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THE "ILLUSION OF COMPENSATION": CY PRÈS DISTRIBUTIONS IN CANADIAN CLASS ACTIONS

Jasminka Kalajdzic*

In both the US and Canada, the now common use of cy près in the design of class action settlement distribution plans represents a radical transformation of the original cy près doctrine. Despite the facilitative role of class actions in aggregating claims, in some cases there may be no practical way to calculate or pay hundreds of thousands of small claims. The cy près device has become the mechanism by which aggregation of loss is effected. It is therefore used not only to dispose of unclaimed settlement funds, but to avoid having class members claim a portion of the settlement at all. In this way, cy près creates the "illusion of compensation" because the bulk of the class receives no compensation at all. This paper critically and empirically examines the use of cy près in Canadian class actions, with references to developments in American cy près jurisprudence. It explores the various judicial approaches to the device, and provides a comprehensive collection of data regarding the nature and extent of cy près use in Canada. The author concludes with observations about the policy implications of resort to cy près in Canadian class action settlements.

Aujourd'hui courante tant aux États-Unis qu'au Canada, l'application du principe de l'aussi-près (cy-près doctrine) dans l'élaboration des plans de redistribution des règlements des recours collectifs constitue

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* Faculty of Law, University of Windsor. I thank Jonathan Wiesenthal, Christina Sibian and Tatha Swann, all former law students at the University of Windsor, for their research assistance over the course of three summers, and the Law Foundation of Ontario for funding these student research positions. Many thanks also to my colleagues Camille Cameron and Jeff Berryman for their helpful comments on a draft of this paper.

une transformation radicale de la conception initiale de ce principe. Malgré le rôle facilitateur que jouent les recours collectifs pour permettre d'établir la totalité des demandes, il est dans certains cas impossible de calculer ou de verser des centaines de milliers de petites indemnités. Le principe de l'aussi-près est maintenant le mécanisme qui permet d'obtenir l'agrégation des pertes. Par conséquent, il est appliqué non seulement pour décider de l'utilisation des fonds de règlement non réclamés, mais également pour éviter qu'aucun des membres du recours collectif ne reçoive une partie des fonds de règlement, créant ainsi l'« illusion d'indemnisation » du fait que car le gros des membres du recours ne reçoit aucune indemnité. Le présent article fait un examen critique et empirique de l'application du principe de l'aussi-près dans les recours collectifs au Canada, et donne des exemples qui illustrent l'évolution de son application par les tribunaux des États-Unis. L'article explore les différentes approches à ce mécanisme adoptées par tribunaux et fournit une collection complète de données sur la nature et l'étendue de l'application du principe de l'aussi-près au Canada. L'auteur conclut par des observations sur les conséquences de la pratique du recours à ce principe sur le règlement des recours collectifs au Canada.

In both the US and Canada, the now common use of cy près in the design of class action settlement distribution plans represents a radical transformation of the original cy près doctrine. The growth of cy près awards has resulted logically from the nature of class actions themselves: the monetary damages of individual class members are usually extremely small, and notifying each member of their right to claim a portion of the settlement proceeds can prove to be both difficult and inefficient. Faced with a number of poor alternatives, ranging from allowing defendants to keep unclaimed funds to refusing to certify the class proceeding in the first place, courts have adopted cy près as a second best alternative to direct compensation of class members, and have done so with only occasional academic scrutiny and virtually no legislative guidance.

Recent American jurisprudence suggests that, despite the ascendancy of cy près, there are policy questions demanding attention. In a controversial article published in 2010, Martin Redish and two co-authors argue that the use of cy près in US class action settlements violates constitutional principles, is inconsistent with procedural due process, and distorts the underlying substantive law being enforced by way of the class action procedure.[1] The authors begin with the proposition that in its original form, cy près is a trust principle invoked merely as a means of disposing of

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[1] Martin H Redish, Peter Julian and Samantha Zyontz, "Cy près Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis" (2010) 62

unclaimed property.[2] In its current manifestation in class actions, however, cy près becomes the mechanism by which aggregation of loss is effected. Despite the facilitative role of class actions in aggregating claims, in some cases there may be no practical way to calculate or pay hundreds of thousands of small claims. Cy près is therefore used not only to dispose of unclaimed settlement funds, but to avoid having class members claim a portion of the settlement at all. In this way, "[c]y pres creates the illusion of compensation," because the bulk of the class receives no compensation at all.[3]

A number of American appellate courts have rejected proposed settlements on the basis of concerns regarding cy près provisions. In a rare set of reasons issued on November 4, 2013 when the US Supreme Court denied *certiorari* in a class action settlement involving Facebook, Chief Justice Roberts signaled the Court's interest in reviewing the use of cy près in class actions, citing the Redish article.[4] Although the Chief Justice found that the cy près settlement under appeal did not provide the opportunity to address "fundamental concerns" surrounding the use of the device, he proceeded to list the matters the Court would clarify in the appropriate case. Among them: when, if ever, such relief should be considered; what the respective roles of the judge and parties are in shaping a cy près remedy; and how closely the goals of any enlisted organization must correspond to the interests of the class.[5]

These are not novel issues, and despite receiving little judicial attention, they arise equally in Canadian class action practice. In this paper I critically and empirically examine the use of cy près in Canadian class actions, with references to developments in American cy près jurisprudence. First, I describe the origins and purpose of cy près in Canadian law. In Part 2, I provide a taxonomy of the ways in which cy près has been used in class actions, and refer to illustrations of these categories in the case law. In Part 3, I summarize and critique the various judicial approaches to cy près in Canadian class actions. In Part 4, I provide an empirical account of the use of cy près in Canada over the last two decades. It is, I believe, the most comprehensive collection of information regarding the nature and extent of cy près use in Canada. Finally, in Part 5, I consider the policy questions surrounding cy près settlements identified in the oft-cited Redish article,

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Fla L Rev 617 . This article has been cited in over two dozen judgments and scholarly articles (Quicklaw and Westlaw search conducted on February 19, 2014).

2 *Ibid* at 624.

3 *Ibid* at 623.

4 *Marek v Lane*, 134 S Ct 8 (2013) [*Marek*].

5 *Ibid* at 4.

and conclude with observations about the use of cy près as it has developed in Canadian class actions.

1. Origin and Purpose of Cy près Awards in Class Proceedings

The doctrine of cy près, meaning "as near as," originated in the law of wills and charitable trusts to give effect to a testator's or settlor's intent in making charitable gifts.[6] When a fund dedicated to a charitable purpose becomes impossible or impractical to be applied, cy près permits the court to direct the funds to be applied instead to another charitable purpose that approximates "as nearly as possible" the settlor's original intent.[7] Cy près therefore comes to class actions by analogy.[8] The equitable doctrine is now permitted by statute in all Canadian jurisdictions and is frequently applied in the settlement of class actions where the identification of eligible class members or distribution of damages would be prohibitively expensive relative to the sums being distributed.

Where there is a potential for unclaimed settlement funds, three principal options present themselves to counsel drafting and negotiating a settlement agreement:

1. Reversion of the residue to the defendants;

2. *Pro rata* apportionment of residue to class members with approved claims; or

3. Cy près distribution of residue to a non-party, charitable interest, such as a not-for-profit organization engaged in community work or research.[9]

It is now well-accepted in Canadian class action jurisprudence and among class action practitioners that reversion of unclaimed settlement funds to defendants is contrary to the policy objectives of class actions and

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6 Nyal Deems, "The *Cy près* Solution to Damage Distribution Problems in Mass Class Actions" (1975) 9 Ga L Rev 893 at 904.

7 Ontario Law Reform Commission, *Report on Class Actions* (Toronto: 1982), vol II at 573 [*OLRC Report*].

8 Deems, *supra* note 6 at 904.

9 In British Columbia and Manitoba, the statutes also specifically allow for forfeiture to the Crown of unclaimed or undistributed funds: *Class Proceedings Act*, RSBC 1996, c 50, s 34(5)(b) and CCSM, c C-130, s 34(5)(b). The Law Society of British Columbia has recommended to the Attorney General that the BC *Class Proceedings Act* be amended to permit the courts to direct cy près awards to the Law Foundation of British Columbia; see Minutes of Bencher Meeting dated December 6, 2013, available online <http://www.lawsociety.bc.ca/docs/about/agendas/2014-01-24_agenda.pdf>.

therefore to be avoided. When defendants retain a reversionary interest, behaviour modification is not achieved since the defendants do not fully internalize the costs of their alleged wrongful conduct, and thus are not deterred from future misconduct. In essence, reversion results in a windfall to the defendant. In addition, access to justice is not advanced since the reverted funds do not benefit, even indirectly, those who were harmed by the defendants' conduct. Quite apart from these policy arguments, reversion also creates perverse incentives for settling defendants to create less than robust notice campaigns and very complicated claims procedures in order to reduce the likelihood of class members participating in a settlement program.

Pro rata apportionment of any residue is preferable to reversion but raises different policy concerns. As the Ontario Law Reform Commission (OLRC) *Report on Class Actions* explained, the payment of additional monies to class members who have already received their rightful share of the settlement fund can be viewed as a windfall, and distorts the access to justice objectives of class actions.[10] This criticism, however, can be somewhat overstated, since most settlements are structured to compensate each class member only a portion of their actual loss; in these cases, it could be said that it is not so much a windfall to divide any residue *pro rata* to those class members who made a successful claim on the funds, as it is inequitable that some class members get substantial recovery while others get nothing. Apportioning the residue among class members also gives class counsel little incentive to craft comprehensive notice or claims procedures, since the entire fund will be paid out to some portion of the class in any event.

Cy près distributions, therefore, are the most attractive option for unclaimed settlement funds for a number of policy and practical reasons. As Redish points out,

> In its modern form, cy pres relief is uniquely and intentionally designed to bridge the often enormous gap between a finding of liability and the distribution of damages in a class action. […] With cy pres, class action attorneys and supporters might believe, the class proceeding still punishes the wrongdoer and while it may fail to compensate actual victims, at the very least it uses the wrongdoer's money for worthy purposes. In this important sense, use of cy pres represents an integral – indeed, often essential – element of the class action process, rather than merely a neutral method of unclaimed property disposition that happens to be applied in the class action context.[11]

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[10] *OLRC Report*, *supra* note 7 at 577-79.

[11] Redish, *supra* note 1 at 621-22.

By requiring defendants to pay a settlement, even if not directed to the class members purportedly harmed by the defendant's activities, cy près orders further the deterrence function of class actions[12] and ensure that class members realize at least some benefits from the settlement, if only indirectly, and therefore receive some measure of justice. Indeed, the use of cy près to achieve specific and general deterrence was expressly endorsed in one of the first settlements involving cy près.[13]

Nevertheless, cy près awards are not without their criticisms. Not unlike defendants who retain a reversionary interest in settlement funds and are thereby not incentivized to contribute (financially or with information) to a comprehensive notice program, cy près awards do not necessarily encourage plaintiff counsel to do so, either. That is, it is far easier to identify an appropriate charitable organization to receive settlement funds than it is to identify potentially thousands of consumers, shareholders, patients or other groups who fall within the definition of a particular class. Where the names and contact information are not readily available to defendants or class counsel, significant time and expense is necessary to locate, notify and process claimants. Cy près awards may be an expedient but inappropriate use of the device in those situations where class members have the right to a share of a settlement, but are not located or are deterred from claiming due to an overly complicated claims process.

Beyond the question of incentives, there are other, more profound policy concerns raised by cy près settlements. Before turning to a discussion of those issues, it is important to understand precisely how cy près is being used in Canada, as the policy implications depend very much on context.

2. A Taxonomy of Cy près Provisions

In Canadian class actions, there are two distinct uses of the cy près provision.[14] First, there is the *residual cy près* clause, present in the

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12 *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 29, 2 SCR 534.

13 In *Alfresh Beverages Canada Corp v Hoescht AG*, [2002] OJ No 79 (QL) (Ont Sup Ct) [*Alfresh Beverages*], after referring to the significant difficulties in identifying indirect purchasers of the products at issue in the price-fixing scheme and describing the *cy près* beneficiaries as "surrogates" for the unidentified class members, Cumming J stated at para 16: "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."

14 I first proposed this taxonomy in "Access to a Just Result: Revisiting Settlement Standards and Cy Pres Distributions" (2010) 6 Can Class Action Rev 215 at 236 [Kalajdzic, "Access"].

majority of recent class action settlement agreements, which provides that any unclaimed settlement monies will be paid to charities. By definition, such cy près distributions are contingent upon there being unclaimed settlement funds. It is therefore impossible to quantify *ex ante* the monetary amount, if any, of residual cy près provisions. In many cases, no significant residue remains to be paid out to the identified charity. Knowing, therefore, that a majority of lawyers include residual cy près provisions in their settlement agreements tells us nothing about the magnitude of payments being made to charities. Moreover, it is not common practice to identify the charitable organization in the settlement documents; the parties may simply indicate that the cy près payment will be subject to approval by the court should there be a residue, at which time counsel will have to turn their minds to identifying a suitable recipient.

The second type of cy près provision is referred to as the *fixed cy près* because the identity of the charity and often the quantum of the payment are fixed at the time the settlement is reached. Some distribution schemes envision the whole or a significant portion of the settlement fund being paid to charitable organizations in place of direct compensation to class members. The amount of the cy près payment may or may not be known at the time the settlement is finalized, but the identity of the cy près recipients will always be specified as they will need to be approved by the court at the settlement fairness hearing. In some cases, the parties will carve out of the settlement fund a specific sum to be paid to charities, as occurred in *Cassano v TD Bank.*[15] In other cases, the parties stipulate that certain class members' payments will be directed to cy près recipients on their behalf. *Georghiades v. Scotia Capital* illustrates the latter scenario; in this case, the claims of all accountholders owed less than $25 were distributed cy près, while claims over $25 were paid to the accountholders.[16] Until the claims process is completed, therefore, the precise sum to be distributed cy près cannot be calculated, but some payment is virtually guaranteed.

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15 (2009), 98 OR (3d) 543, (Ont SupCt) [*Cassano*].

16 (23 January 2009), Windsor 03-CV-1982 (Ont Sup Ct) (judgment certifying action and approving settlement). The cy près recipients were the Law Society Foundation in trust for the Lawyers' Feed the Hungry Program (10%), Pro Bono Law Ontario (10%), Toronto Ronald McDonald House (26.6%), Pelletier Homes for Youth (26.6%) and Unity for Autism (26.6%)

Arguably, the OLRC had only residual cy près provisions in mind when a majority of the commissioners recommended that class proceedings statutes authorize this form of distribution.[17] Repeatedly, the Report referred to the "residue" of an aggregate award being distributed.[18] The Report concluded that, "where it has proved impossible to distribute all of an aggregate award to individual class members, the court should be able to order that any residue be applied in a manner that may reasonably be expected to benefit some or all of the members of the class."[19] The cy près provision in the draft class action statute contained in the OLRC Report similarly referred to "money that has not been distributed" to the class.[20] In situations where a cy près distribution is not possible because it cannot be applied in a manner to benefit the class, a majority of the commissioners recommended that courts balance the need for behaviour modification against the equities favouring a return of the residue to the defendant, and be empowered to order that the remainder of the funds be forfeited to the Crown.[21]

The Ontario legislature did not adopt the forfeiture recommendation, nor did it include an express cy près provision as it appeared in the OLRC draft statute. Rather, Ontario courts have interpreted the interplay between the aggregate damages (section 24) and judgment distribution (section 26) provisions of the Act as authorizing cy près distributions.[22] Section 24 permits aggregate assessments of damages that may be awarded on an average or proportionate basis to class members. Section 26 gives judges broad discretion to direct the means of distribution of section 24 awards, and then provides an *idem*:

> (4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual 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.[23]

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[17] Interestingly, the recommendations regarding cy près were the only ones that did not elicit unanimity from the commissioners. The dissenting commissioner, BA Percival, believed that the "undistributed residue of any aggregate assessment […] should be returned to the defendant;" see *OLRC Report*, *supra* note 7 at 581, n 292.

[18] *Ibid* at 572-96.

[19] *Ibid* at 581.

[20] *Ibid* at 870.

[21] *Ibid* at 595. Note that Ontario did not follow this recommendation, although Manitoba and British Columbia chose to include a forfeiture provision in their statutes; see *supra* note 9.

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

[23] *Ibid,* s 26(4).

From the earliest approval of a settlement involving a cy près payment, courts have referred to sections 24 and 26 as authority for the substitution of charitable recipients for class members in both residual and fixed cy près awards.[24] They have done so notwithstanding statutory ambiguity. Although section 26(4) speaks to "all or part of an award" being distributed in a manner that may benefit a reasonable number of class members, it explicitly contemplates a claims process and deadline set by the court by referring to "an award … that has not been distributed within a time set by the court." The operating presumption is that there will first be an attempt to distribute the monies to the class, and only after the time set by the court has expired and all or part of an award remains outstanding does the court have the authority to distribute the money in another manner. Notwithstanding this reasonable interpretation of the statutory language, Ontario and other courts have universally construed class proceedings statutes to as conferring jurisdiction to approve not only residual cy près clauses, but also substantial fixed cy près distributions in settlements in lieu of direct compensation to class members.

3. Judicial Approaches

Generally speaking, courts have held that a fixed cy près payment will be approved "when direct compensation to class members is not practicable."[25] No objective standard is discernible from the case law as to when the "impracticability" threshold is crossed. Judges accept, with little or any discussion, the submissions or evidence that identifying class members is "cost-prohibitive." US courts, on the other hand, are increasingly vigilant about counsel improperly using cy près relief when it is not clear that direct compensation is not feasible; in a recent case, the Third Circuit vacated a District Court's approval of the class settlement on the basis that the parties had not conducted a sufficient search for the contact information of the class members in order to properly advise them of the settlement.[26]

In contrast to the paucity of judicial guidance as to *when* cy près payments should be used at all, there is a comparatively rich jurisprudence on the second question of *who* should receive the cy près money. Although many courts do not provide extensive reasons for approving a proposed cy près recipient, a list of criteria to be considered in the approval process can be derived from a few key decisions:

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[24] *Alfresh Beverages*, *supra* note 13 at paras 15-16; *Sutherland v Boots Pharmaceuticals PLC* (2002), 21 CPC (5th) 196 (Ont Sup Ct) at para 16 [*Sutherland*]; *Ford v F Hoffman - La Roche Ltd* (2005), 74 OR (3d) 758, (Ont Sup Ct) at para 132 [*Ford*].

[25] *Sorensen v easyhome Ltd*, 2013 ONSC 4017, 49 CPC (7th) 305 [*Sorensen*].

[26] *Larson v AT&T Mobility LLC*, 2012 US App LEXIS 13292.

- the organization's membership base
- the organization's ability to deliver benefits to a particular group of class members
- the organization's financial stability
- the organization's ability to deliver benefits in each province and territory
- the organization's ability to reach one or more target age groups, being children, youth, adults or the elderly
- whether the organization was non-denominational
- the organization's charitable or non-profit designation
- the organization's history of advocacy, service delivery, research or education relevant to the products at issue in the litigation[27]
- there must be a tangible impact on class members.[28]

Thus, counsel should identify organizations that will use the funds in a manner that will deliver *identifiable benefits* to the class, directly or indirectly, in an efficient and manageable way. The proposed cy près recipient's distribution program should be sufficiently related to the interests and needs of the class to be "materially beneficial" to the class.[29]

A recent cy près decision in an Ontario action exemplifies adherence to the test set out above. *Sorensen v easyhome Ltd*.[30] involved a residual cy près distribution. The class members were entitled to receive some compensation for their losses in the shareholder class action, and only after the claims deadline passed would unclaimed funds, if any, be distributed to the University of Ottawa.[31] Perell J acknowledged that cy près payments are not specifically referred to in the *Class Proceedings Act*, but affirmed

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27 All of the above factors are derived from *Ford*, *supra* note 24 at paras 84-86, 96.

28 *Elliott v Boliden Ltd* (2006), 34 CPC (6th) 339 (Ont Sup Ct).

29 *Ibid* at para 35.

30 *Sorenson*, *supra* note 25.

31 Note that the Plan of Allocation stipulates that any class member whose recoverable loss is calculated by the Administrator to be less than $5.00 will not receive compensation and presumably their settlement amount will be distributed cy près.

that the Act contemplates a distribution that will indirectly benefit the class when direct compensation is not feasible.[32]

With respect to the question of *who* should receive the payment, Perell J stressed that the distribution must "serve the objectives of the particular case and the interests of the class members."[33] Although the proposed recipient in the case before him – the Canadian Foundation for Advancement of Investor Rights (FAIR Canada), an organization dedicated to advancing investors' rights – had the requisite nexus with the class, Perell J rejected it because FAIR Canada was a *pro bono* client of class counsel and had joined with the class action firm in making submissions to the Ontario Securities Commission.[34] A month later, Perell J approved an alternative recipient: the Faculty of Law at the University of Ottawa, with the cy près funds to be used for the research of shareholder issues in the context of securities regulation.[35] Targeted research on the very issues at the heart of the class action is precisely the indirect benefit contemplated by class proceedings statutes; nevertheless, it is not known why this particular law school was chosen.

A large number of cy près distributions, however, lack any nexus to the class or to the nature of the action, and therefore do not benefit the class members. In his study of cy près distributions in Ontario class action settlements, Jeff Berryman describes fifteen settlements, almost all of which distributed funds to charities that had no connection to the subject-matter of the class action or the class members. The charities included law school research programs (in a settlement involving price-fixing of food additives),[36] the Boys and Girls Club of Canada (in three price-fixing cases)[37] and two business schools (in settlement involving failure to

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32 *Sorenson*, *supra* note 25 at paras 24-25.

33 *Ibid* at para 30. The Quebec Superior Court recently adopted the same strict approach to the "rational connection between the interests of the members and the one or more beneficiaries to whom the balance [of the settlement fund] is to be distributed;" *D'Urzo c Tnow Entertainment Group*, 2014 QCCS 365, [2014] QJ No 804 (QL) at para 8 [*D'Urzo*].

34 *Sorenson*, *supra* note 25 at para12.

35 Information obtained from Siskinds' website: <http://www.classaction.ca /classaction-ca/master-page/actions/Securities/Resolved-Actions/EasyHome>.

36 Jeff Berryman, "Class Actions and the Exercise of Cy-Pres Doctrine: Time for Improved Scrutiny," in Jeff Berryman and Rick Bigwood, *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law, 2009) ch 22, referring to *Bona Foods v Pfizer,* [2002] OJ No 5553 (Ont Sup Ct) (QL) [*Bona Foods*].

37 *Ibid* referring to *Bona Foods, ibid*; *Minnema v Archer Daniels* [unreported]; and *Ford*, *supra* note 24. According to counsel for the class in these cases, because the actions related to increased prices for food additives, there was a direct link between the meals programs offered by the Boys and Girls Club and the persons most adversely

disclose in a share prospectus).[38] The largest cy près award to date is the $28 million settlement of *Cassano*. There, half the funds were paid to an organization promoting financial literacy – arguably very closely related to the nub of the class action, which involved improper fees levied by banks on foreign credit card purchases. The other $14 million was directed to the Law Foundation of Ontario, which created the Access to Justice Fund. Of the connection between the Fund and the class members in *Cassano*, Cullity J wrote: "I do not think there is any doubt that a purpose of providing or promoting access to justice must be considered to be beneficial to the public."[39] The connection between the cy près recipient and the class required by the *Class Proceedings Act* was remote, in that the class members (credit cardholders) would no more benefit from access to justice projects in the community than would other members of the general public.

While all of these charities are laudable in their own right, it is fair to question why class members' settlement money should be paid to organizations whose purpose and works do not benefit the class. For these reasons, US appellate courts increasingly reject settlements containing cy près provisions lacking a nexus to the class members or their underlying grievance.[40] American courts have been more vigilant than our own in ensuring that settlement monies retain some connection to the class and its underlying claims. Appellate courts have affirmed, time and again, that there must be "a driving nexus between the plaintiff class and the cy près beneficiaries."[41] So, for example, the Ninth Circuit rejected a cy près distribution to legal aid foundations and the Boys and Girls Club arising from a class action by over 66 million internet users whose emails were exploited by the defendant for unlawful advertising campaigns; the

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impacted by high food costs; email communication from Charles Wright to author dated April 23, 2014 [on file with author].

38 Berryman, *ibid* referring to *Boliden Ltd v Liberty Mutual Insurance Co*, 2008 ONCA 288, 90 OR (3d) 274 (CA).

39 *Cassano*, *supra* note 15 at para 29.

40 *Nachshin v AOL, LLC*, 663 F3d 1034 (9th Cir. 2011) [*Nachshin*]; *Dennis v Kellogg Company*, F3d 8109 at 8121-22 (9th Cir 2012) [*Kellogg Company*].

41 *Nachshin*, *ibid*. Note that the settlement agreement was subsequently revised to increase the cash fund distribution to class members and distribute any remaining balance equally to Consumers Union, Consumer Watchdog and the Center for Science in the Public Interest. The revised settlement was approved in May 2013. See also Daniel Fisher, "Roberts Puts Cy Pres Settlements in Crosshairs As He Lets Facebook Pact Pass" *Forbes* (Nov. 5, 2013), online: <http://www.forbes.com/sites/danielfisher/2013/11/05 /roberts-puts-cy-pres-settlements-in-crosshairs-as-he-lets-facebook-pact-pass/> ("Judges are getting more aggressive in policing class-action settlements, which can be collusive deals in which plaintiff lawyers bargain away the rights of the class in exchange for a fee and little else.")

recipients had "no apparent relation to the objectives of the underlying statutes" which were to protect internet users from fraud, predation and other forms of online malfeasance.[42] Similarly, a cy près award to organizations that feed the indigent was rejected in *Dennis v Kellogg Company*, a misleading advertising lawsuit, on the basis that it was "divorced from the concerns embodied in consumer protection laws" and too narrow in its geographic reach relative to the demographics of the class.[43]

The underlying concern reflected in these cases is that self-interest – either of the parties, their counsel or the court – rather than the class' interests, will be favoured in the course of settlement negotiations.[44] Recognizing that class members do not benefit significantly from a cy près settlement and the risk that lawyers may not vigorously protect class members' interests, one circuit has noted that district courts are permitted to "decrease attorneys' fees where a portion of a fund w[ould] be distributed *cy pres*."[45] Where the quantum of the residual cy près is unknown, the same appellate court recommended delaying the final approval of the counsel fee until the distribution process is complete.[46]

There is the further risk that particular class members' interests will be preferred in the selection of a cy près recipient. In the very recent Bre-X settlement, a lone objecting class member was successful in persuading the settlement approval judge that part of the $3.5 million fund should be paid to the University of Ottawa's business school.[47] The class member was an alumnus of the school and already had an award for excellence in applied ethics established in his name.[48] Given that the class member was but one of thousands of class members harmed in the Bre-X fraud, bestowing settlement monies on his preferred institution, even if the money is to be used to promote business ethics, is not an obvious benefit to the class as a whole. This is especially so when the award is made against the recommendations of class counsel.[49]

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42 *Nachshin*, *ibid* at 1040-41.

43 *Kellogg Company*, *supra* note 40.

44 *AOL*, *supra* note 40 at 1039.

45 *In re Baby Prods Antitrust Litig,* Nos 12-1165, 12-1166, and 12-1167, – F 3d –, 2013.

46 *Ibid*.

47 *Carom v Bre-X Minerals Ltd*., 2014 ONSC 2507, [2014] OJ No 1898 (QL) [*Carom*].

48 These details were not contained in the reasons for judgment, but rather are available by searching the objector's name on the University of Ottawa's website: <http://www.telfer.uottawa.ca/mba/en/awards-and-support> [last visited on April 30, 2014].

49 *Carom*, *supra* note 48 at paras 89-90.

As I and several other commentators have noted,[50] the unprincipled use of fixed cy près is problematic, particularly from an access to justice perspective. Policy concerns arise in two ways. When monies that could be paid directly to those who suffered the loss at issue in the action – the class members – are instead paid to charities because of a less than diligent attempt on the part of class and defence counsel to identify and contact the class members, access to justice is turned on its head. Class members are denied their reasonable recovery while at the same time they are precluded from litigating their claim with the defendant individually. The compensatory function of civil litigation is therefore completely thwarted.

Moreover, even where it is clear that it would be cost-prohibitive or logistically impossible to pay class members their share of a settlement fund, the choice of cy près recipient can defeat the objectives of cy près specifically and of class proceedings more broadly if there is a weak nexus between the cy près recipient and the class members, and therefore no access to justice for the class.[51] Admittedly, what constitutes an "indirect benefit" to the class members is inherently subjective, and it is likely that many lawyers make a concerted effort to ensure the recipient organization will use the award in a manner that indirectly benefits the class. If the courts in approving the cy près payment do not make those efforts transparent, however, class members and the public at large cannot be faulted for questioning the validity of the choice of recipient.

As I argued in a 2010 paper, courts should be vigilant that cy près is not resorted to simply because it is easier and cheaper to draft a fixed cy près clause than it is to create a settlement distribution plan that aims to compensate the class in whose name the action was brought. To this end, I questioned why the aggregate damages provisions of class action statutes were not being used to fashion settlement distributions that provided at least "rough justice":

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[50] Berryman, *supra* note 36; Kalajdzic, "Access," *supra* note 14 at 237-50; Jasminka Kalajdzic, "Consumer (In)Justice: Reflections on Canadian Consumer Class Actions" (2011) 50 Can Bus LJ 356; E Rebecca Potter and Natasha Razack, *"Cy Pres* Awards in Canadian Class Actions: A Critical Interrogation of What is Meant by 'As Near As Possible'" (2010) 6(2) Can Class Action Rev 297; Christina Sgro, "The Doctrine of Cy Près In Ontario Class Actions: Toward A Consistent, Principled, And Transparent Approach" (2011) 7(2) Can Class Action Rev 265.

[51] Done properly, cy près can provide an indirect benefit to the class. An example of a distribution with a nexus to the class members and their cause of action is *Sutherland*, *supra* note 25. The case involved 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.

> 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.[52]

When is it not economically feasible to locate or distribute settlement money to class members? The case law provides no rule of thumb, let alone a definitive test. Rarely is there an indication in the various cases as to what evidence, if any, was led regarding efforts to locate class members or the cost of directing compensation to them.[53] There has been virtually no discussion about whether approximate amounts, as opposed to calculations of individual losses, could be distributed to class members to overcome the expense of costly assessments.[54] And in no decision that I could find did the court seriously question the parties' assertion that a direct benefit could not be paid to class members. While it may be the case that such questioning did occur at the settlement approval hearing, the absence of any discussion in the reasons for decision of the evidence led or submissions gives observers little comfort that it is truly impossible to direct the benefits of the settlement to the class.

Assuming the necessity of a fixed cy près payment can be established, the second question – to whom should it be paid – also merits close scrutiny in order to give effect to the purposes of class actions statutes. As mentioned above, the statutes provide that courts are empowered to order all or part of an aggregate award be distributed "in any manner that may reasonably be expected to benefit class members."[55] The compensatory function of class actions embodied by this provision belies the argument, made by some academics, that behaviour modification alone justifies a class proceeding and it is therefore not important to whom money is paid

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52 Kalajdzic, "Access," *supra* note 14 at 243.

53 *Alfresh Beverages*, *supra* note 13 is an exception. There, three expert economists gave evidence on the question of the impracticability of locating class members.

54 Kalajdzic, "Access," *supra* note 14 at 243.

55 See e.g. *CPA*, *supra* note 22, s 26(4).

so long as the defendant pays it.[56] If compensation is an objective, then the identity of the cy près recipient matters.

These questions are important not only for purely academic reasons. How and why significant sums of money are paid out with the imprimatur of our courts is a matter of public interest, not least because the money ostensibly belongs not to corporate defendants but to the individuals they harmed. As stated earlier, it is virtually impossible to determine how much money has been distributed as a result of residual cy près clauses, because information about take up rates in the claims process are infrequently requested by the courts. What we can determine, however, is approximately how much money has been distributed pursuant to fixed cy près clauses, because the amounts at issue are almost always disclosed to the court in the context of the settlement approval hearing. To what extent is the cy près tool being utilized in Canada, in either its fixed or residual form? Is there an apparent nexus between the recipients and the class members? What follows is a summary of the data collected about cy près provisions in class actions spanning more than a decade.

4. An Empirical Account of Cy Près Distributions in Canada

The extent of cy près use in class actions has been documented only in passing. There is no method for determining the number of class actions in which funds have been distributed with 100 per cent accuracy. Although some information is publicly available, not all class action settlement decisions are published. A large-scale survey of all lawyers conducting class actions in Canada would likely fill in many of the gaps in publicly available information; still, self-reporting has its limits and does not guarantee accuracy of data. In the absence of such large-scale qualitative research, I focused my empirical study on legal databases, law firm websites and other internet-based sources.[57]

There is no registry or other accurate record of class action settlements in Canada.[58] The number and quantum of cy près distributions pursuant to

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[56] Berryman, *supra* note 36; Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law Book, 2003) [Jones, *Theory*].

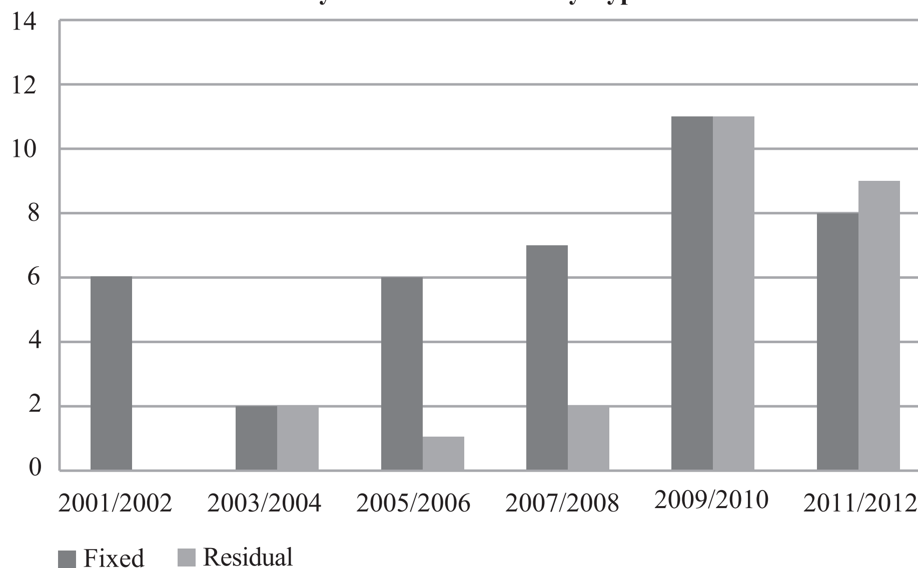
[57] My research students and I mined CanLII, SOQUIJ, QuickLaw and Westlaw for reported decisions that included the search terms "cy pres" and "class action," along with their variations, as well as the applicable provisions of Quebec's Civil Code, articles 1033, 1034 and 1036. We also searched "cy pres" and "class actions" on Google along with general terms like "charity" and "recipient." We then looked for unreported decisions on twenty-four individual law firm websites.

[58] The Canadian Bar Association's National Class Action Database is of recent vintage, and despite practice directions which require counsel to file statements of claim with the Database when a proposed class action is commenced, not all counsel do so. In

class action settlements, therefore, are not readily ascertainable. The focus of this study has been to collect as much information as is publicly available about the frequency with which counsel are using both fixed and residual cy près distributions. A chart listing all Canadian cases with cy près provisions for the twelve-year period ending in 2012, including the identity of the recipients and the quantum of the payment where known, is appended to this paper.[59] The information collected is summarized in the following table:

Table A

Cy Près Distributions by Type



From 2001 to 2012, cy près distributions have been approved in at least 65 class actions, the vast majority of them in the past decade. Of these 65 cases, 40 contemplate a fixed cy près distribution, and 25 provide for a residual cy près.[60] It is important to note that it is almost certain many more than 25 settlements contain residual cy près clauses. Not all settlements are reported on CanLII or other databases, and even where the judge's approval of the settlement is reported, a residual cy près clause rarely attracts much judicial discussion. A reported class action settlement, therefore, may well contemplate the residue being paid to a charity, without "cy près" being mentioned in the reasons for decision. Assuming that roughly 65 cy près awards have been made, however, Canadian class action practitioners are using the fixed cy près device much more frequently than their American counterparts. According to one American

any event, lawyers generally do not indicate on the Database whether a class action has concluded or on what terms.

59 See Appendix A.

60 Where a settlement provides for both fixed and residual cy près distributions, the case was counted only once for our tally, as a fixed cy près case.

study, fixed cy près awards comprise only 25% of all cy près distributions in Federal class actions.[61]

The Canadian data reveals a number of other interesting points:

- Cy près awards are most popular in class action settlements approved in Ontario. This fact is not surprising insofar as national classes are usually Ontario actions, and class actions have the longest pedigree in Ontario as compared to the rest of English-speaking Canada. Residual cy près distributions are contemplated by Art. 1033, 1034 and 1036 of Quebec's Civil Code but few reported decisions were available.[62]

- The amounts distributed to charities vary greatly. The fixed cy près distributions ranged from approximately $17,000 to $28 million. It is not possible to know the sums distributed by way of residual cy près based on public documents; only class counsel or claims administrators possess this information.

- The organizations receiving these monies also vary greatly. Hospitals are popular recipients, as are medical research facilities, public education organizations, and national charitable foundations (the Heart and Stroke, Cancer and Arthritis Foundations, for example).

- Multiple charitable organizations were often identified to receive portions of a single cy près award in settlements approved between 2000 and 2010. In the past three years, it has become more common for a single recipient or a handful of charities to be identified. This may be due to the creation of the Access to Justice Fund by the Law Foundation of Ontario,[63] which obviates the need for class and defence counsel to identify a variety of organizations or initiatives. The Access to Justice Fund itself supports a variety of projects.

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61 Redish, *supra* note 2 at 657.

62 Several unreported decisions were discovered in footnotes to the *D'Urzo* decision, *supra* note 33 and in *Stieber c Joseph Elié ltée*, 2009 QCCS 2498, [2009] QJ No 8228 (QL), leading the author to conclude that residual cy près distributions are not uncommon in Quebec, just unreported.

63 The Law Foundation created the Access to Justice Fund in 2009 after receiving a $14.6 million cy près award in *Cassano*, supra note 15. It is a permanent fund and has since received five more cy près awards: <http://www.lawfoundation.on.ca/what-we-do/access-to-justice-fund-cy-pres/>. Most recently, it received almost $3 million in the winding up of the Bre-X class action; *Carom, supra* note 47.

- The number of fixed cy près cases remained relatively consistent between 2009 and 2011. In 2011 seven class action settlements containing fixed cy près awards were approved, and in each of 2010 and 2009, six such settlements were approved. These numbers are comparable to rates in US federal courts, which have approved an average of roughly eight cy près awards per year since 2001.[64] In 2012, however, only one fixed cy près distribution was reported in Canada, compared to seven awards the previous year.

- Not including residual cy près distributions, which cannot be quantified based on a review of settlement agreements alone,[65] roughly $100 million has been given to charitable organizations and other non-profit institutions pursuant to class action settlements over the last decade. These are funds theoretically owed by defendants to class members.

- The fixed cy près awards resulted mainly from *Competition Act* claims and actions against banks regarding credit card terms. This is not surprising given that in both of these types of cases, consumer losses are small per capita and the class is very large. In addition, purchasers who make up the class in *Competition Act* claims may be unidentifiable unless and until they make a claim on the settlement, and the cost of locating them, therefore, may be high.

The cy près device, therefore, has become commonplace in class action settlements, with significant sums of money being distributed. *When* distributions will be made to third parties instead of to class members is largely the decision of plaintiffs’ and defence counsel. *To whom* they shall be paid is also a private matter between counsel for the parties, the defendants and, in some cases, the settlement hearing judge. The policy implications of this privatized form of distributive justice merit closer attention.

5. Policy Concerns

In the Redish article, three discrete critiques of cy près awards are offered. First, the authors argue that the class action cy près doctrine “unconstitutionally transforms the judicial process from a bilateral private

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64 Redish, *supra* note 1 at 653.

65 In order to get an accurate total of all monies distributed cy près pursuant to class actions, one would need access to administrators’ reports or information provided by class counsel to the courts about the administration of a settlement. Many, if not most, judges, however, do not require that counsel report back to the court with such information.

adjudicatory model into a trilateral process" involving an uninjured third party (the cy près beneficiary), in violation of the "case-or-controversy" requirement under Article III of the US Constitution.[66] Such a constitutional argument is peculiar to the US Constitution and has no precise correlative in Canadian jurisprudence. Outside of constitutional law, there are legal concepts of standing and mootness which require that there be a live controversy for a case to be justiciable. It is, in my view, over-reaching to suggest that a class action in which damages are not easily quantified or distributed undermines the court's adjudicative function to constitutionally impermissible levels.

Second, Redish argues that procedural due process is imperiled because class attorneys are disincentivized from vigorously pursuing individualized relief for the class members. Even where no actual prejudice occurs, the existence of the temptation to ignore one's duties to the client is a breach of due process.[67] This concern also does not map onto the Canadian terrain as a constitutional or administrative law procedural fairness principle; however, it finds some analogies in the Rules of Professional Conduct which mandate duties of utmost loyalty to one's client as well as the avoidance of conflict of interest. Still, this objection begs the question as to whether a settlement involving a significant cy près distribution is ever a reasonable resolution negotiated by a zealous advocate for the class. Some cy près settlements may indeed have been the result of a pitched battle between plaintiffs and defendants in which payment to a charitable organization was the only feasible option. In addition, in the realm of class actions, the temptations to prefer one's own interests abound, and are mediated by the requirement of judicial oversight.[68] The conflict of interest problems in cy près settlements are simply of a different kind, but not of a different order, than any of the other ethical issues in class actions, and cannot by themselves delegitimize cy près distributions.

It is the third argument that is most apposite in the Canadian context. Redish and his colleagues posit that the use of cy près illegitimately transforms enforcement of the underlying substantive law (the laws that are alleged to have been breached by the defendant) from a compensatory framework into the practical equivalent of a civil fine.[69] Put differently, if,

66 Redish, *supra* note 1 at 641-42.

67 *Ibid* at 650.

68 Jasminka Kalajdzic, "Self-Interest, Public Interest and the Interests of the Absent Client: Legal Ethics and Class Acton Praxis" (2011) 49:2 Osgoode Hall LJ 1.

69 Redish, *supra* note 1 at 644-646.

as the courts have repeatedly stated,[70] the class action is only a procedural device that does not alter the substantive law, has the payment of settlement monies to non-parties expanded the remedial choices normally available to a wronged party under either the common law or statute? If fixed cy près awards are being granted, thereby depriving class members from even the opportunity of claiming their share of the funds paid by the defendants, have courts replaced the compensatory function of class action litigation with a civil fine model that is unavailable in any other litigation procedure?

That cy près is only used in class action litigation does not by itself delegitimize the use of the device. After all, it is not surprising that such distributions do not arise in regular litigation; in ordinary binary lawsuits the named parties are before the court and there is no difficulty, therefore, in identifying the recipients of the settlement proceeds.

The normative questions about the legitimacy of this alternative remedial move remain. These various questions can be reduced to one: can deterrence alone justify a class action? Although the OLRC thought not, preferring instead the view that deterrence is an inevitable but important by-product of class actions,[71] there is some academic support for class actions performing solely a deterrence function. Craig Jones has argued that the "main goal of the class action is deterrence; that is, to reduce the systemic risks of business activity to a socially optimal level."[72] Jeff Berryman and Robyn Carroll have also argued that "all legal systems have behavioural modification as a pervasive concern" and that the fixation on compensation as the sole aim of private litigation is neither intellectually defensible nor factually accurate.[73]

Unlike US courts, which have expressed a lack of sympathy for the argument,[74] there may, in fact, be some support for the deterrence-only

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70 See e.g. *Bisaillon v Concordia University*, 2006 SCC 19 at paras 17-22, 1 SCR 666; *Hollick v Toronto (City),* 2001 SCC 68 at para 14, 3 SCR 158; *Hislop v Canada (Attorney General),* 2009 ONCA 354 at para 57, 95 OR (3d) 81, leave to appeal to SCC refused, [2009] SCCA No 264.

71 *OLRC Report*, *supra* note 11 at 145.

72 Craig Jones, "The Class Action as Public Law," in Janet Walker, ed, *Class Actions in Canada* (Emond Montgomery, 2014) at 29; see also Jones, *Theory*, *supra* note 56.

73 Jeff Berryman and Robyn Carroll, "Cy- près as a Class Action Remedy – Justly Maligned or Just Misunderstood?" in Kit Barker and Darryn Jensen, eds, *Private Law: Key Encounters with Public Law* (Cambridge: Cambridge University Press, 2013).

74 *Marek, supra* note 5 (*per* Chief Justice Roberts). See also *In re Thornburg Mortgage Inc Securities Litigation*, 2012 US Dist LEXIS 170875 at 24 (class actions are not "free-standing device(s) to do justice").

function of class actions within our own Supreme Court. In *Sun-Rype Products v Archer Daniels Midland Company*, a price-fixing case decided in October 2013, the majority acknowledged that the difficulty of distributing damages to indirect purchasers frustrated the compensation goal of Canadian competition laws.[75] Nevertheless, "[w]hile *cy-pres* distributions may not appeal to some on a policy basis, this method of distributing settlement proceeds or damage awards is contemplated by the [British Columbia] *CPA*, at s. 34(1)."[76] The majority then cited the BC equivalent of Ontario's section 26, pointed out that nine other approved indirect purchaser settlements involved cy près distributions, and stated that, while "not the ideal mode of distribution, it allows the court to disburse the money to an appropriate substitute for the class members themselves."[77] For the latter proposition, the majority cited an American law review piece that, ironically, is critical of cy près distributions, and that recommends judges not be permitted to approve them.[78]

While the inevitable absence of direct compensation to the class was not sufficient to preclude the initiation of a class action, the lack of evidence demonstrating that two or more persons could prove a loss at the hands of the defendants was fatal to certification in the *Sun-Rype* case.[79] The plaintiffs could not prove that they had purchased products containing the ingredient that was the subject of the alleged price-fixing scheme. The two dissenting justices would have allowed certification anyway, on the basis that aggregate damages caused by the defendants' conduct *could* be established, and that the deterrence function of litigation, taken at its purest, justified the action:

> Behaviour modification is an important goal, especially in price-fixing cases. While class proceedings are clearly intended to create a more efficient means of recovery for plaintiffs who have suffered harm, there are strong reasons to conclude that class proceedings are not limited to such actions. As I detail below, the CPA is designed to permit a means of recovery for the benefit of the class as a whole, without proof of individual loss, even where it is difficult to establish class membership. Thus, if no individual seeks an individual remedy, it will not be necessary to prove individual loss. Such class actions permit the disgorgement of unlawful gains and serve not only the purposes of enhance access to justice and judicial economy, but also the broader

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75 2013 SCC 58 at paras 24-27, 3 SCR 545 [*Sun-Rype*].

76 *Ibid* at para 25.

77 *Ibid* at para 26.

78 Daniel Blynn, "Cy Pres Distributions: Ethics & Reform" (2012) 25 Geo J Legal Ethics 435. Blynn, a law student, argues that judges are susceptible to corruption and improper influence in being asked to approve donations to organizations that may benefit judges themselves.

79 *Sun-Rype*, *supra* note 75 at paras 62-73.

> purpose of behaviour modification. Therefore, I am not persuaded that it is a prerequisite that individual members of the class can ultimately prove individual harm.[80]

In the dissenters' view, individuals need not prove individual harm, because individual compensation is not the raison-d'être of the litigation to begin with. Deterrence alone *can* justify a class action.

The majority, however, was not prepared to adopt this fairly radical worldview. To say that behaviour modification is an objective of class actions does not mean that the promise of deterrence is a sufficient justification for proceeding as a class. In the words of Rothstein J: "[T]he circumstances here demonstrate that class proceedings are not always the appropriate means of addressing behaviour modification. In cases in which loss or damage due to price-fixing cannot be proven, the appropriate recourse may be for the Commissioner of Competition to charge the defendants under the *Competition Act*."[81] The majority, it seems, was not prepared to accept the complete outsourcing of the public law function of regulatory bodies to private entrepreneurial lawyers.

If deterrence alone is the function of class proceedings, as the dissenting judges in *Sun-Rype* suggested, then much of the class action procedural apparatus would need to be revisited. Why the fiction of a representative plaintiff if the class is amorphous and no member, not even the representative plaintiff, will be expected to prove loss or receive compensation? If ensuring disgorgement of wrongful gains in the hands of the defendants is the primary focus, is much of the current certification test moot?[82] With compensation to class members no longer an objective, cy près distributions could well become the norm, rather than the exception.

But as the majority's more cautious approach to the pure deterrence theory of class actions exhibits, the "conversion" of our litigation model to a civil fine regime is not inevitable. Rather, the limited use of cy près – as a last resort, when compensation is truly not feasible, and when other regulatory oversight mechanisms fail – reflects a continued adherence to the traditional goals of our civil justice system, of which deterrence is but one aim.

For this reason, I propose that our courts strictly scrutinize the threshold question as to when direct compensation is truly not feasible.

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80 *Ibid* at para 97 (*per* Karakatsanis J).

81 *Ibid* at para 79 (*per* Rothstein J).

82 Jasminka Kalajdzic, "Public Goals by Private Means, & Public Actors Protecting Private Interests: A Response to Professor Jones" (2013) 53 Can Bus LJ 371.

Judges must hold both plaintiff and defence counsel's feet to the fire; what efforts were made to locate class members, or distribute funds to them efficiently? Assuming the judge is satisfied that it is impossible or economically unfeasible to compensate all class members, is cy près the appropriate alternative? In the context of residual cy près, perhaps courts have been too quick to dismiss pro rata apportionment of residue to the class members who have successfully claimed a share of the settlement proceeds.[83] After all, it is rarely the case that claimants receive 100 per cent of their losses in a settlement claims process. Is a top-up of those losses as good a policy decision, or even better, than a cy près distribution to an uninjured third party?

There will also be situations where it is known at the outset of the claims process (or perhaps, at the outset of the litigation) that class members will not be identifiable or individual loss will be incalculable. The paradigmatic example of such a case is the price-fixing scenario. Indeed, the empirical data described in Part 4, above, confirms that *Competition Act* cases comprise the largest proportion of fixed cy près class action settlements in Canada. The majority in *Sun-Rype*, also a *Competition Act* claim, suggested that in cases where it is clear that individual loss cannot be proven, prosecutions by a regulatory body would be more appropriate.[84] Plaintiffs' counsel will respond that regulatory inefficacy is what makes private litigation necessary; regulatory bodies are underfunded or understaffed and simply not as effective as the private bar in holding corporate wrongdoers to account.[85] In such a situation, a denial of certification or a rejection of a cy près settlement because of the impossibility of quantifying individual loss may not be defensible from a policy perspective. But if the goal is deterrence, and private litigation is in a symbiotic relationship with public regulators as has been suggested by our courts,[86] then should cy près distributions in cases where individual

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83 There are examples of pro rata apportionment of either residue or amounts due to class members that are too small to distribute. See e.g. the Plan of Allocation in the Arctic Glacier class action settlement, online: <http://www.classaction.ca/CMSFiles/PDF/Securities/Arctic/Plan%20of%20Allocation.pdf>.

84 *Sun-Rype*, *supra* note 75 at para 79.

85 There is some empirical data to support this assertion in the securities field; see Stephen J Choi and AC Pritchard, "SEC Investigations and Securities Class Actions: An Empirical Comparison," U Michigan Law & Econ Research Paper No 12-022 (Jan. 20, 2014), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109739>. Note, however, that an empirical study in Australia confirms that the financial ombudsman there provided faster and cheaper redress to consumers than traditional class action litigation; see Vicki Waye and Vince Morabito, "Collective Forms of Consumer Redress: Financial Ombudsman Service Case Study" (2012), 12 J Corp L Stud 1.

86 *AIC Limited v Fischer*, 2013 SCC 69 at para 63, 3 SCR 949, aff'g 2012 ONCA 47 at para 54, 109 OR (3d) 498 ("The OSC proceedings and the civil action in the form

loss is incalculable be paid to the relevant regulatory bodies themselves, to help buttress their oversight mechanisms?[87] This is, after all, but a variation of the provisions in some class action statutes that permit settlement monies to escheat to the Crown, one that ensures a more direct benefit to the class than a payment to the general purse.[88]

6. Conclusion

Recent Canadian jurisprudence reflects a clear preference for the continued viability of class proceedings to achieve both of their prime functions: deterrence and compensation. Even in its recent decisions approving a liberal approach to class certification, however, the Supreme Court of Canada has raised the possibility that in some instances, the regulatory function of class actions may be better performed by the regulator itself. In this way, the majority in *Sun-Rype* expressed some discomfort with the notion of private litigation serving purely a deterrence function. In a recent decision denying certiorari, the Chief Justice of the US Supreme Court signaled a similar discomfort, by questioning the use of cy près settlements, and the roles of courts in approving them.[89]

Our approach to cy près tests our commitment to the compensatory function of civil litigation. A strict application of the requirement to distribute an award "in a manner that may reasonably be expected to

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of the proposed class proceeding are intended as parallel, not mutually exclusive, proceedings."); *Green v Canadian Imperial Bank of Commerce*, 2014 ONCA 90 at paras 38 and 65, 118 OR (3d) 641.

[87] I credit Dave Johnston (Class of 2015), a student in my class action seminar, for this perceptive suggestion.

[88] Express provisions permitting escheat to the Crown exist in the Manitoba and BC statutes, supra note 9. Another statutory alternative is the provisions or rules in several US states which specify that residual cy près payments must go to legal service organizations for the indigent or to support pro bono legal needs; see Emily Baker and Lynsey Barron, "Cy Pres … Say What? State Laws Governing Disbursement of Residual Class-Action Funds," online: <www.JonesDay.com: http://www.jonesday.com/files/Publication/d5da170f-e20d-4f96-aec1-12cf62115d70/Presentation/PublicationAttachment/fbbc24cf-ffcd-43ed-98ba-be026d39ef17/cypres2.pdf>. A similar provision has been recommended by the BC Law Society, supra note 9. There is a marked difference between cy près payments to such organizations as a matter of judicial discretion or counsel choice in the context of *existing* class action statutes, on the one hand, and as a matter of *legislative mandate*, on the other. My argument in this paper is that payments to non-parties where (a) direct compensation to class members is possible or (b) the payments will not "reasonably be expected to benefit class members" (to use the language of the Ontario Act), is not in accordance with the statutes. It is an entirely different matter if the Legislature expressly directs that residual or fixed cy près funds must go to a particular organization or support specific activities.

[89] *Marek*, *supra* note 4.

benefit some or all of the members of the class" where it has proved "impossible" to compensate individual class members directly,[90] signals a strong commitment to this normative goal. Unprincipled payments to third parties with no connection to the class members or the issues at the heart of the class action risk converting private litigation into civil penalties, as Redish and others have argued. While Redish's argument that cy près payments may be unconstitutional cannot be sustained in the Canadian legal context, resort to cy près when direct compensation is feasible is legally suspect as a matter of statutory interpretation.

How and why we use cy près is important not just from a normative perspective. As the empirical study described in this paper shows, cy près has become a common tool for resolving complex claims. At least $100 million has been distributed to date to third parties in fixed cy près settlements alone; an additional untold amount has been paid out pursuant to residual cy près awards. These are not defendants' funds, but rather monies that belong to litigants who have been harmed by defendants' conduct, and who, as members of the class, are relinquishing their rights to pursue the defendants individually. It is not money that has gone unclaimed by apathetic class members.[91] In the case of fixed cy près relief, it is money that class members are not given the opportunity to claim in the first instance at all. That counsel and judges should decide when and how to distribute class members' settlement monies to third parties in a principled fashion, with transparency and in keeping with the civil justice system's compensatory function, goes without saying. Failing this, the "illusion of compensation" risks becoming the certainty of injustice.

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[90] *OLRC Report*, *supra* note 7 at 581.

[91] Morrison and Rosenberg argue that low take-up rates in class action settlements signal "faux class actions" – those which class members have no interest in pursuing, and from which they will therefore not make any effort to claim their rightful share; see F Paul Morrison and Michael Rosenberg, "Missing in Action: An Analysis of Plaintiff Participation in Canadian Class Actions" (2011) 53 Sup Ct L Rev (2d) 97. Whatever the arguments for or against residual cy près in these circumstances, the "apathetic class member" argument does not apply to fixed cy près settlements.

APPENDIX A

CY PRÈS DISTRIBUTIONS IN CANADIAN CLASS ACTIONS

Year	Date	Case Name	Citation	Prov	Cy-près Recipient(s)	Distribution
2012	10/17/12	*Markson v MBNA Canada Bank*	2012 ONSC 5891	ON	Law Foundation's Access to Justice Fund (consumer rights theme mentioned)	Fixed [$500,000] and Residual
	8/14/12	*D'Urzo c Tnow Entertainment Group Inc*	2012 QCCS 3820	PQ	to be designated	Residual
	7/4/12	*Krajewski v TNOW Entertainment Group, Inc*	[2012] OJ No 3146	ON	not specified; to be designated	Residual [up to $500,000]
	5/8/12	*Helm v Toronto Hydro-Electric System Limited*	Court File No: CV-10-415780	ON	United Way Centraide Canada; Second Harvest; Red Door Family Shelter	Residual
	3/5/12	*Stieber c Joseph Elie ltee*	2009 QCCS 2498	PQ	Receiver General of Canada (with recommendation that amount be allocated to inspection section of Measurement Canada)	Residual [$59,860]
2011	12/15/11	*Moyle v Cash Money Cheque Cashing Inc*	[2011] OJ No 5821	ON	credit counseling non-profit, InCharge Debt Solutions Canada	Residual
	12/8/11	*Wein v Rogers Cable Communications Inc*	[2011] OJ No 5572	ON	Law Foundation of Ontario's Access to Justice Fund [consumer rights were identified by counsel in their proposal]	Fixed [$100,000]

Year	Date	Case Name	Citation	Prov	Cy-près Recipient(s)	Distribution
2011	11/30/11	*Baker Estate v Sony BMG Music (Canada) Inc*	[2011] OJ No 5791	ON	The settlement agreements contemplate a distribution of certain amounts which cannot be paid directly, either because the Class Members cannot be located or for other valid reasons provided for in the settlement agreements. An objective Canadian market share analysis will be undertaken and those Class Members with Canadian market share during periods of time specified within the settlement agreements will be paid a portion of the undistributed sums according to their market share allocation.	Residual
	11/30/11	*Voutour v Pfizer Canada Inc*	[2011] OJ No 5610	ON	45% to Arthritis Society, 45% to Women's College Hospital Foundation and 5% to Walrus Foundation	Residual
	10/13/11	*Elliott and Kormos v NovaGold Resources Inc*	Court File No CV - 09- 13833	ON	75% to not-for-profit organization designated by U.S. Lead Plaintiff and U.S. Lead Counsel; 25% to Law Foundation of Ontario's Access to Justice Fund	Residual
	9/12/11	*Windsor Glass Co v AGC Flat Glass North America Inc*	Court File No CV -08- 11573 (Windsor)	ON	Canadian Green Building Council (to fund promotion of an energy and environmental design green building rating system across Canada) and Habitat for Humanity Canada (to defray costs of purchasing glass products for its affordable and sustainable housing project builds).	Fixed [10% of net settlement amount or approx. $100,000]
	8/25/11	*Waheed v Pfizer Canada Inc [affiliated with Robin c Pfizer]*	2011 ONSC 5057	ON	To be proposed by class counsel once the claims deadline has passed, subject to court approval.	Residual

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2011	6/8/11	*Price v Mattel Inc [affiliated with Wiggins v Mattel]*	2011 QCCS 2906	PQ	Children's & Women's Health Centre of British Columbia in Vancouver, Hospital for Sick Children in Toronto, Children's Hospital of Eastern Ontario in Ottawa, Montreal Children's Hospital in Montreal, Maisonneuve Rosemont Hospital in St. Hubert, Quebec, Children's Hospital Foundation of Saskchatchewan	Fixed [$25,000]
	2/15/11	*EPDM Class Action - Waterville TG, Inc, R.N. Parton Ltd and Jean-Claude Fluet v DSM Elastomers Europe B.V. And DSM Copolymer, Inc*	settlement agreement available on Siskinds website	ON	AUTO21, Automobile Protection Association, Canadian Roofing Contractors' Association, London Community Foundation, and Habitat for Humanity	Fixed [$1.2 million (approx.)]
	5/31/11	*Griffin v Dell Canada Inc*	[2011] OJ No 2487	ON	children in hospitals and youth programs will get Dell computers for their education, training and recreational use	Fixed [$200,000 worth of Dell computers (at retail value) or where it is not practical to make equivalent cash donations to various Canadian children's hospitals and other youth programs in Canada]
	2/9/11	*Mortillaro v Unicash Franchising Inc*	[2011] OJ No 595	ON	InCharge Canada Debt Solutions or a similar credit counseling charity	Fixed [$50,000]
	1/7/11	*Serhan (Trustee of) v Johnson & Johnson*	[2011] OJ No 27	ON	Diabetic Monitoring Program, Compassionate Use Program, Public Awareness Program, Diabete Quebec for public awareness program	Fixed [$4,000,000]

Year	Date	Case Name	Citation	Prov	Cy-près Recipient(s)	Distribution
2010	11/12/10	*BC Ear Bank Class Action*	Court File No L050414	BC	Canadian Hard of Hearing, BC Branch, a not for profit organization, to fund a program called "Managing Hearing Loss, Speech Reading Course"	Fixed [$85,000 after deduction of legal fees, disbursements and taxes]
	10/29/10	*Skopit v BMO Nesbitt Burns Inc*	Court File # CV-10-15239	ON	Charities: Law Foundation of Ontario Access to Justice Fund – National; Law Society Foundation Feed the Hungry Program in Windsor, WindsorEssex Community Foundation, the Law Foundation of Ontario as the funder of a grant to study history of the Court of Appeal for Ontario, Simon Fraser University Faculty of Business, The Law Foundation of Ontario Access to Justice Fund, the Juvenile Diabetes Research Foundation	Fixed [for every recovery of a Class Member calculated that is less than $25 after deduction for Class Counsel Fees shall be paid by BMO NB by cy pres to the Charities]
	8/10/10	*Henault v Bear Lake Gold Ltd [decision pending]*	unreported	ON	Small Investors' Protection Association	Residual [any amount less than $40,000 left over]
	8/5/10	*Ainslie v Afexa Life Sciences Inc*	[2010] OJ No 3302	ON	not specified	Residual
	7/22/10	*Pichette v Toronto Hydro; Griffiths v Toronto Hydro-Electric*	[2010] OJ No 3185	ON	low income energy assistance programs	Fixed [$11,932,000 exclusive of legal fees and disbursements/GST/HST]
	5/26/10	*Ali Holdco v Archer Daniels [*affiliated case: Sun Rype Products Ltd v Archer Daniels Midland Company 2010 BCSC 472 [2010] BCJ No 630]*	[2010] OJ No 2511	ON	not identified	Residual

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2010	5/7/10	*John Doe and Jane Doe v The Scarborough Hospital*	Court File # CV - 311846CP	ON	Kidney Foundation of Canada to fund research into kidney-related diseases, promote healthcare access and provide education and support to individuals living with chronic kidney disease and increase public awareness of and commitment to kidney donation	Fixed $18,960 [474 uninfected class members x $40]
	5/3/10	*Ford v Degussa -Huls AG*	2010 ONSC 2787	ON	Chicken Farmers of Canada; the Canadian Pork Council; Food Banks Canada and Breakfast for Learning	Fixed [not specified however the entire settlement amount was $1.25 million]
	3/3/10	*Smith Estate v National Money Mart Co*	[2010] OJ No 873	ON	Access to Justice Fund of the Law Foundation of Ontario	Residual
	2/18/10	*Speevak v Canadian Imperial Bank of Commerce*	[2010] ON No 770	ON	Public Interest Advocacy Centre ["PIAC"]	Fixed [$100,000]
2009	10/1/09	*Lawrence v Atlas Cold Storage Holdings Inc*	[2009] OJ No 4067	ON	not specified	Residual
	8/24/09	*Farkas v Sunnybrook Women's College Health Science Centre*	Court file No 03-CV-259655CP	ON	Uonto Centre for Patient Safety; Support Prostate Cancer Patient Care and research funded by the Sunnybrook Health Sciences Centre Foundation	Residual
	8/13/09	*Bishay Estate v Maple Leaf Foods Inc*	2009 SKQB 326	SK	organizations whose purposes are children's causes, food and nutritional issues or food banks	Residual

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2009	8/10/09	*Fantl v Transamerica Life Canada*	[2009] OJ No 3366	ON	Heart and Stroke Foundation	Residual & Fixed [No compensation paid to Class Members whose entitlement is less than $50; these amounts paid to Heart and Stroke Foundation. Residue also paid cy près.]
	8/6/09	*Skopit v Merrill Lynch Canada Inc*	CV-09-13357 CP	ON	Canadian Cancer Society; Big Brothers and Big Sisters of Canada; UBC Business School; Windsor-Essex Human Society Shelter Expansion Fund; Assumption University Chair in Business Ethics and Law; Canadian Merit Scholarship Foundation; Big Brother and Big Sisters of Windsor; United Way of Windsor (Food Bank); Alzheimer Society of Windsor-Essex County); John McGivney Centre; Windsor-Essex Children's Aid Society Foundation; United Way of Canada	Fixed [$2,671,055]
	7/9/09	*Cassano v Toronto-Dominion Bank*	[2009] OJ No 2922	ON	Law Foundation of Ontario's Access to Justice Fund; the Social and Enterprise Development Innovations, a not-for-profit charitable organization to help administer activities through the Canadian Centre for Financial Literacy to improve the financial literacy of low-income and otherwise economically disadvantaged Canadians; the TD Financial Literacy Fund	Fixed [$28.4 million]

Year	**Date**	**Case Name**	**Citation**	**Prov**	**Cy-près Recipient(s)**	**Distribution**
2009	4/2/09	*Melvin v Maple Leaf Foods Inc*	[2009] JQ No 2790	PQ	not stipulated	Residual
	3/9/09	*Bilodeau v Maple Leaf Foods Inc (affiliated with Bishay Estate v Maple Leaf Foods Inc)*	[2009] OJ No 1006	ON	organizations whose purposes are children's causes, food and nutritional issues or food banks	Residual
	2/12/09	*Charles Trust (Trustees of) v Atlas Cold Storage Holdings Inc*	[2009] OJ No 4271	ON	not specified	Residual
	2/10/09	*Walker v Union Gas Ltd [affiliated with Garland v Enbridge Gas]*	[2009] OJ No 536	ON	Winter Warmth Fund [supply of Enbridge's gas to families in need]	Fixed [$5.4 million]
	1/23/09	*Meretsky v Bank of Nova Scotia*	[2009] OJ No 6375	ON	Lawyers' Feed the Hungry Program operated by the LSUC; Windsor & Essex County Cancer Centre Foundation, Toronto General Hospital Foundation for Thrombosis Treatment Program Fund; 90% of the balance of the Net Settlement Funds to Cancer Hospitals throughout Canada for cancer research and 10% of the Funds to the United Way in various provinces throughout Canada	Fixed [$10 million]
		Des Coteaux v Menu Foods [affiliated with Whiting v Menu Foods]	2009 QCCS 1865 [and Ontario 07-CV-329875 CP]	PQ	Provincial Societies for Prevention of Cruelty to Animals	Residual

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2009	1/23/09	*Georghiades v Scotia Capital Inc*	Windsor 03-CV-1982 (Sup. Ct.)	ON	Lawyers' Feed the Hungry Program; Pro Bono Law Ontario; Toronto Ronald MacDonald House; Pelletier Homes for Youth; Unity for Autism	Fixed [all class members with claims of less than $25 will have their funds distributed cy pres]
2008	11/28/08	*Kingsville Fire*	Not available/found on Sutts Strosberg website	ON	Kingsville Community Food Bank Association, Kingsville & Gosfield South Goodfellows Club and Kingsville Public School Breakfast Program	Fixed $17,364.87
	11/3/08	*Stastny v Southwestern Resources Corp and John G Paterson*	Court File No 07-CV-009525	ON	not stipulated	Residual [not stipulated]
	9/28/08	*Hydrogen Peroxide Class Action [Solvay, Degussa, Akzo]*	Court File No 47025	ON	Sentinel Bioactive Paper Network, Canadian Association of Food Banks, Invest in Kids	Fixed [6% of settlement funds]
	7/7/08	*Joachim Laferrière Électricien Inc c Cascades Groupe papiers fins Inc*	2008 QCCS 3219	PQ	United Way (Ontario and Quebec chapters), Retail Council of Canada (Ontario and Quebec members)	Fixed [$1,032,500] and Residual
		McColl v Whitehall-Robins Inc	[2008] OJ No 5311	ON	Canadian Heart and Stroke Foundation	Fixed [$200,000]
	7/2/08	*799376 Ontario Inc (Trustee of) v Cascades Fine Papers Group Inc [affiliated with Joachim c Cascades]*	[2008] OJ No 2671	ON	United Way (Ontario & Quebec chapters); Retail Council of Canada (Ontario & Quebec chapters)	Fixed [not stipulated]
2007	12/21/07	*Casselman v CIBC World Markets Inc and CIBC Investor Services Inc*	Court File # 04-CV-2352	ON	Canadian Breast Cancer Foundation	Fixed [$849, 347.33]

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2007	9/25/07	*Currie v McDonald's Restaurants of Canada Ltd*	[2007] OJ No 3622	ON	Ronald McDonald House Charities Foundation and the Canadian Association of Food Banks	Fixed [$650,000]
	1/1/07	*Davies v Clarington (Municipality)*	2006 CanLII 10212	ON	Pro Bono Law Ontario (to fund access to justice initiatives)	Residual [$19,500]
2006	11/2/06	*R.N. Parton Ltd v Bayer Inc*	2006 BCSC 1621	BC	not stipulated	Fixed [$128,780.62]
	10/13/06	*Elliott v Boliden Ltd [*affiliated with Pearson v Boliden]*	[2006] OJ No 4116	ON	Small Investors' Protection Association, Rotman School of Management of the University of Toronto, the Sauder School of Business at the University of British Columbia and the Consumers' Association of Canada	Fixed [$1,020,000]
	9/25/06	*Garland v Enbridge Gas Distribution Inc*	[2006] OJ No 4273	ON	Winter Warmth Fund	Fixed [$9 million]
2005	4/21/05	*Laferriere c Rhone - Poulenc Canada Inc*	[2005] JQ No 20609	PQ	Canadian Association of Goat Growers and Canadian Boer Goat Association	Residual
	12/1/05	*Corrugated Material Class Action [La Cie McCormick Co, Mark LeFrancois and South Vancouver Card Company*	agreement available on Siskinds website	ON	Tree Canada Foundation	Fixed [$75,000]
	3/23/05	*Ford et al v F Hoffman-La Roche Ltd et al [*affiliated with Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd]*	74 OR (3d) 758	ON	Agricultural Producers, Grocer/wholesalers/drug stores & pharmacies, consumer organizations for activities related to vitamin products such as food and nutritional research, education and food programs, consumer activities or consumer protection activities for the indirect benefit of consumers of all ages	Fixed $22.8 million [of a $140 million settlement]; part residual distribution for universities across Canada from the Direct Purchaser Fund

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2005	3/23/05	*Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd*	[2005] OJ No 1118, 74 O.R. (3d) 758, 12 CPC (6th) 226	ON	see Ford et al	Fixed [see Ford et al]
2004	10/7/04	*Gilbert v CIBC*	[2004] OJ No 4260	ON	United Way	Fixed [$1 million]
2003	12/22/03	*A&M Sod Supply Ltd v Akzo Nobel Chemicals BV*	Court File No 40300 CP	ON	Advanced Foods and Materials Network [AFMNet]	Residual
	4/7/03	*Newly Weds Foods Co v Pfizer Inc, Pfizer Canada Inc, Otsuka Chemical Co, Ltd*	Court File No 39495	ON	Breakfast for Learning [45%], Cosmetic Fragrance and Toiletry Association [45%]	Fixed [$113,400 plus interest and less class counsel fees, disbursements and costs of Notice]
	2/28/03	*Lysine Class Action*	not available/ found on Siskinds website	PQ	Boys and Girls Clubs of Canada; Santropol Roulant [8.3% of Remaining Funds], Le Regroupement des magasins Partage de L'Ile de Montreal – 8.3%, Moisson Montreal [8.3% and Breakfast for Learning [25%]	Residual [50% of remaining funds]
2002	4/9/02	*Sutherland v Boots Pharmaceutical*	[2002] OJ No 1361	ON	University Health Network, Hospital for Sick Children, Dalhousie University and University of Alberta, Centre for Research into Women's Health, Thyroid Foundation of Canada [used for specific research projects, education and outreach having to do with thyroid disease]	Fixed [$2.25 million]
	1/14/02	*Alfresh Beverages Canada Corp. v Hoechst AG [affiliated with Mura v Hoechst]*	16 CPC (5th) 301	ON	Consumers Association of Canada; Canadian Association of Food Banks; University of Guelph, Ontario Agricultural College; Canadian Federation of Independent Grocers; Canadian Council of Grocery Distributors	Fixed [approx. $800,000]

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2002		*Assn. coopérative d'économie familiale du Nord de Montréal c Hoechst Aktiengesellschaft,*	2002 CanLII 27413	PQ	Regroupement des Magasins Partage de l'Ile de Montreal (non-profit organization of 21 stores distributing food to persons in need]	Fixed [approx. 100,000]
	2002 [date unknown]	*Bona Foods v Pfizer settlement*	[2002] OJ No 5553	ON	3 organizations (not stipulated)	Fixed [$180,000]
2001	10/23/01	*Alfresh Beverages Canada Corp. v Archer Daniels Midland Co*	[2001] OJ No 6028	ON	Same organizations identifed in Alfresh v Hoechst, above.	Fixed [approximately $100,000]
	10/17/94	*Quebec (Curateur Public) c Syndicat National des employes de l'Hopital St-Ferdinand*	[1994] JQ no 848	PQ	Present and future patients of St. Ferdinand Mental Hospital	Fixed [$200,000]