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REPORTS, COMMENTS AND NOTES

## Class action dilemmas: the ethics of the Canadian DRAM settlement

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Class action terrain is laden with ethical minefields. As I have written, '[I]awyers must regularly mediate between self-interest, the interests of the client, and the public interest. Judges must consistently ensure that the latter two interests prevail'.<sup>1</sup> In the absence of rules of professional conduct that are responsive to the particularities of class action litigation, judges have had to create a body of ethical rules and norms piecemeal. A recent spate of decisions in Canada involving a single class action settlement reveals that normative confusion remains about the role of the class action lawyer, the identity of her clients and the duties owed to them.

In this commentary I discuss the ethical issues raised by the recent Canadian DRAM (dynamic random access memory) settlement, in part by using the framework for analysis introduced in a 2011 article.<sup>2</sup> In that paper, I outlined three principal reasons for which representative litigation on behalf of a large number of class members differs both in number and in kind from ordinary, binary litigation. First, class actions are far more entrepreneurial than any other kind of litigation and give rise to unique risks of self-interest as a result. Second, the adversarial void present in the class action settlement approval process creates a systemic risk of collusive behaviour between opposing counsel and unique challenges for the judge tasked with assessing the fairness of the settlement. Finally, class action lawyers do not know, let alone get instructions from, their clients, who at any given time may be a single representative plaintiff or thousands of class members with conflicting interests.

The discussion proceeds as follows. First, I describe the DRAM class actions briefly, as well as the settlement distribution protocol that gave rise to a legal dispute between class counsel and five objecting class members. In part 2, I discuss features of the DRAM settlement that reflect the unique ethical challenges of class action litigation. In part 3, I critique the September 2015 judgment that rejected the objecting class members' argument about the applicability of human rights legislation to class action settlements. In part 4, I highlight the procedural idiosyncrasies of class actions made evident by the DRAM case, which have important ramifications for legal ethics. I conclude with a renewed call for dialogue between lawyers, policymakers and judges about the ethics of class action practice.

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<sup>1</sup>Jasminka Kalajdzic, 'Self-Interest, Public Interest, and the Interests of the Absent Client: Legal Ethics and Class Action Praxis' (2011) 49 *Osgoode Hall Law Journal* 1, at 4.

<sup>2</sup>*Ibid.*

## 1. DRAM settlement

### *Chronology of the class actions*

The DRAM class actions concerned allegations that over a dozen electronic chip manufacturers worldwide conspired to fix prices in dynamic random access memory (DRAM) devices between 1999 and 2002. During that period of time, DRAM was the most common form of digital memory used in computers, servers, printers and game consoles. Some DRAM was sold directly to computer manufacturers like Dell, Apple and IBM (the original equipment manufacturer [OEM] class). A significant amount of DRAM was also sold to distributors and electronic manufacturing services companies (the EMS class), the largest of which in Canada is Celestica. At the end of the distribution chain is the indirect purchaser, who purchased electronic equipment containing DRAM (the consumer class).

In 2005, class proceedings were commenced in British Columbia, Ontario and Quebec on behalf of all direct and indirect purchasers of DRAM, claiming damages for overpayments caused by the alleged price-fixing. Over the ensuing decade, the cases wended their way through various levels of court, including an important decision by the Supreme Court of Canada.<sup>3</sup> The British Columbia action was the first to be certified,<sup>4</sup> followed by the Quebec case,<sup>5</sup> both on appeal after being initially rejected by the motions courts. Two Ontario actions were commenced – the first in 2005,<sup>6</sup> and the second in 2010 – by the same representative plaintiffs naming additional defendants.<sup>7</sup> Counsel in each of the three provinces agreed to work together and collectively were considered counsel to a class defined as all ‘Canadians and Canadian entities who purchased DRAM or electronic devices containing DRAM between April 1, 1999 and December 31, 2002’.<sup>8</sup>

In 2011, the same year that the Quebec Court of Appeal certified the Quebec class action, plaintiffs’ counsel in all three provinces negotiated settlement agreements with some of the defendants. Settlements were reached with the remaining defendants over the course of the following year,<sup>9</sup> culminating in a total settlement fund of Can\$80 million. As is required by class action statutes, counsel in each province obtained court approval of the settlements in a series of fairness hearings held in 2012 and 2013.<sup>10</sup>

Generally speaking, for a judge to approve a proposed settlement, she must be satisfied that the agreement is fair, reasonable and in the best interests of those affected by it, taking into account a number of factors, including the terms and conditions of the agreement.<sup>11</sup> The DRAM fairness hearings were somewhat unusual in that the manner in which the settlement funds were to be distributed was not known at the time the settlement agreements were approved. Although the global settlement figure was known, as were the details of the negotiations, the risks of going to trial and the history of the hard-fought proceedings, the actual amount of damages to be paid to a class member had not yet

<sup>3</sup>*Infineon Technologies AG v Option Consommateurs* [2013] SCC 59, [2013] 3 SCR 600.

<sup>4</sup>*Pro-Sys Consultants Ltd v Infineon Technologies Inc* [2009] BCCA 503, reversing [2008] BCSC 575; leave to appeal denied 2010 CanLII 32435 (SCC).

<sup>5</sup>*Option Consommateurs v Infineon Technologies AG* [2011] QCCA 2116, reversing [2008] QCCS 2781.

<sup>6</sup>*Eidoo v Infineon Technologies AG*, Ontario Superior Court of Justice, Court file 05-CV-4340CP.

<sup>7</sup>*Eidoo v Hitachi Ltd*, Ontario Superior Court of Justice, Court file 10-CV-15178CP.

<sup>8</sup><[www.dramclassaction.com](http://www.dramclassaction.com)>; see also Official Court Notice, Appendix A.

<sup>9</sup>Chronology cited in *Infineon Technologies AG* [2012] ONSC 7299 (CanLII) at paras 13–20.

<sup>10</sup>In Ontario, see *Eidoo v Infineon Technologies AG* [2012] ONSC 3801 and *Eidoo v Infineon Technologies AG* [2013] ONSC 853.

<sup>11</sup>*Dabbs v Sun Life Assurance* [1998] OJ 1598 (Gen Div) at para 9.

been determined. The presiding judge in Ontario, Justice Paul Perell, observed that this gap in information left him in a 'difficult position of having to determine the fairness of the proposed settlement without knowing how the settlement funds would actually be distributed', apart from the amount sought by class counsel for their fees.<sup>12</sup> His comment came in response to a written submission by an objecting class member who was critical of the delay in the litigation, the lack of communication to class members and the unlikelihood of class members being able to substantiate their claims.<sup>13</sup> In response, class counsel indicated that they were 'keen to begin the work of developing a distribution plan' – an answer Justice Perell described as an unsatisfactory 'trust us' position.<sup>14</sup> Nevertheless, he went on to approve the settlement notwithstanding the absence of a distribution scheme, which he acknowledged raised serious problems for him; the alternative of rejecting the settlement, he wrote, was worse.<sup>15</sup>

Counsel spent the following year developing a sophisticated distribution plan with the assistance of an economist. They also engaged a former Supreme Court of Canada Justice, Ian Binnie, QC, to review the plan and provide an independent opinion regarding its fairness to the courts of British Columbia, Ontario and Quebec (in Canada, retired judges may return to the Bar<sup>16</sup>). The British Columbia judge who ultimately approved the plan commended class counsel for their approach to developing it.<sup>17</sup> All three reviewing courts ultimately blessed the distribution scheme, along with an elaborate notice campaign asking class members to file a claim. Several months later, however, on the eve of the claims deadline, an Ottawa lawyer representing five class members wrote to class counsel challenging the claims process. The basis? The court-approved plan appeared to contravene human rights legislation.

### ***The impugned distribution plan***

The distribution plan recommended by Binnie and approved by the courts divided the settlement fund into three categories: consumers (50%); EMS (30%); and other DRAM purchasers (20%). This allocation was initially controversial because it did not correspond with what is known about the actual market of DRAM purchasers.<sup>18</sup> Although end-user consumers probably purchased over 80% of DRAM in the relevant period, there was a concern that the expected take-up by this class of purchasers would be low, given the experience in Canada and elsewhere with consumer class actions.<sup>19</sup> Any funds not claimed by the

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<sup>12</sup>*Eidoo v Infineon Technologies* [2013] ONSC 853 at para 48.

<sup>13</sup>*Ibid* at para 44. In class action litigation, notice of a proposed settlement and fairness hearing is issued by the court and disseminated to class members in a number of ways, including ads in newspapers, on class counsel's website, social media and direct mailing. The more diffuse the class, the more difficult it is to reach class members, who are very often unaware that a class action affecting their rights and interests is underway.

<sup>14</sup>*Ibid* at para 46.

<sup>15</sup>*Ibid* at para 57.

<sup>16</sup>See Stephen GA Pitel and Will Bortolin, 'Revising Canada's Ethical Rules for Judges Returning to Practice' (2011) 34 *Dalhousie Law Journal* 483.

<sup>17</sup>*Pro-Sys Consultants v Infineon Technologies AG* [2014] BCSC 1936 at para 37.

<sup>18</sup>Thomas W Ross, 'Report: Review of the Proposed Settlement Distribution Protocol in the DRAM Class Action' (13 June 2014) [Ross Report] [on file with author; also available at <<http://www.cfmlawyers.ca/wp-content/uploads/2012/05/DRAM-Ross-Distribution-Protocol-Report.pdf>>].

<sup>19</sup>Because the dollar amounts usually at issue in consumer class actions are low, and direct notice of the settlement usually impossible, many consumers either don't know they can make a claim or cannot be bothered to do so.

consumer class would be donated to charity, a mechanism known as *cy près*.<sup>20</sup> In contrast, because the EMS sector is dominated in Canada by one company, the take-up by that segment of the class would be 100%. According to counsel, it was preferable to get money to those directly affected than to distribute unclaimed funds to a charity.<sup>21</sup> Although rational, the decision to allocate proportionately less money to consumers can be construed as preferring one group of class members over another.

An expedient claims process was designed for the consumer class. Those without receipts for DRAM purchases simply filled out an online form on a website entitled 'themoneyismine.ca' to receive up to Can\$20. In verifying the accuracy of the information contained in the form, consumers confirmed that 'no other family member currently residing with [him or her] has nor will submit a separate claim for compensation'.<sup>22</sup> This limitation applied only to family members residing together; family members living in separate residences, or non-family members living together, could file separate claims and receive Can\$20 each. That cohabiting family members, each of whom may be a class member in their own right, were precluded from participating individually in the settlement, was the source of the objecting class members' intervention. They argued that '[u]sing such a characteristic for a differentiation is generally prohibited by the Ontario Human Rights Code' and that '[t]here is no relationship or rational [sic] between the discriminatory standard established by the Distribution Protocol and an End-User DRAM class member's current family or marital status'.<sup>23</sup>

Before turning to a discussion of the merits of the objection, it is worth noting the following additional information about the simplified claims procedure:

- No proof of purchase was required when claiming the Can\$20 compensation;
- Those consumers with receipts could have sought compensation of Can\$5 for every computer purchased in the class period, and lesser amounts for other DRAM devices;
- Consumers requesting Can\$20 in the simplified procedure may indeed have been overcompensated, a fact acknowledged by the expert economist but deemed necessary in order to ensure that the benefits of filing a claim exceeded the costs of filing;<sup>24</sup>
- The 'one claim per family' limitation was not explicit in any of the court-approved notices, in the Binnie Report, in the economist's report, or in the court order approving the distribution plan. It is not known whether the limitation was the subject of oral submissions when court approval was sought;
- The justification for the limitation is mainly one of administrative convenience, but it was also designed to avoid multiple fraudulent claims.<sup>25</sup>

<sup>20</sup>*Cy près* is widely used in Canadian class actions to distribute unclaimed settlement money or to avoid a claims process altogether. For a discussion of the use of *cy près*, see Jasminka Kalajdzic, 'The "Illusion of Compensation": *Cy près* Distributions in Canadian Class Actions' (2014) 92(2) *Canadian Bar Review* 1.

<sup>21</sup>The Ross Report reflects this preference, *supra* note 18 at 3. I have also argued that *cy près* should be a tool of last resort, given the compensatory function of class actions (see 'The Illusion of Compensation').

<sup>22</sup>See <<https://themoneyismine.ca/simplified-claim>> accessed 20 July 2015.

<sup>23</sup>Letter from Eric Letts, Barrister & Solicitor to Justice Paul Perell, 20 May 2015 [on file with author].

<sup>24</sup>Ross Report (n 17) 8.

<sup>25</sup>*Eidoo v Infineon Technologies AG* [2015] ONSC 5493 at paras 47, 98.

## 2. DRAM illustrates the ethical minefield of class action litigation

The objection by five class members to an Can\$80 million settlement distribution involving tens of thousands of class members may appear to be but a small wrinkle in a long-running class action involving several multinational companies. It serves, however, as an apt illustration of the peculiarities of class actions and their ethical implications. In my 2011 article,<sup>26</sup> I categorised what differentiates class actions from ordinary litigation in three ways: their entrepreneurial nature; the adversarial void that accompanies class action settlements; and the complicated question of who is class counsel's client.

### *Entrepreneurial litigation*

Like many class actions, but unlike most other types of litigation, the DRAM class action was born of lawyers' ingenuity. In the words of the presiding judge, the proceeding was an 'archetypal entrepreneurial Class Counsel driven class action'.<sup>27</sup> The representative plaintiffs were recruited by counsel to serve as the named plaintiffs. Class counsel earned millions, while almost all class members in the consumer category will each receive Can\$20. That five class members had the wherewithal to object at all is noteworthy; given the small sums at issue, consumers are notoriously disincentivised to either critique or participate in class actions.<sup>28</sup> The objectors, however, found a lawyer who shared their ideological goal: he specialises in representing clients facing family status and marital status discrimination.<sup>29</sup> He wrote in his letter to the presiding judge that his 'client base is [...] concerned that this highly publicized Distribution Protocol is promoting and perpetuating discriminatory attitudes and norms that cause, and have caused, serious harm in other aspects of their lives'.<sup>30</sup> Absent this shared ideological goal, it would have been irrational for a class member to pay a lawyer to challenge a distribution protocol involving Can\$20, and equally irrational for a lawyer to take on such a case *pro bono*.

### *Adversarial void*

Without the oversight of clients, ethical conduct in class actions necessitates a great deal of self-policing. In the settlement phase of a class action, the adversarial relationship between plaintiffs and defendants disappears, and both parties (or at least both plaintiffs' *counsel* and the defendants) share a common goal of convincing the fairness hearing judge that the settlement should be approved. Justice Perell noted the difficulties raised by this lack of adversarialism when he refused a request to pay the representative plaintiff an honourarium after the settlement was approved:

In being asked to approve an honourarium, the court is in an awkward and uncomfortable position as a regulator. The requests are never opposed, and the supporting material has

<sup>26</sup>'Legal Ethics and Class Action Praxis' (n 1).

<sup>27</sup>*Eidoo v Infineon Technologies AG* [2013] ONSC 853 at para 16.

<sup>28</sup>Justice Perell himself says as much in one of the DRAM decisions: '[I]t is unfortunate that more class members with concerns do not come forward.' *Eidoo v Infineon Technologies AG* [2013] ONSC 853 at para 48.

<sup>29</sup>*Ibid* at 4.

<sup>30</sup>Letter (n 22) 3.

become a *de rigueur* mutual admiration society between class counsel and the representative plaintiff.

I have no reason to doubt that Mr Eidoo and Mr Wehbe made an exemplary contribution as Representative Plaintiffs, and I have no reason to doubt that they should share in the tributes for a successful outcome, but how can a court ever come to have a doubt with an unopposed and untested evidentiary record? In other words, it is too easy for class counsel to present facts as revealing an extraordinary contribution by the representative plaintiff and the court is understandably uncomfortable playing devil's advocate.<sup>31</sup>

Class counsel's retainer of former Justice Binnie to provide an independent assessment of the proposed distribution protocol was an attempt to address this judicial discomfort with the inquisitorial role necessitated by unopposed settlements. Binnie submitted a 23-page report in which he provided a legal opinion that the proposed protocol met the statutory requirements for a fair settlement, and in which he recommended that the three courts approve it.<sup>32</sup> Nowhere in his report, however, is there discussion of the one claim per family limitation, or its possible infringement of human rights legislation.

### **Ambiguity regarding client identity**

The thorny issue of who is the client in a class action also becomes a factor in the DRAM settlement, and is the source of the most challenging ethical issues. Previous courts have declared that the representative plaintiff alone has a true lawyer–client relationship with class counsel before the class action is certified; all of the usual duties and obligations are owed to the representative plaintiff, including the duties of candour, loyalty, and zealous representation.<sup>33</sup> *Before certification*, there is a *sui generis* relationship between counsel and potential class members,<sup>34</sup> but the nature of the obligations toward thousands of such 'clients' is amorphous. *After certification*, a solicitor–client relationship is also formed with class members, but again, the content of that relationship is unclear.<sup>35</sup> The most fundamental of duties owed to a client is the duty of loyalty, and yet the DRAM settlement aptly illustrates that it is often impossible to zealously pursue the interests of all clients or to avoid conflicts.

Conflicts of interest between class members are commonplace, in a way that is not acceptable in binary litigation. As already mentioned, the DRAM settlement was structured to disproportionately prefer the interests of one set of class members (the EMS category) to another (the consumers). The distribution protocol then laid bare another set of conflicts, by giving priority to administrative efficiency and conservation of the fund. The one claim per family limitation may have reduced the number of windfall payments, but it did so to the detriment of class members who made multiple DRAM purchases and who now live in the same household as other DRAM purchasers.<sup>36</sup> That the settlement also creates distinctions between class members based on prohibited grounds under human rights legislation further problematises the lawyer–client relationship.

<sup>31</sup>*Eidoo v Infineon Technologies AG* [2015] ONSC 2675 at paras 20–21.

<sup>32</sup>Report of the Hon. Ian Binnie dated 23 July 2014 [on file with author] at para 62.

<sup>33</sup>*Richard v British Columbia* [2007] 159 ACWS (3d) 340 (BCSC); *Fantl v Transamerica Life Canada* [2008], 166 ACWS 1045 at para 61 (ONSC).

<sup>34</sup>*Fantl v Transamerica Life Canada* [2008] 166 ACWS 1045 at paras 61, 80 (ONSC).

<sup>35</sup>*Richard v British Columbia* (n 33).

<sup>36</sup>This is the case if none of the class members in the household retained receipts. Co-habiting class members with receipts could submit a claim for more than Can\$20.



Though there are few of them, objecting class members adopt an adversarial position vis-à-vis class counsel. In DRAM, only one class member wrote in response to the notice of proposed settlement and disputed the fairness of the settlement. He argued that there was no possibility of fair compensation to the parties who were actually harmed, and complained that class counsel had not communicated with class members years earlier, when DRAM purchase receipts might have been available.<sup>37</sup> In an ordinary lawyer–client relationship, such opposition to one’s own lawyer’s conduct would simply lead to instructions to act according to the client’s wishes or to a termination of the relationship. Neither option, however, is available to a class member. Class counsel is not required to heed the instructions of any single class member, nor is a class member able to ‘fire’ class counsel.<sup>38</sup> Counsel need not disclose a settlement offer to the class, and representative plaintiffs are free to accept or reject offers, without any input, let alone instructions, from the rest of the class.<sup>39</sup> Once the opt-out window has expired, an objecting class member is bound by the result of the class action, even if he does not wish to participate.

A client’s expectations of what constitutes fair representation by his lawyer also requires a normative shift in class action litigation. Consumers who are unhappy with the DRAM settlement because it may overprotect the claims of one group of purchasers while undercompensating others would have a legitimate grievance if the case were an ordinary multi-party proceeding. A class action, however, may be inherently incapable of anything better than rough justice. As Binnie explained in his report to the three fairness hearing judges, ‘[b]y any objective measure, a plan of allocation need not be, and cannot be, perfect ... a delicate balance must be achieved between precision and administrative feasibility’.<sup>40</sup> Statutory provisions that permit the use of statistical sampling and aggregate damages support this approach.<sup>41</sup> Whether allocations based on protected social grounds can be justified by administrative feasibility is a more challenging question, and one that Justice Perell addressed in his most recent decision in DRAM, discussed below.

### 3. The DRAM ruling: human rights legislation and class action settlements

The merits of the objecting class members’ human rights challenge were argued before all three judges who originally approved the DRAM settlement. In reasons released on 2 September 2015, Justice Perell denied the class members’ challenge to the distribution protocol, and invited the parties to make submissions on costs.<sup>42</sup> First, he found that the distribution of funds from a court judgment (here, the order approving the distribution protocol) was not a service, goods or facilities as those terms are used under human rights legislation.<sup>43</sup> Although the administration of justice is a public service, Justice

<sup>37</sup>*Eidoo v Infineon Technologies AG* [2013] ONSC 853 at paras 43–44.

<sup>38</sup>For a fuller discussion of these dilemmas, see ‘Legal Ethics and Class Action Praxis’ (n 1).

<sup>39</sup>*Berry v Pulley* [2011] ONSC 1378.

<sup>40</sup>Binnie Report (n 32) at para 43.

<sup>41</sup>*Class Proceedings Act* 1992, SO 1992, c-6, ss 24, 25.

<sup>42</sup>*Eidoo v Infineon Technologies AG* [2015] ONSC 5493. The objectors ultimately agreed to forego an appeal of the decision in exchange for a no costs order. A separate and concurring judgment was issued in BC: *Pro-Sys Consultants Ltd v Infineon Technologies AG* [2015] BCSC 1846 and in Quebec: *Option Consommateurs v Infineon Technologies AG*, #500-06-000251-047.

<sup>43</sup>*Ibid* at para 78.



Perell concluded that ‘the Human Rights Code does not apply to court orders’.<sup>44</sup> Second, even if the Code did apply, the distribution protocol did not contravene it because ‘the restriction imposed by the pooling of family member’s [sic] claims that restricts overcompensation (windfall payments) is not a disadvantage’ – or at least, not one that perpetuates prejudice or stereotyping.<sup>45</sup> Justice Perell also rejected the argument that class counsel had discriminated in providing services to class members.<sup>46</sup>

Faced with the prospect of a significant adverse cost order, the objectors chose not to appeal the decision. Its correctness is open to debate, however, for at least two reasons. First, Justice Perell determined that the Code did not apply to the protocol because court orders are not ‘services’ within the meaning of the Code. The protocol, however, did not become a court order until he approved it, thus begging the question whether a judge ought to apply the Code when assessing the fairness of a proposed settlement. Put differently, prior to the distribution receiving the court’s blessing (and thus becoming a court order), does the judge have the jurisdiction to assess the protocol’s consistency with human rights norms? Surely, the answer to that question must be ‘yes’. To offer an extreme example, a judge could (and surely would) refuse to approve a settlement that precluded racialised or female class members from making a claim. As a matter of principle, a settlement that discriminates between class members on grounds protected by the Code cannot be ‘fair and in the best interests of the class’.

A second difficulty with the judgment is the conclusion that even if the Code applies to the protocol, there is no unlawful discriminatory treatment because restricting windfall payments is not a ‘disadvantage’ that perpetuates prejudice. Justice Perell recognised that the standard Can\$20 payment constituted a windfall for most class members, but accepted it on the basis that a Can\$20 minimum payment was necessary to encourage harmed consumers to claim a portion of the settlement.<sup>47</sup> The one-per-household claim limitation merely represented a ‘reasonable way to curb windfall compensation’.<sup>48</sup> Even if one accepts that rough justice is inevitable in class actions, and that minimum payments are required to overcome class member apathy, on what bases can lawyers legitimately – ethically – determine who gets rough justice? Can it be meted out on discriminatory bases? One could not, in the name of administrative efficiency, arbitrarily carve out of the distribution plan all female class members; can one do so on the basis of family or marital status? The objecting class members argued unsuccessfully that such distinctions in this particular case were unlawful. The larger question is to what extent fairness and fidelity to the letter of the law should give way to considerations of efficiency and practicability. Prioritising efficiency over fairness has implications not just for the legislative goals of the class action regime, but also for what we claim constitutes ethical class action practice.

Whether the distribution protocol in DRAM offended marital or family status protections under the Code is, in the end, of no major consequence. After all, we are talking about a mere pittance in monetary terms. Of greater moment is the determination that human rights legislation has no applicability to class action settlements at all. Given the ethical challenges endemic to class actions described in part 2, above, it would have

<sup>44</sup>Ibid at para 79.

<sup>45</sup>Ibid at paras 98–99.

<sup>46</sup>Ibid at paras 106–10.

<sup>47</sup>Ibid at para 101.

<sup>48</sup>Ibid.

been helpful to signal that, if nothing else, human rights legislation must act as a guide when a lawyer structures a settlement. After all, lawyers have a special duty to uphold human rights norms as a matter of professional responsibility.<sup>49</sup> Lawyers also have a duty to avoid conflicts of interest between clients.<sup>50</sup> In a class action where the client class is disparate and large, where conflicts of interest between members are inevitable, and where what is good for one subgroup may well inure to the detriment of another, is class counsel even capable of meeting those professional duties?

#### 4. The procedural perils of class actions

In the previous two sections, I discussed the ethical dilemmas raised by the substance of the DRAM settlement. The case also illustrates that procedure in class actions may be another point of distinction with other types of litigation, and be equally vexing from an ethical point of view.

The alleged violation of human rights standards was first raised with class counsel by way of correspondence from the Ottawa lawyer retained by five class members. Class counsel in turn wrote to the case management judge alerting him to the objection. According to the judge, the six-page letter described the debate between class counsel and the objecting class members. The judge replied through his assistant that counsel should bring a motion. No motion was brought; but further correspondence from both sets of lawyers followed, describing areas of disagreement and seeking judicial guidance. This ‘procedural off-roading’ prompted the judge to issue an order *proprio motu* (on the court’s initiative) admonishing counsel for contacting the judge by email and letter.<sup>51</sup> ‘I do not know what procedural planet the parties think they are living on, but it is not one known to me’, he wrote, and then ordered counsel to stop writing to him and to file a motion.<sup>52</sup>

Arguably, however, the procedural planet inhabited by counsel in DRAM is familiar to class counsel in every other case. Flexibility, efficiency and broad supervisory powers are built into the statutory scheme.<sup>53</sup> Efficiency and proportionality are common themes in the current push to improve access to civil justice. And while parties are regularly encouraged to negotiate resolutions to disputes and avoid formal court proceedings,<sup>54</sup> in DRAM Justice Perell refused to approve a negotiated settlement of the challenge to the one claim per family limitation.<sup>55</sup> ‘[T]he Court cannot endorse whatever this [resolution] is at the whim of Class Counsel and Mr Letts and his clients without ruling on the merits of the underlying dispute’, he wrote, adding that he was not certain the objecting class members had standing to challenge a protocol that had already been approved by three

<sup>49</sup>Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 2.1-1, Commentary 4.1, available at <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486159>> accessed 9 December 2015.

<sup>50</sup>*Ibid.*, Rule 3.4-1.

<sup>51</sup>This chronology is recited in *Eidoo v Infineon Technologies AG* [2015] ONSC 3282.

<sup>52</sup>*Ibid.* at para 14.

<sup>53</sup>Case management is mandatory in all class actions and supervising judges are accorded wide discretion to manage their cases. For example, s 12 of Ontario’s *Class Proceedings Act* gives the judge the power to ‘make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination’.

<sup>54</sup>Indeed, lawyers have a professional duty to encourage settlement: see *Rules of Professional Conduct* (n 49), Rule 3.2-4.

<sup>55</sup>*Eidoo v Infineon Technologies AG* [2015] ONSC 3668. The parties had agreed to add explicit language to the distribution protocol that would provide the claims administrator the discretion to adjust the rules when more than one claim is filed for the same household.

courts.<sup>56</sup> Thus, class actions exhibit a stark tension between, on the one hand, efficiency and informality made possible by active case management, and on the other, the need for transparency and formalism, particularly when absent class members' rights are at issue.

The procedural idiosyncrasies of class actions give rise to still other ethical issues. Class members are given the option to remove themselves from the litigation if they do not wish to participate, or if they want to preserve their right to litigate individually. This opt-out option, however, is offered only once, and in the DRAM case, it occurred long before the size of the settlement or the manner of distribution was known.<sup>57</sup> Class members, therefore, must decide early on if they wish to participate in the lawsuit, assuming they are aware of the action at all. While this regime promotes settlement in that defendants and plaintiffs' counsel know with some certainty the size of the class for whom compensation (and its correlative, an extinguishment of litigation rights) is being negotiated, it leaves class members with little leverage if the ultimate settlement is unsatisfactory. While objections are technically possible, for reasons already discussed there are few incentives to mount them. The biggest lever – voting with your feet by exiting the class action – is removed once the opt-out deadline has passed.

There is also the problem of objecting too late. At the outset of the protocol motion, class counsel argued that class members do not have standing to protest a distribution protocol that has already been approved. The proper time to object was when the hearing to approve the plan was heard. In this case, however, the provision limiting claims to one per household was not described in the notice to class members.<sup>58</sup> Class members also do not have standing to appeal the approval of a settlement.<sup>59</sup> Should they be allowed to circumvent this rule by challenging the distribution protocol, even if on a point that was not raised in the earlier proceeding? More importantly, ought class counsel challenge the standing of objecting class members – who are still their clients – in these circumstances? These questions remain unanswered. In his decision, Justice Perell chose to address the motion on the merits and so declined to address counsel's submissions that the protocol challenge came too late or was precluded on grounds of estoppel, collateral attack or abuse of process,<sup>60</sup> leaving for another day this important question about the rights of objecting class members and the role of class counsel.

## 5. Conclusion

By their very nature, class actions are rife with ethical issues. There is a decidedly entrepreneurial character to this form of litigation, in which lawyers identify a legal wrong, recruit a representative plaintiff, represent the potentially conflicting interests of thousands of 'clients', and then negotiate a settlement in their absence. The absent clients' interests are to be protected by an overseeing judge, but it is in the context of a hearing that lacks the traditional adversarialism on which common law courts rely. While class

<sup>56</sup>ibid at para 11.

<sup>57</sup>The Ontario case was certified in March 2012 and the opt-out deadline was 2 June 2012: *Eidoo v Infineon Technologies AG* [2012] ONSC 7299 at paras 13 and 15 (CanLII).

<sup>58</sup>See eg Official Court Notice at Appendix A.

<sup>59</sup>*Dabbs v Sun Life Assurance Co of Canada* [1998] CanLII 7165 (ON CA), 41 OR (3d) 97 (CA), leave to appeal to SCC refused [1998] SCCA 372.

<sup>60</sup>*Eidoo v Infineon Technologies AG* [2015] ONSC 5493 at para 68.

members can at best expect rough justice, their lawyers have exponentially more to lose and to gain than any one client. This context puts class counsel in a difficult position of mediating between self-interest, the public interest, and the interests of the absent client.

The DRAM settlement exhibits all of these tensions. Counsel were faced with the very complex challenge of devising a process by which purchasers of DRAM all along the distribution chain could claim a small share of an Can\$80 million fund. They used their best efforts and relied on expert advice in formulating a plan – ultimately approved by three courts – that allocated 50% of the fund (net of counsel fees) to end users, few of whom could prove their damages. Possible overcompensation of some class members and undercompensation of others, coupled with a potentially discriminatory limit of one claim per family, may be inevitable when distributing rough justice. The ethics of counsel's conduct in such circumstances are easily impugned. More difficult is the setting of rules and norms to provide counsel with clearer guidance. In DRAM, the court may have missed an opportunity to use human right norms as one such guide. The DRAM settlement illustrates the challenges in identifying the content of class counsel's role morality,<sup>61</sup> and may well necessitate a shift in our thinking about what constitutes ethical conduct in the class action context. For judges tasked with overseeing class actions, and the lawyers charged with representing the best interests of the class, it is a discussion worth having.

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<sup>61</sup>According to David Tanovich, role morality is 'the set of norms, standards and values that govern the conduct of individuals when acting as lawyers'; see David Tanovich, 'Law's Ambition and the Reconstruction of Role Morality in Canada' (2005) 28 *Dalhousie Law Journal* 267 at 274.