account of a class member or paid by cheque without the need for a claims process and compensation, therefore, is both feasible and inexpensive, *cy præs* may never be appropriate except in those situations where payment is truly *de minimis*. Where class members are not so easily identifiable, a cost-benefit analysis is required, but as I have argued above, it is an analysis that judges should ensure has been conducted rigorously. There is little in the jurisprudence which suggests that judges in Ontario consistently scrutinize claims by settling parties that compensation is not feasible, or how “feasibility” is determined. Indeed, one class action lawyer interviewed for this research candidly stated that compensation in one price-fixing settlement in which his firm was co-counsel could and ought to have been distributed to indirect purchasers and a higher percentage recovery allocated to direct purchasers, rather than the bulk of the settlement distributed *cy præs*.<sup>121</sup> Though this is one lawyer’s opinion made with the benefit of hindsight, it raises the possibility that the feasibility of compensating class members is not tested thoroughly enough at fairness hearings.

It is less likely that objectors are available to test counsel’s opinion in *cy præs* settlements than in other settlement contexts. After all, if there are difficulties identifying class members, or if the amounts involved are very small, few class members would be aware of, or have the necessary economic incentive to protest, the proposed plan.<sup>122</sup> Both plaintiffs’ and defendants’ counsel bear a burden in satisfying the presiding judge that

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120 National Association of Consumer Advocates, *Class Action Guidelines* (as revised in 2006) online: [www.naca.net/\\_assets/media/RevisedGuidelines.pdf](http://www.naca.net/_assets/media/RevisedGuidelines.pdf) at 30 (accessed on 9 May 2009). The NACA is a nationwide organization of over 1500 members committed to promoting justice for consumers, particularly those of modest means.

121 Interview with class counsel on 11 May 2009 (notes on file with author).

122 For a notorious exception, see *Soderstrom v. Hoffman-La Roche Limited*, 2008 CanLII 15778 (Ont. S.C.J.), which describes the history of dissatisfaction of one class members with the fixed *cy præs* in *Vitapharm*, above note 33.

the decision to distribute *cy près* is not a decision of convenience or a cost-saving measure. Courts ought to scrupulously consider such submissions, given that the rights of class members will be extinguished without any direct compensation at all. Therefore, presumptions of fairness are of particular concern, and courts should be wary of accepting the parties' submissions that direct compensation would be impractical if class counsel has not cross-examined defence witnesses or otherwise obtained discovery of the defendants' records relevant to this issue. Procedurally, this manner of approaching the threshold question of whether direct compensation is feasible would be more consistent with access to justice than the current approach. After all, *cy près* merely "creates the illusion of compensation"<sup>123</sup> pursuant to which the usual consequences of settlement accrue to the parties: defendants achieve "global peace" and the protection of *res judicata*, and class counsel are paid a contingency fee based on the amounts paid by the defendants — even if there is no recovery by their clients.

Assuming the necessity of fixed *cy près* has been established on the evidence before the court, fixed *cy près* arguably can still benefit class members; this depends entirely on the nexus between the *cy près* recipient and the composition of the class. As will be seen in the next section, however, many *cy près* settlements fail to benefit the very people who have been harmed by the conduct at issue in the litigation.

## 2) To Whom Should *Cy près* Awards be Paid?

Once the threshold issue of feasibility of direct compensation has been crossed, it then becomes vital to consider which criteria will be employed to determine the best possible *cy près* recipients. Section 26(4) of the *CPA* provides some guidance on this matter: the court is empowered to order all or part of an aggregate award that has not been distributed "in any manner that may *reasonably be expected to benefit class members*," if the court is "satisfied that a reasonable number of class members who would not otherwise receive monetary relief would *benefit from the order*."<sup>124</sup> The *cy près* distribution, therefore, is to benefit the class members, even if indirectly.

In a few cases, judges have shown fidelity to the goals of class action legislation by approving payments made *cy près* to charities or non-profit

123 Martin H. Redish, Peter Julian, & Samantha Zyontz, "Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis" [forthcoming in Fla. L. Rev], online: [www.law.northwestern.edu/searlecenter/uploads/CyPresClassActions.pdf](http://www.law.northwestern.edu/searlecenter/uploads/CyPresClassActions.pdf) at 9 [Redish, Julian, & Zyontz].

124 *CPA*, above note 48, s. 26(4) [emphasis added].

organizations whose works will *indirectly* benefit the class.<sup>125</sup> For these courts, monies distributed *cy près*, which literally means “as near as,” should be applied for a purpose that is as near as possible to the purpose of the lawsuit. The objective is, as mentioned above, to provide benefits to the actual class members, even if indirectly. So, for example, in a class action involving a drug prescribed for the treatment of hypothyroidism, the *cy près* beneficiaries were various institutions conducting specific research projects, education, and outreach having to do with thyroid disease.<sup>126</sup> To fulfill the compensatory purpose of class actions, therefore, there needs to be at least some nexus between the recipients of the *cy près* scheme and the class members themselves.

Such an approach, however, is not predominant. From a policy perspective, the payment of a significant settlement award *to any recipient* by a defendant can be justified as serving the deterrence function of class proceedings. Reliance on the deterrence argument alone, however, effectively transforms *cy près* awards into payment of a fine, and class counsel into a true private attorney-general. A few courts have explicitly embraced this normative view of class action settlements.<sup>127</sup> From this view of *cy près* awards, there need not be any nexus between the charitable recipient and the nature of the class action or composition of the class. What is important is that there is a forfeiture by the defendant.

In his study of *cy près* distributions in Ontario class action settlements, Professor Berryman describes fifteen settlements, almost all of which distributed funds to charities that had no conceivable connection to the subject-matter of the class action or the class members. The charities included law schools (in a settlement involving price-fixing of food additives),<sup>128</sup> the Boys and Girls Club of Canada (in three price-fixing cases),<sup>129</sup> and two business schools (in settlement involving failure to disclose in a share prospectus).<sup>130</sup> Similarly, in the *Scotia Capital* settlement approved earlier this year, the designated charities were the Law Society Foundation in trust for the Lawyers’ Feed the Hungry Program (10 percent), Pro Bono Law Ontario (10 percent),

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125 *Sutherland*, above note 87.

126 *Ibid.*

127 *Alfresh*, above note 21 at para. 16.

128 Jeffrey Berryman, “Class Actions and the Exercise of *Cy-Près* Doctrine: Time for Improved Scrutiny” in Jeffrey Berryman & Rick Bigwood, eds., *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law, 2010) c. 22 at 17, referring to *Bona Foods v. Pfizer*, [2002] O.J. No. 5553 (S.C.J.).

129 *Ibid.* referring to *Bona Foods v. Pfizer*, *Minnema v. Archer Daniels* [unreported] and *Vitapharm*, above note 33.

130 *Ibid.* referring to *Boliden v. Liberty Mutual Insurance Co.* [unreported].

the Toronto Ronald McDonald House (26.6 percent), Pelletier Homes for Youth (26.6 percent), and Unity for Autism (26.6 percent).<sup>131</sup>

While it is encouraging that none of the settlement funds reverted to the defendants and that the defendant in at least the *Scotia Capital* case was required to report back to the court with respect to the claims process,<sup>132</sup> the choice of *cy près* recipients appears arbitrary. The charities, though legitimate and worthy in their own right, have no connection to either the nature of the wrongs committed by the defendants, or the makeup of the respective classes. Judges do appear to ensure that the beneficiaries are validly constituted, and they scrutinize the ability of the various organizations to deliver the intended benefit.<sup>133</sup> The same level of care does not appear to be taken to ensure the settlement is going to be applied in a manner that, in the commanding language of the statute, “may reasonably be expected to benefit the class members.”<sup>134</sup>

Does it matter whether the *cy près* distribution serves only a deterrence function or that it benefits the very class members who were harmed by the defendant’s conduct? The distinction between these two normative views is critical for access to justice. While settlements that approach full compensation for class members’ losses also serve a deterrence function, the reverse is not necessarily true. That is, payments that only serve a deterrence function do not have any salutary compensatory benefits.<sup>135</sup> While it is true that behaviour modification is an accepted goal of class proceedings, the *CPA* does not prioritize this goal over access to justice. Indeed, the traditional purpose of litigation is to remedy the harm suffered by the plaintiff; yet a *cy près* settlement is a remedial non sequitur<sup>136</sup> in that it orders the payment of monies to non-parties, who have not been harmed at all. Access to justice

131 Above note 107 at para. 1(a).

132 *Ibid.* at para. 27.

133 The best examples of such review are *Vitapharm*, above note 34, and *Cassano* S.C.J., above note 107.

134 *CPA*, above note 48, s. 26(4).

135 In this respect, I disagree with Jeff Berryman’s distinction between the choice of recipients dictated by the behaviour modification objective. He argues that if courts are primarily concerned with the deterrence objective, then public interest organizations and consumer associations, among others, might be a better fit than recipients more closely related to the class members (above note 128 at 12). I argue that from a behaviour modification perspective, the identity of the *cy près* recipient is immaterial to the defendant so long as a forfeiture takes place. *Cy près* payments that indirectly compensate class members, however, would serve the deterrence function, but would also be capable of achieving the compensation objective.

136 Redish, Julian, & Zyontz, above note 123, coined this term (at 35).

goals do not have to be sacrificed at the altar of deterrence; wherever possible, both access to justice and deterrence objectives should be reconciled by directing the funds disgorged by the defendant to the very class members who suffered harm.

Access to justice considerations clearly favour *cy prè*s distributions that at indirectly benefit the class for at least two reasons. First, although it is not possible to know with certainty at the time a claim is initiated that the case will eventually settle on a *cy prè*s basis,<sup>137</sup> a pattern of *cy prè*s settlements is detectable in price-fixing and credit card/financial services class actions.<sup>138</sup> As these settlements become more commonplace, it will become arguably more difficult to secure the cooperation of individuals to act as representative plaintiffs; individuals would truly be acting out of altruism to assume the responsibility of representative plaintiff in these circumstances. This is particularly so in light of one court's decision that representative plaintiffs who actively participate in researching and vetting appropriate *cy prè*s recipients to ensure a commonality of interest between the organization and class members are not entitled to any compensation for the work performed.<sup>139</sup>

A second reason access to justice dictates that there be a link between the class and the *cy prè*s recipient, and that the process of selecting recipients be more transparent and principled, relates to basic notions of fairness. As described by Professor Berryman, the case law suggests that courts have been "party to schemes that simply privilege some charities, universities, or other organizations over others, or which are the particular idiosyncratic favourites of lawyers."<sup>140</sup> He argues that judges should be actively involved in vetting proposed *cy prè*s recipients to ensure that class members benefit indirectly, and in a manner that meets standards of openness, fairness, and

137 It is theoretically possible that even prior to certification, fixed *cy prè*s distributions are contemplated, especially now that the device has become entrenched in price-fixing and consumer lending cases. A review of litigation plans in all fixed *cy prè*s settlements would test this hypothesis.

138 Above note 128. Professor Berryman's case study includes ten price-fixing cases and three foreign/criminal interest claims as of 2007. Since 2007, eight more settlements involving fixed *cy prè*s have been approved, all of them involving either price-fixing, criminal interest violations, or undisclosed fees by financial institutions. See list of eight cases, above note 107.

139 *Sutherland*, above note 87 at paras. 18–22. Justice Winkler (as he then was) seemed particularly concerned about the appearance of a conflict of interest where representative plaintiffs gain materially more than other class members. But see *Garland*, above note 37, where Cullity J. referred to *Sutherland* but concluded that Mr. Garland deserved compensation for his active role in litigation that spanned decades and which ultimately settled on a *cy prè*s basis.

140 Berryman, above note 128 at 19.

effectiveness. Access to justice fundamentally involves these same notions. Indirect benefits fulfill in at least a partial way the substantive components of access to justice discussed in part I.

A transparent and more rigorous selection and approval process for *cy près* is also consistent with procedural access to justice. Deference to counsels' choice of recipients on grounds of parties' contractual liberty is not.<sup>141</sup> As has already been explored, the presumption of fairness ought to be tempered in light of the dynamics peculiar to class actions. Those arguments are all the more persuasive in the context of *cy près* settlements.

Concerns about the potential for abuse of the *cy près* device have been expressed in American literature and jurisprudence for some time. Recall Judge Posner, who called *cy près* a misnomer in the class action context; he wrote rather cynically that *cy près* settlements "sold claimants down the river."<sup>142</sup> Most recently, Redish, Julian, and Zyontz have argued that

[i]f *cy près* did not exist, the fund — and, of course, the size of the attorney's fee — might well be far smaller. This is especially true when the *cy près* relief is established by judicial order or class settlement *ex ante*. Thus, it is surely not unreasonable to speculate that one of the primary effects, if not purposes, of class action *cy près* is to inflate the size of class attorneys' fees. Whether intended or not, it surely has that effect.<sup>143</sup>

The authors' charge is valid only if one accepts that the size of the settlement fund would be significantly lower under a direct compensation settlement plan that contemplated reversion to the defendants — a proposition not supported by a random sampling of recent Canadian settlements. Increasingly, reversion appears to be more the exception than the rule. Moreover, as there are few cases in which judges tie class counsel compensation to the take-up rate of a claims process,<sup>144</sup> there is no obvious financial advantage to a fixed *cy près* over an open-ended claims process. If counsel fees do not fluctuate with the structure of the settlement, then it is unreasonable to speculate

141 On the basis of contractual liberty, the court in *Gilbert*, above note 34 approved a partial *cy près* payment to the United Way, despite no apparent link between the charity and Visa cardholders who were improperly charged a foreign currency exchange fee.

142 *Mirfahisi*, above note 92 at 785. See Redish, Julian, & Zyontz, above note 123 at 27 for other US examples.

143 Redish, Julian, & Zyontz, *ibid.* at 31.

144 For an exception, see *Stewart*, above note 80, a case in which the judge was not prepared to approve the entire counsel fee requested until the claims process was completed.

that counsel would specifically choose the *cy près* distribution scheme to maximize their fees.

Random charitable distributions do, however, increase the risk that access to justice objectives are neglected by both class counsel and defence lawyers. Both may be tempted to adopt *cy près* as a simple solution to the complicated alternative of locating innumerable members of a diffuse class, and crafting a user-friendly claims process and effective notice campaign. Defendants may be particularly loathe to use their resources to comb through customer records and calculate individual losses. All of these efforts take time, cost money, and potentially decrease the amount available for counsel fees. Yet those are the efforts called for by the access to justice imperative. *Cy près* should operate as a last resort, and then only in a transparent, fair process.

A court procedure must be principled and fair for it to inspire confidence and be seen as promoting the rule of law among its users. Settlements that, with the imprimatur of the courts, confer significant sums of money on organizations personally selected by counsel “without a single penny finding its way into the hands of a class member”<sup>145</sup> undermine not only substantive access to justice, but procedural and symbolic access to justice as well. After all, access to justice demands a process that is understandable to users and responsive to their sense of fairness.<sup>146</sup>

Given the absence of substantive compensation in a settlement distributed solely or predominantly *cy près*, courts must be more attentive to these less tangible elements of access to justice. The approval process ought to be rigorous in assessing whether *cy près* distributions are strictly necessary, and exacting in the application of criteria to select appropriate recipients. Submissions by class members and others, including potential *cy près* recipients, should be encouraged. Only in this way might it be said that the *process* of a class proceeding empowers citizens, responds to their needs, and fosters their ability to understand and participate within the legal system.

## D. CONCLUSION

Meaningful access to justice involves giving victims access to courts; it also requires that the court process be fair and transparent; that class members’ few participation rights be meaningful; and that the process results in sub-

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145 *Sutherland*, above note 87 at para. 22. Ironically, the court used this language in reference to the unseemliness of the representative plaintiff receiving monetary compensation where other class members receive nothing.

146 *Macdonald*, above note 12 at 105.

stantive justice. Determining whether courts have, on the whole, ensured class members have achieved access to a just result is a complex task. While judges generally recognize the importance of their role in guarding the interests of absent class members when reviewing a proposed settlement, the standard criteria include a presumption of fairness that, as I have argued, is inconsistent with the active role judges are to play as envisioned by *Dabbs*. Judges clearly favour settlement over trial. While access to justice also favours fair settlements, there is good reason to be more cautious about approving settlements of class actions, given the lack of monitoring by both representative plaintiffs and absent class members, and the rights that are compromised when a settlement is approved. A sampling of cases suggests that objectors do not have an influential place at the fairness hearing due to a lack of resources, the absence of legal representation, and a judicial culture that places great faith in the ability of unhappy class members to simply opt out and commence their own litigation. Yet the same barriers to justice that make class actions necessary in the first place vitiate against the possibility that objectors will litigate their claims individually.

*Cy près* settlements illustrate why factors like the presumption of fairness and the lack of objectors should not prevail. These types of settlements are challenging for judges, who must be particularly active and vigilant to ensure that diligent efforts have been made by both sets of counsel to assure class-wide compensation for those harmed by the defendant's conduct. If access to justice aspires to provide access to a just result, then settlements which provide no direct compensation to class members while conferring substantial fees on class counsel and litigation finality for defendants rightly deserve strict scrutiny. *Cy près* awards should only be permitted where direct compensation is impossible or economically unfeasible; probative evidence in this regard must be produced by the parties. Moreover, where aggregate assessments of liability can be determined, class members should be compensated directly even if such payments do not precisely correspond with their actual losses.

Ultimately, a more rigorous approach to settlement approval by our courts will ensure that class actions inspire public confidence in the fairness of the court system, and give victims of unlawful behaviour access to a just result.