ACCESS TO JUSTICE FOR THE MASSES?

A CRITICAL ANALYSIS OF CLASS ACTIONS IN ONTARIO

by

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 Judges and lawyers have embraced class proceedings as fulfilling an access to justice objective. In the more than fifteen years since the introduction of class proceedings legislation in Ontario, however, few have sought to evaluate whether or to what extent class actions have improved access to justice. The author begins to fill that void by first exploring various meanings of access to justice, and then examining in detail the initiation and settlement of class actions, and the controversial issue of counsel fees, using both doctrinal analysis and empirical data representing the class action practices of more than 75 plaintiff-side lawyers. She concludes that there are several aspects of class action practice and jurisprudence that fall short of advancing access to justice to its fullest extent, and calls for further socio-legal analysis to measure the impact, and evaluate the success, of class actions.
Acknowledgments

I am indebted to Professor Lorne Sossin for his guidance throughout this class action project; our conversations helped give shape to many nebulous ideas, and provided me with the necessary encouragement to plod on.

My research methodology took me out of the library and into the field, in the hope that I might find some much needed context for this and other discussions about class actions. I am therefore very grateful to the dozens of lawyers who provided valuable information and frank views on many aspects of class action practice. Protocol prevents me from naming counsel here, but they know who they are; their generous donation of time and their interest in expanding this field of knowledge represent some of the finest aspects of the bar.

Finally, I extend my heartfelt thanks to my family, without whom this project, and my dream of an academic career, would not have been realized. Thank you.
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INTRODUCTION AND OVERVIEW

Access to justice has been a dominant theme in legal discourse for decades. In Ontario, it has been described as today’s overarching issue in civil justice. It is a dominant theme in law reform initiatives and government programs. It has been posited as a human right, and confirmed as a constitutional right. In its more limited conception, it refers fundamentally to the range of institutional arrangements that enable people to access the justice system for the vindication of their rights. More broadly, it refers to participation in every institution “where law is debated, created, found, organized, administered, interpreted and applied.” It has generated a tremendous body of legal literature, yet its content remains fundamentally contested. Few would deny the importance of access to justice as a foundational principle in a liberal democracy, but how such a principle manifests itself “on the ground” elicits anything but unanimity. The focus of this

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1 Hon. Coulter A. Osborne, Q.C., Civil Justice Reform Project: Summary of Findings & Recommendations (November 22, 2007) at 4. Specifically, Justice Osborne found that “cost and delay (two related issues) continue to be cited nationally and provincially as formidable barriers that prevent average Canadians from accessing the civil justice system” (ibid. at 1).
2 Michael Trebilcock, Report of the Legal Aid Review 2008 (Toronto: Ministry of the Attorney-General, 2008), online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/ at section VI.
4 B.C.G.E.U. v. British Columbia (A.G.), [1998] 2 S.C.R. 214 at paras. 25-26 (“We have no doubt that the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens”).
7 See eg. Marc Galanter, “Access to Justice as a Moving Frontier” in J. Bass, W.A. Bogart & F. Zemans, eds., Access to Justice for a New Century, ibid. 147 at 150, 153 (observing that there are 361 books and periodicals with “access to justice” in their titles published in the last 25 years, and positing that “justice” is itself a “fluid, moving, and labile thing” that continues to expand.) See also Faisal Bhabha, “Book Review: Access to Justice as a Human Right” (2008) 24 W.R.L.S.I. 85 at 86 (referring to access to justice as “contested and emerging terrain”).
study will be on the relationship between access to justice and collective redress through the mechanism of class actions.

In 1993, the Ontario Legislature enacted legislation aimed at improving access to courts for redress of mass wrongs. The *Class Proceedings Act, 1992*\(^8\) codified the procedural framework within which representative litigation could be brought and conducted in the province. Ontario, the second province in the country to enact a class proceeding statute,\(^9\) proffered a very particular concept of access to justice. The CPA’s promise rests singularly on the potential for purely procedural tools to achieve greater social justice. By allowing the aggregation of claims, it provides litigants with access to the courts that would otherwise not be available to them. As one commentator put it, the class action is “[m]ore than a tool of convenience. It is entrusted with an explicitly social mission: to protect consumer rights, ensure access to justice, and sanction illicit institutional behaviour.”\(^10\)

Not all commentators agree that such lofty goals are achievable, or even appropriate. Detractors, from business representatives to economists to access to justice scholars, have sounded the alarm that with the advent of class actions, Canada is inheriting America’s litigious

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\(^8\) *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [“CPA”].


legacy and promoting a form of “litigation blackmail”.¹¹ In the popular press, class action litigation is sometimes seen as promoting greed amongst class counsel, and providing little for the class members they are meant to serve.

Fifteen years after coming into force, it is appropriate to revisit the aims of the CPA and evaluate its actual performance. As with jurisdictions all over the world, however, Ontario lacks empirical data by which to measure any of the pressing questions critics of class proceedings routinely raise. There is also a dearth of scholarly work in Canada regarding the ability of class proceedings to achieve not only access to a just procedure – the minimum aim of a wholly procedural statute – but also access to a just result.

In this paper, I aim to take stock of class actions in Ontario. In light of the enduring controversy surrounding the prevalence of class actions in the United States and an increasingly heated debate about the wisdom of adopting class proceeding legislation in various European jurisdictions, a rigorous assessment of the outcomes being produced by class actions in Ontario is timely. I propose to focus my analysis by reference to one of the three pillars of class actions: access to justice.

It is by now axiomatic that increased access to justice is a key objective of class proceedings.\textsuperscript{12} While the effectiveness of class proceedings to achieve the other two of the stated objectives is worthy of analysis,\textsuperscript{13} access to justice is a particularly important normative framework within which to evaluate class actions, in no small part because of the enduring importance of the access to justice debate within our civil system of justice. Although ubiquitous, the term requires closer examination. What do judges and lawyers mean when they talk about “access to justice”? What specific institutional and normative goals are class actions thought to achieve? And to what extent does the reality of the class action experience in Ontario measure up to its ambition?

In order to begin to answer these questions, I will explore both the dominant themes in the jurisprudence as they relate to access to justice concerns, and the practices of class counsel ‘on the ground’. In \textit{chapter one} I describe the methodology used in my research and summarize two case studies and the results of a survey distributed to 29 prominent members of the class action plaintiff bar. In \textit{chapter two} I review access to justice literature to unearth the various conceptions of access to justice that may be significant to class proceedings, and propose a “thick” concept of access to justice against which class action outcomes ought to be measured.

I will then turn, in successive chapters, to three distinct components of a typical class action which engage specific access to justice concerns: case selection; settlement (including subsidiary

\textsuperscript{12} Hollick v. Toronto (City), [2001] 3 S.C.R. 158 at para. 15. Judicial economy and deterrence of wrongful behaviour are the other two objectives.

\textsuperscript{13} For a theoretical analysis of Canadian class actions from a behaviour modification perspective, see C. Jones, \textit{Theory of Class Actions} (Toronto: Irwin Law, 2003).
issues of notice to the class and *cy près* settlements); and counsel fees. How proposed class actions are selected for prosecution is a little explored question, but nevertheless fundamental to understanding who gets access to the class action mechanism. Issues surrounding settlement also directly engage the question of the scope and nature of justice achieved. Finally, fees – the costs paid by class members for the legal services delivered by class counsel – are important for understanding not only the costs of justice in this context, but also the incentives that are created for counsel to pursue this form of litigation, as well.

In chapter three: Case Selection, I examine the criteria and methodologies used by class counsel to select prospective class actions, as reported in the survey results and qualitative interviews, followed by a discussion of the implications of these criteria for access to justice.

In chapter four: Settlements, I examine the criteria courts are using to determine a fair outcome, and explore the increasingly important issue of “take-up rates”. The take-up rates reported by class counsel in the survey provide an important empirical foundation for this discussion. In addition, I include a survey of the kinds of notice programs approved by Ontario courts in recent cases and in the two case studies, and a discussion of whether, if access to justice

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14 Noticeably absent from the list of class action elements to be explored is what some view as the pivotal moment in the life of a class action: the certification decision. Access to justice as a theme pervades all certification judgments. More is known about certification, however, than perhaps any other aspect of class proceedings. We know that the “vast majority” of proposed class actions are certified, and the criteria for certification are by now entrenched. There is no lack of literature on the topic of certification either. See e.g. Kirk M. Baert, “The Road Less Travelled By: Certification of Actions Under the Ontario Class Proceedings Act, 1992” in T. Archibald ed., *Annual Review of Civil Litigation* (Toronto: Thompson Canada Ltd., 2002) 115; D. Robertson, “The Problem with Preferable Procedure” (2005) 2 Can. Class Action Rev. 193; S. Fortini, “The Preferable Procedure Analysis in a Class Proceeding Certification Motion” (2004) 1 Can. Class Action Rev. 311. Far less is known about the considerations used to select cases, how they are financed, and to what extent class members are participating in the cases.
is understood as access to legal information, the current approach to notice fulfills the access to justice objective of the CPA. I also discuss a particular kind of settlement that is becoming more prevalent in Ontario: awards that are distributed to charities rather than paid directly to compensate class members.

A survey of the Canadian and American literature on counsel fees, considered by some commentators as the “lightning rod in the controversy over damage class actions,” is the focus of chapter five. Here, again, recent jurisprudence is critiqued, and scholarly literature on the topic in both Canada and the United States is explored for arguments and theories that help better understand the ways in which counsel fees are a critical feature of the access to justice goals of class proceedings.

In each chapter, both doctrinal and empirical approaches will be employed to explore the extent to which each element contributes to, or detracts from, the access to justice imperative. Specifically, the results of the survey and qualitative research will be used to provide a contextualized discussion of the class action jurisprudence.

In the Conclusion, I pull together these discussions of various aspects of class actions and offer an assessment of how class actions measure up in terms of the access to justice framework developed throughout the paper. In the end, I conclude that there are good reasons to doubt that

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16 Deborah Hensler et al., Class Action Dilemmas (Santa Monica: Rand Institute for Civil Justice, 2000) at 434.
class actions are fulfilling their access to justice potential, notwithstanding the many incidents of class action settlements for parties who would not otherwise have had the ability to litigate their claims. This is so for a number of reasons, including those that are definitional and evidentiary in nature. First, there is a very narrow understanding of the scope of the term “access to justice”, and second, there is a lack of information as to how class actions are operating on the ground.

A review of the leading cases confirms that access to justice has come to be viewed in its most limited sense as access to a court procedure when it would otherwise be too expensive to litigate. This approach is at odds with the bulk of the scholarly literature on the subject, which views barriers to justice as more complex than limited financial resources. The definition of access to justice adopted in this paper contemplates more than access to a court procedure. The term also invokes fundamental concepts like procedural fairness, a transparent process, and substantive justice, either by way of meaningful compensation to class members or the exposure and curbing of unlawful behaviour.

Evaluating class actions using this metric is difficult because of the lack of reliable, detailed and system-wide information. Very little is known, for example, about the substantive justice meted out in the class action regime. Information regarding take-up rates – a topic explored in this paper – is but one way of gauging the extent to which class members are participating in

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17 The same chronic information gaps exist in the U.S., though scholars there have been engaged in empirical studies in the class action context for at least two decades. For a detailed discussion of the state of empirical research on class actions, see Nicholas M. Pace, “Class Actions in the United States of America: An Overview of the Process and the Empirical Literature” (Report Prepared for the Globalization of Class Actions Conference, Oxford Univ., 13-14 December 2007) [unpublished], online: http://www.law.stanford.edu/display/images/dynamic/events_media/USA__National_Report.pdf.
settlements or distributions of damage awards. Few statistics are available regarding the results achieved in class proceedings. Similarly, little is known as to the kinds of cases class counsel are rejecting. Survey results on the criteria employed by class counsel in selecting and rejecting cases may help illuminate to whom access is being given; such qualitative information is but the beginning of an appreciation of the continuing barriers to justice for low to middle income Canadians to whom access is denied.

Ultimately, in this paper I aim to provide a contextualized approach to the evaluation of class proceedings, in which I am considering the statutory and jurisprudential dimensions of class actions, in addition to how they are actually conducted, financed and settled, and all with a view to better understanding the scope for class actions to improve access to justice. In doing so, the need for further research, particularly of an empirical nature, is highlighted. For this reason, a research agenda is suggested at the end of the paper.

While class actions are and should continue to be an important part of Ontario’s civil justice system, the assumption that all class actions further access to justice is misplaced. Complacency should be replaced with vigilance; there is a need to monitor class actions, both their conduct, oversight and outcomes, in order to ensure that the power of the class proceeding mechanism is harnessed to promote access to justice in the fullest sense. It is a project in which judges, lawyers, academics and public interest organizations each have a role to play. All are encouraged to think more critically about the access to justice goals they seek to serve when engaged in class action litigation.
Chapter 1
RESEARCH METHODOLOGY &
DATA SUMMARY

The aim of this thesis project is to study the initiation, conduct and resolution of class actions using doctrinal, qualitative and quantitative empirical approaches, and then to evaluate this class action experience against access to justice objectives. Close analysis of judicial approaches to such pivotal questions as effective notice, fairness of settlement proposals, and the reasonableness of counsel fees, is critical to evaluating the extent to which class actions are furthering access to justice. Such doctrinal analysis, however, is insufficient for measuring the impact and outcomes of class action litigation. For example, while judicial approaches to the test for certification are useful in understanding how the certification stage serves as a gatekeeper to the court system for prospective class members, certification decisions alone do not inform our understanding of which class actions are initiated, the criteria used by class counsel to determine which cases to pursue, and how funding from the Class Proceedings Fund impacts decisions to continue with, or abandon, class proceedings. In other words, doctrinal research alone cannot explain how class counsel and other actors operate as gatekeepers to the justice system.

For this reason, the research plan for this thesis contained significant empirical components. Data of both a qualitative and quantitative nature was collected principally via a

1 While it is true that denial of certification does not necessarily end the litigation for the named plaintiffs or preclude litigation by other individuals, the reality is that failure to certify almost always results in the termination of the litigation, and therefore the effective denial of access to the courts.

2 Quantitative methods help gain a better understanding of “what” is happening; qualitative methods help explain “why” events and outcomes occur.
written survey and follow-up interviews and correspondence, but was necessarily circumscribed by the time and resources at my disposal for a project of this kind. Given the preoccupation of access to justice literature with substantive outcomes and its ideological affinity with law and society scholarship, attention to the practices of lawyers and the experiences of class members is a natural focus for this paper. Thus, the three main research methods used were doctrinal; quantitative (survey data); and qualitative (interviews). 3

I. Primary and Secondary Sources

There is a growing body of scholarly literature in Canada on both access to justice and class actions. Roderick Macdonald, in his ambitious survey of access to justice in Canada published in 2003, referred to the literature as “enormous” and cited 18 government reports, treatises and conference papers dating back to the 1970s as the central works for a Canadian audience. 4 Canadian class action scholarship, on the other hand, is more recent, and largely confined to procedural and doctrinal analyses. 5 While some of the Canadian literature on class actions is critical of certain aspects of class actions, “none of these criticisms strike at the existence of class

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3 Some readers will recognize in this methodology the approach used by Deborah Hensler et al. in their three-year study of class actions for the Rand Institute for Civil Justice, a report eventually published in the highly regarded Class Action Dilemmas: Pursuing Public Goals for Private Gains (Santa Monica: Rand, 2000). I had decided to use a survey and case study approach to my research before I read Class Action Dilemmas; nevertheless, the book both confirmed the legitimacy of my methodology and served to identify possible areas for exploration in the survey.


5 Adam Dodek has also observed that Canadian literature on class actions is almost entirely published in a specialized journal on class actions as opposed to various law journals of a more general nature. See A. Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) 46 Osgoode Hall L.J. 1 at n. 166.
actions or their legitimacy,” in the way that much of the vast American class action scholarship could be characterized. Normative discussions about class actions are few and far between in the Canadian context. With over forty years of class action experience, American legal literature provides a fertile source of commentary on the policy issues raised in this paper, and will be examined for key articles. Despite the differences between our legal cultures, our class action regimes and the supervisory role of the courts share a number of key similarities; thus, many of the same critiques and policy debates explored by American scholars are applicable in the Canadian context.

There is, as well, considerable case law in Ontario and at the Supreme Court of Canada on various aspects of class proceedings. I will explore this jurisprudence for insights into the meaning of access to justice explicit and implicit in judicial approaches to various aspects of class actions.

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8 For a notable exception see Craig Jones, Theory of Class Actions (Toronto: Irwin Law, 2003).

9 Professor Bogart, for example, has identified the United States as an “outlier” in terms of its reliance on courts and litigation for regulating a wide array of important social, economic and political issues: W.A. Bogart, Consequences: The Impact of Law and its Complexity (Toronto: U of T Press, 2002) at 112-153. On the other hand, American scholars conducting socio-legal research contest the notion that American culture is ‘hyper-litigious’; see e.g. Marc Galanter, “The Day After the Litigation Explosion” (1986) 46 Maryland L. Rev. 1; Deborah Hensler et al., Compensation for Accidental Injuries in the United States (1991), both as cited in Deborah Hensler, “Reflections on the Use of Empirical Research in Legal Policy Reform” (2003-2004) 7 Newcastle L. Rev. 1 at 12.
will also review and analyze the current law relevant to each of the three ‘events’ being examined in the paper.

II. **Survey & Interviews**

With respect to quantitative and qualitative methodology, in early 2009 I created and distributed a short survey,\(^{10}\) comprised of 17 questions, to 29 leading plaintiffs’ class counsel across the country. The aim of the survey was to collect data on: the number and nature of class actions pending at each firm; the selection criteria employed by class action lawyers before initiating a claim; the impact of funding from the Class Proceedings Fund; and the take-up rates in settled actions. These questions could only be answered by plaintiff-side class action lawyers.

Interviews with defence counsel would be fruitful for other kinds of information, especially about the structuring of settlements, views about class counsel fees, and the perceived impact of class action litigation on corporate behaviour. For the purposes of measuring class actions using an access to justice metric, however, I deemed it most important to gather information from the lawyers who are perceived to drive class actions.

Similarly, it would also be very useful to collect data from class members themselves. How individuals experience the litigation process and what value they see as having been derived from it – monetary or otherwise – is important in a comprehensive, equality-oriented approach to

\(^{10}\) The survey is attached as Appendix A.
accessing justice and empowering citizens through the law.\textsuperscript{11} However, leaving aside the question of whether class actions are designed to empower or advance equality objectives, identifying and contacting class members presents practical and ethical difficulties. For the purposes of the current research project, therefore, with one exception,\textsuperscript{12} class counsel alone were targeted for the collection of empirical data.

Lawyers were selected using a variety of techniques: from the headnotes of recent decisions on class actions cited in the Quicklaw database; from an internet search of current pending class actions; and from my own personal knowledge of the plaintiffs’ bar as a former plaintiffs’ class action lawyer.\textsuperscript{13} The class counsel survey was sent by email and post to 29 lawyers at 21 law firms.\textsuperscript{14} Ten of the firms are situated in Ontario, five in Quebec, three in British Columbia, two in the Maritimes and one in Saskatchewan.\textsuperscript{15} Fifteen completed surveys were returned, but several surveys incorporated the responses of more than one recipient of the survey. Thus, of the 29 lawyers who were sent the survey, information has been received from 21 lawyers, for an


\textsuperscript{12} The exception is an interview conducted of a lawyer representing an objecting class member in the Atlas class action. See chapter 5, below.

\textsuperscript{13} I was a litigation lawyer at Sutts, Strosberg LLP law firm in Windsor, Ontario for ten years, until I left the firm in the spring of 2008. My practice focussed on class actions for most of that time. In this thesis paper, unless otherwise expressly noted, I do not report on any of the class actions in which I was involved while in private practice, nor do I discuss any facts about that firm’s class actions that are not otherwise in the public domain.

\textsuperscript{14} For the most part, surveys were sent to only one lawyer at a given law firm. In some cases, however, surveys were sent to more than one lawyer at a single firm, on the basis that the large number of class actions emanating from the particular firm likely meant no one lawyer worked on every action.

\textsuperscript{15} One of the firms has offices and active class action practices both in Ontario and British Columbia. The responding lawyer works in Ontario, and I have therefore counted the law firm in question as an Ontario firm for the purposes of this grouping.
effective rate of return of 72%. In addition, several responding lawyers reported on the class action activity for their entire firm (not just those cases in which the reporting lawyer was involved, and on behalf of lawyers to whom a survey had not been sent). Consequently, the survey data actually reflects the class action activity of approximately 77 class action lawyers, working in 13 firms.

While the sample group may not be large enough to be statistically significant, the responses provide a foundation for discussing key issues, particularly those in chapters 3: Selection and 4: Settlements. Moreover, any study that relies on self-reporting has limitations, particularly in terms of verifying the accuracy of the responses given. Based on the time taken by many respondents to prepare answers to the survey, and in light of the promise that results would be reported anonymously, I believe that for the most part the respondents were honest in their self-reporting. In any event, despite the limitations of self-reporting, cumulative responses do give a more comprehensive view of the state of affairs than has been collected to date. Equally important, the responses provide a basis not only for testing commonly held hypotheses about class action practices, but also for exploring possible behavioural patterns that are only beginning to emerge in the field.

This quantitative research was then supplemented by face to face and telephone interviews, and written correspondence between me and several respondents. After receiving and

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16 The number of lawyers doing plaintiff-side class action work in Canada is unknown. It is difficult to estimate, therefore, what proportion of the universe of plaintiffs’ class action lawyers is represented in this study, although 77 lawyers is likely a considerable number of them.
analyzing the completed surveys, I followed up with eight of the respondents to clarify and expand upon points raised in their survey responses. Three lawyers also contacted me at their initiative, to discuss aspects of the survey. This interaction enriched the data set, provided a check on my own unstated assumptions about class action practice, and ensured that I was not forcing preconceived ideas onto the collected data. All of the information gleaned from both the survey results and the interviews will be cited where relevant in the ensuing chapters.

a. Ethics

Ethics approval was sought and obtained from the University of Toronto’s Research Ethics Committee. Because the recipients of the survey and the proposed interview subjects were all lawyers and therefore not vulnerable, and because confidential or sensitive information was not solicited, expedited approval from the Ethics Committee was obtained. Conditions for approval included the maintenance of the confidentiality of the respondents’ identities and the safekeeping of the completed surveys.

Another aspect of the research raised ethical considerations of a different sort. As a former plaintiff-side class action lawyer, I had to be constantly vigilant about any perceived or actual bias that might manifest itself in my analysis of the collected data. Research Ethics Approval provided some assurance of neutrality. It was important for me, however, to be continually self-reflective and to question to what extent, if any, conclusions drawn from the data were influenced by my own experience at the bar.
The corollary of my previous experience in the class action field was that I enjoyed a rather unique level of access to and trust from class action counsel. To what extent the high degree of respondent participation in the survey can be attributed to my former membership in a rather small legal community is unknown, but my sense is that at the very least, it did not impede my ability to negotiate access to lawyers and their documents.

**b. Survey Results**

A chart summarizing the information obtained from all respondents is attached as Appendix B. I did not use any coding software to analyze the data; rather, I reviewed and organized the survey responses by hand. What follows is a description of the highlights of the survey responses. The implications of these results will be explored in the ensuing chapters.

*Numbers of Class Actions*

Respondents reported a total of approximately 332 class actions pending as of the spring of 2009. The survey confirms what has long been suggested in the literature and case law: there is a concentration of class action litigation among a few firms across the country. Four firms participating in the survey (three in Ontario, one in Western Canada) each have over forty claims currently pending.

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17 An approximate number is given because one of the respondents, a firm with over 40 pending actions, could only provide an estimate of the number of its current cases (50). All other respondents provided precise figures.
Types of Class Actions

Survey recipients were asked to categorize the kinds of cases currently pending from a list of choices. As illustrated in Figure 1, in total numbers, defective drug and medical device cases (at 60 actions) accounted for the most actions in a single category, followed closely by price-fixing and other Competition Act claims (41). Product liability (38), securities actions (37), and consumer actions\(^\text{18}\) (32) were the next most popular categories of cases. Mass tort\(^\text{19}\) (29), pensions (26), environmental (18), tainted food (11) and employment (9) actions rounded out the survey. In addition, an “other” category option was given, and 31 cases were included in this category. Respondents specified that “other” included institutional abuse cases and breach of contract/fiduciary duty claims.

\(^{18}\) The consumer category was described as actions involving criminal interest, fees and currency exchange rates.

\(^{19}\) These were defined as personal injury cases.
Initiation of Claims

The literature and jurisprudence is replete with references to entrepreneurial lawyers, who conceive and drive class action litigation unrestrained by client instructions. It is the entrepreneurial conduct of class counsel, however, which gives life to class proceedings. As one judge put it: “The entrepreneurial nature of a class proceeding can be a good thing because it may be the vehicle for access to justice, judicial economy, and behaviour modification, which are the...
driving policy goals of the *Class Proceedings Act, 1992.*" Given the centrality of the lawyer as entrepreneur paradigm, the survey included several questions relating to the selection process engaged in by class counsel, who investigate potential claims and ultimately determine whether to bring a class proceeding.

Respondents were asked to identify how pending actions had been initiated from a list of choices: at the instigation of a client; by referral from another firm or a third party; as a result of regulatory investigation; by virtue of a U.S. action against the same defendant (the so-called “piggyback” cases); or the firm’s own concept resulting from research and investigation of potential class actions. Respondents were asked to rank the options from the most predominant reason to the least.

Figure 2 illustrates the diversity of reported sources of cases. Piggybacking on American class actions was cited as the least likely reason to pursue a claim by all but two firms: one reported that most of its actions were commenced after a similar claim was launched in the United States, and another firm reported piggybacking as the second-most prevalent source of new cases. Two respondents attributed most of their cases to client-initiated claims; notably, however, these two

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respondents had very few pending class actions.\textsuperscript{22} None of the four firms with the largest portfolio of class actions (over 40 cases each) attributed more than 25\% of their cases to client-initiation.\textsuperscript{23}

Two firms\textsuperscript{24} stated that over half of their cases were initiated as a result of internal research and investigation. Half of the respondents had at least some cases derive from ideas brought to them by third parties, with one firm with a large class action portfolio attributing 25\% of its cases to ideas by third parties. Three respondents cited regulatory investigations as their predominant source of cases; notably, one of these respondents had more \textit{Competition Act} claims than any other category of cases in its pool of pending actions, while drugs and medical devices, and securities cases, accounted for the vast majority of the other two respondents’ cases, respectively.

\textsuperscript{22} Respondent #3 has only 2 cases pending, one of which was client-initiated; respondent #13 has 7 class actions pending, 6 of which were client-initiated.

\textsuperscript{23} Three lawyers at one of these four firms responded to the survey. Respondent #4 reported on all class actions handled by the firm, whereas respondents 8 and 11 reported on a subset of those actions for which they individually had responsibility. Although respondent #4 did not provide a breakdown of cases by source, respondents 8 and 11 did so for a number of cases, and assumptions were made with respect to the remaining cases by reference to the nature of the action. I assumed, for example, that all of the firm’s price-fixing, securities, pharmaceutical/medical devices and tainted food actions followed regulatory investigations.

\textsuperscript{24} One has between 10-19 cases pending, the other over 40 cases pending.
In terms of case selection, the vast majority of respondents (80%) rejected over 60% of the prospective claims considered in 2008; several respondents stated that they rejected over 90% of the cases they considered. “Prospective claims” were defined in the survey as potential actions to which a firm devoted at least eight hours of research or investigation, or for which a file had been opened.

In terms of the criteria used to select those cases ultimately prosecuted by class counsel, respondents were given seven options: size of class; quantum of damages; existence of proceeding against same defendant(s) in U.S. or other foreign jurisdiction; existence of regulatory investigation or report; novelty of claim; public interest; and ‘other’. Eight out of fifteen respondents chose
‘other’ and then specified that the most important selection criterion was the legal merit of the claim – a criterion that I assumed would of necessity be present in any case launched by class counsel, and therefore not a factor which by itself would determine which of the meritorious claims were selected for prosecution. Quantum of damages was the most important reason for three of the respondents and the second most important reason for ten others. Public interest was the most important selection criterion for two respondents, while size of the class and novelty of case were each cited as the most important selection criterion by two respondents.

Respondents were also asked what was the most important factor for rejecting a prospective claim. Here the results were somewhat less disparate: difficulty of certifying the claim was the most important factor for four of the respondents, while for ten others, ‘prospects for success on legal issues at trial too low’ was most significant. Difficulty in finding an appropriate representative plaintiff was only moderately significant (i.e. ranked third or fourth most prevalent reason) for four respondents. For one firm, the fact that another law firm already commenced an action involving the same issue or defendants was the most prevalent reason for rejecting prospective claims. For half of the respondents, the low monetary value of the claim was the second or third most important reason for choosing not to commence an action.

Once an action has been commenced in Ontario, class counsel must then decide whether to seek funding from the Class Proceedings Fund. The survey sought to address the reasons for which counsel applied to the Fund, and the impact of a negative decision from the Class Proceedings Committee.
**Class Proceedings Fund**

Unlike all other provinces except Quebec, Ontario established by legislation a public funding mechanism for class actions.\textsuperscript{25} Class counsel may apply at various stages of the litigation, but only after a claim has been commenced. Successful applicants receive modest funding for disbursements only, not counsel fees,\textsuperscript{26} and more importantly according to some commentators, the Fund indemnifies the representative plaintiffs in funded cases against any adverse costs awards. In return, the Fund collects a 10\% levy on the class members’ net recovery. Since costs are the traditional and perhaps most basic of barriers to justice, I decided questions surrounding use of the Fund would be important to pursue.

Respondents were first asked how many applications had been submitted to the Fund in the five-year period ending December 31, 2008. Of the eleven Ontario respondents, seven had submitted applications; one out-of-province respondent also reported an application to the Fund. Among those who had applied, all but one respondent had made six or fewer applications; one respondent applied ten times to the Fund in the five-year period.

Acceptance rates were also explored, and proved to be consistent with recent statistics released by the Law Foundation in their semi-annual report.\textsuperscript{27} In my sample group, the acceptance

\textsuperscript{25} *Law Society Act*, R.S.O. 1990, c. L.8, c.7, as am. by *Law Society Amendment Act (Class Proceedings Funding)*, 1992, c.7, s. 3 (sections 59.1 to 59.5 deal with the Class Proceedings Fund).

\textsuperscript{26} One respondent observed that funding appears to be somewhat more generous in very recent months. Historically, the funding granted was viewed by many lawyers as largely nominal relative to the actual disbursements incurred.

\textsuperscript{27} During the period January 1, 2008 to December 31, 2008, the Class Proceedings Committee approved 9 new applications for funding, denied 2 new applications for funding and deferred 1 new application for funding pending
rate was over 80%. The implications of a rejected application were also explored in the survey: two respondents reported that a rejected funding application resulted in the action in question being discontinued.

The respondents were somewhat divided as to their primary reason for applying to the Fund. Of the eight respondents who had applied for funding, seven indicated that the indemnity provided by the Fund was the most important reason for going to the Fund, while three stated that their primary reason was to obtain financial assistance with disbursements. One respondent commented that the application process was too cumbersome – that it was “simpler to get certification than to get signed on with the support fund.”

**Discontinuance**

The CPA requires that court approval be obtained before any class proceeding (whether certified or not) can be discontinued. Very few decisions regarding the abandonment of class proceedings are reported, however; a search of the Quicklaw database revealed only 9 such judgments. Without consistent reporting of all decisions approving the discontinuance of class

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28 Letter from Tony Merchant to author dated March 13, 2009 (reprinted with permission) (on file with author).

29 CPA, s. 29.

30 Among these nine judgments are at least two that did not involve the abandonment of class proceedings *per se*, but merely the discontinuance of an Ontario action in favour of one in another province that also proposed a national class: *Sollen v. Pfizer Canada Inc.* (2008) 290 D.L.R. (4th) 603, aff’d (2008), 305 D.L.R (4th) 184 (C.A.), and *Alves v. My Travel Canada Holiday Inc.*, [2007] O.J. No. 4237.
actions, and absent a mandatory registry where such orders would be deposited, the incidence of abandoned class actions is unknown.\textsuperscript{31}

For these reasons, the survey included a series of questions about discontinuances, which were defined as the “conversion of a certified action into individual actions, or the termination of an action altogether without a settlement being paid to the class.” The results were somewhat surprising; between ten firms, 65 class actions have been discontinued in the last five years. Given the dearth of reported judgments considering s. 29(1) of the CPA, it can be said that class actions are discontinued far more frequently than a cursory look at the case law would suggest.

The reasons for discontinuing varied greatly: only one respondent reported that an action had been discontinued because the representative plaintiff had settled his or her claim with the defendant separately.\textsuperscript{32} Eight respondents stated that the decision was reached by class counsel either because the case turned out to be too small in terms of potential damages, because the case was not certified, or for “other” reasons that were not specified. The second most prevalent reason was that the legal basis had changed with respect to liability. No one reported that the primary reason for abandoning a class proceeding was that the action at issue had become too costly to prosecute.

\textsuperscript{31} Beginning in 2007, the Canadian Bar Association has maintained a National Class Action Database; online: <http://www.cba.org/ClassActions/main/gate/index/>. It is a voluntary initiative, however, and plaintiffs’ counsel are not required to report when an action is discontinued. A search of the database on May 25, 2009 revealed no actions listed as discontinued.

\textsuperscript{32} Another respondent explained that one action had been discontinued because “all claims had been settled individually.”
Costs of discontinued actions may be ordered against the plaintiffs, and fees may be negotiated as a term of the discontinuance. Again, the case law does not disclose the frequency of such arrangements. Of the eleven survey respondents who had discontinued actions, seven reported that money was paid to the representative plaintiffs as a term of the discontinuance, and all but one respondent reported that counsel were paid fees and disbursements in at least some of their discontinued actions.

**Adverse Costs**

Orders for costs against unsuccessful representative plaintiffs have long been feared to cause a chilling effect on class actions. Recent legal commentary suggests courts are less reticent to order such costs than in the past. While reported cases provide some measure of the extent to which plaintiffs are ordered to pay costs, there has been no study conducted to more accurately identify the prevalence of adverse costs awards and their repercussions. The survey thus included a series of questions about costs.

All but one of the Ontario firms represented in the survey had costs awarded against their class action clients. These costs orders were satisfied in a number of ways. Only two class counsel reported to have paid the order themselves. Two others turned to the Class Proceedings Fund for

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34 It was the belief that existing costs rules would have the effect of discouraging all class actions that compelled the Ontario Law Reform Commission to recommend that actions brought under the proposed class action legislation not be governed by traditional cost rules: OLRC Report on Class Actions (Min. of the Attorney General, 1982) at 663.

indemnification. Three other respondents reported that the defendants agreed to waive costs either on appeal or as part of an agreement to discontinue the action. Definitive conclusions cannot be drawn from such a small sample size, but the results do test the two commonly held notions that the risk of adverse costs will deter representative plaintiffs (since plaintiffs paid none of the costs awarded reported in the survey), and that class counsel must always indemnify their clients.

**Settlement Take-Up**

Most certified actions settle; to date, in Ontario only eight class actions have gone to trial on the common issues. Much of the Canadian jurisprudence is devoted to considering the criteria for approving a settlement, and related notice requirements. Almost no jurisprudence exists as to the effectiveness of the notice to class members, or the rates at which the class members take up a settlement – and actually obtain access to substantive justice.

The final part of the survey thus asked counsel to report take up rates on settlements concluded in 2008. The question was confined to one year in order to ensure respondents were not put to the onerous task of researching several years worth of records. In retrospect, however, an earlier date or multi-year results would have been helpful. Nevertheless, the results will be of interest in ensuing chapters. Seven respondents reported that they disclose take-up rates to the

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36 One respondent also reported that as of April 2009 the costs order remains outstanding pending appeal.

37 C. MacLeod et al., “Discovery and Trials of Class Actions” (Paper presented to the 6th Annual Symposium on Class Actions, Toronto, 2-3 April 2009) at 3 [unpublished].

38 This is so because the administration and claims process of an approved settlement can take more than a calendar year.
presiding judge even absent court order. The case law suggests that courts rarely make such orders. Six respondents stated that they do not voluntarily report take up information, and one responding firm said it did so “sometimes”. 39

Disclosure of take up rates in the survey itself was sporadic. Four respondents reported rates ranging from 10% to 100%. One reported take up rates of less than 1% for two of four settled actions, and provided very specific numbers of claims filed by class members for two other settled actions; without any reliable estimate of class sizes, the respondent could not provide a take-up rate for these two actions. The remainder of the respondents indicated that “take up rates can’t be determined in most cases” or that it is “impossible to give” because it “would be unusual to know the number of claimants with any precision.” Take-up information thus is not even consistently collected by class counsel themselves.

Conclusion – Survey Data

Although the implications of the survey data for specific issues central to this paper will be addressed in the following chapters, some concluding observations are in order. First, it is difficult to gauge whether the results are surprising or expected when there are no other such studies in Canada against which to measure consistency. What may be unexpected are the types of cases being litigated; environmental class actions and those involving discriminatory policies affecting employees – two of the four categories cited as examples of paradigmatic class actions by the

39 The 13th respondent works in a Maritime province where class action legislation is still nascent and no cases have yet settled.
Supreme Court in *Dutton*\(^{40}\) – are among the fewest of the class actions reported. Further, contrary to what courts often assume to be the consequences of an adverse cost award, representative plaintiffs themselves do not often (in my sample group, they did not ever) pay the awards themselves.

The information received about how cases came to be is also noteworthy. The vast majority of class actions are not initiated as a result of a client who approaches counsel with a legal problem. Yet where respondents derived their cases varies significantly from firm to firm. Those firms with a large number of securities, pharmaceutical and *Competition Act* claims (the most popular kinds of actions in terms of hard numbers), point to regulatory investigations and comparable American class actions as a significant source of their actions. Nevertheless, almost all firms also point to internal research and investigation for at least some of their class action activity.

Other information gleaned requires further exploration. The disjunction between the number of publicly reported judicial decisions approving a discontinuance of a class action and the numbers of discontinuances actually taking place suggests that class actions are being abandoned at far greater rates than is commonly known. Take-up rate information is also scarce, even though it would be critical information for policy-makers, among others, interested in assessing the true costs and benefits of class litigation.

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\(^{40}\) Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at para. 26. The other two kinds of class actions described were faulty consumer products and shareholder grievances over corporate mismanagement.
III. Case Studies

Finally, my research methodology for the thesis also included a close examination of two completed class actions: *Hislop*, a concluded class action on behalf of same-sex couples, and *Atlas Cold Storage*, a recently settled securities class action. While a greater number of case studies would have been preferable, two were considered manageable for a research project of this nature. The two case studies are used to gain a better, more in-depth understanding of the issues that are central to the paper, and are another facet of the qualitative method. Hensler *et al.* adopted a case study approach in their three-year study on the basis that this method is well suited to investigating processes: “[I]t is the ways in which these cases are litigated that is the primary subject of controversy in the US and quantitative research techniques, while good for counting and correlating characteristics of phenomena, to my mind are not very good for investigating processes, particularly highly contextualized processes.”

In addition to reviewing the court documents and press coverage related to the cases, I conducted lengthy interviews of class counsel involved in those actions. I used a semi-structured interview format, that is, an interview using a prepared list of questions that could be asked in any order, depending on the flow of the interview, but which allowed for other questions to be asked beyond those in the interview guide. The questions were based on various sources: the court documents for the case in which the interviewee was involved; the interviewee’s answers to the survey; and recurring themes in the class action case law and survey results.

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41 I do not claim that the case studies are statistically representative of all class actions in Ontario. A statistically relevant sample would number in the hundreds of actions, far beyond the scope of a thesis of this nature.

a. Selection and Summary of Case Studies

In selecting the two cases to be examined in more depth, several criteria were used:

- the actions had to be concluded, in order for information relevant to take-up rates, fees and notice to be available;
- one case of a public law nature was sought, in order to provide a foundation on which to explore the potential differences between litigation against the Crown and litigation against private entities;
- the second case would be of a purely economic nature (either securities or consumer goods), on the assumption that such lawsuits provide an objectively determinable calculation of the losses suffered by the class members, and therefore the substantive justice of the outcome could potentially be more precisely measured; and
- the cases would have to involve class counsel who would be amenable to discussing their cases in detail.


b. Summary of *Hislop*

*Hislop* was a national class action on behalf of approximately 1000 class members whose same-sex partners paid into the Canada Pension Plan and died between 1985 and 1998. In 2000, the *Modernization of Benefits and Obligations Act*[^45] was passed following successful litigation by


[^44]: *Lawrence et al. v. Atlas Cold Storage Holdings Inc. et al.* (2006), 34 C.P.C. (6th) 41 (Ont. S.C.J.) (motions to strike, for leave to amend and to add plaintiff); (12 February 2009), Toronto 04-CV-263289CP (Ont. S.C.J.) (certification and settlement approval) [unreported].

[^45]: S.C. 2000, c. 12 [MBOA].
gay and lesbian groups, particularly the Supreme Court of Canada’s ruling in *M. v. H.*\(^{46}\) The MBOA amended sections of the *Canada Pension Plan*\(^{47}\) and 67 other statutes which discriminated against same sex couples; in the case of the CPP, however, it also restricted benefits to applications made after June 1998. In the class action, the plaintiffs alleged that the arbitrary cut-off of 1998 was contrary to s. 15 of the Charter.

In the fall of 2003, *Hislop* became the first national class action to go to trial in Canada. Following a 15-day trial in Toronto, E. Macdonald J. found that the impugned provisions of the CPP contravened s. 15, were not saved by s. 1, and were therefore struck. She declared that the class members were entitled to retroactive pension payments to one month following the date of death of their partner, and interest on arrears from February 1992.

The Crown appealed, and in 2004, the Court of Appeal reversed E. Macdonald J. in part. The Court upheld the trial judge’s decision to strike down as unconstitutional the CPP sections that applied only to same-sex survivors, but set aside her constitutional exemption to a legislative cap that limits retroactive benefits to one year prior to the date on which the claimant applied for benefits. The plaintiffs had argued that they should be able to collect arrears owing back to 1985, when the Charter was enacted.

The plaintiffs appealed, and in 2007, the Supreme Court of Canada affirmed that the constitutional rights of the class members were violated by the federal government’s refusal to pay

\(^{46}\) [1999] 2 S.C.R. 3. In this case, the Court struck down the definition of “spouse” in the *Family Law Act* as contrary to s. 15 of the Charter, thus heralding sweeping changes in all legislation which defined spouses in a discriminatory manner.

\(^{47}\) R.S.C. 1985, c. C-9 [CPP].
them survivors’ pensions, and that the plaintiffs were entitled to benefits going forward. The court
did not find, however, that the general cap on retroactive payments to one year prior to a
survivor’s application contravened the Charter, a decision that Peter Hogg and other commentators
state “departed from the well-settled general rule that remedies for constitutional violations apply
retroactively”.48

In the result, the class members were entitled to up to eight years of arrears, as opposed to
over twenty years. The value of the damage award was scaled back from between $80 and $100
million to an estimated $50 million.49 Still, it marked the largest trial award for a class action to
date in Canada, and the “largest recovery by gays and lesbians anywhere in the world – because it
is a class action.”450

Class counsel’s efforts were recognized by the trial judge when she awarded them a fee
equal to their base fee and a 4.8 multiplier, the highest multiplier awarded up to that time.
Another legislative pitfall, however, scuttled recovery. Section 65 of the CPP states that benefits
cannot be assigned or charged. The Federal government successfully argued both before E.
Macdonald J.51 and the Court of Appeal52 that the section operated to prevent class counsel from
deducting their contingency fees from the damages ultimately paid to class members. Prior to the

48 Cristin Schmitz, “Top Court’s Restriction of Charter Remedies Seen as Major Shift” The Lawyers Weekly (16 March
2007).
49 Ibid.
50 Interview of Douglas Elliott, lead plaintiffs’ counsel (8 April 2009) (notes on file with author).
application of the 4.8 multiplier, class counsel had incurred total fees in excess of $5.3 million and had received fees, exclusive of all disbursements, of slightly less than $2 million by way of costs from the defendants. How they would collect the remainder of their base fee, and any premium, was the subject of another spate of orders by the trial judge.

Plaintiff’s counsel argued that unlike future payments of benefits, arrears were more like damages under the Charter, not “benefits” for the purpose of s. 65. The Attorney-General disagreed and opposed a solicitor’s lien on any of the arrears payments. In an effort to avoid further delay releasing money to the class members, class counsel undertook not to claim a solicitor’s lien as against future payments or 50% of the arrears. With the consent of the representative plaintiffs, class counsel moved for an order that 50% of the pension arrears accrued prior to December 19, 2003 (the date of trial judgment) be withheld pending the hearing of a substantive motion on the interpretation of s. 65.\(^{53}\) Despite this arrangement, the Federal government continued to withhold payment of arrears and even of benefits going forward, on the basis of another provision of the CPP which the government argued does not permit partial payments if entitlement issues remain outstanding.\(^{54}\)

After losing on the s. 65 CPP issue in the lower court, and in light of the collateral problem of class members not getting benefits or any arrears due to the government’s stance on partial payments, class counsel devised an alternative payment process. They negotiated a revised retainer agreement with representative plaintiffs, which permitted class counsel to contract with

\(^{53}\) *Hislop et al. v. Canada (AG)* (30 April 2004), Toronto 01-CV-221056CP (Ont.S.C.J.) (on file with author).

\(^{54}\) Letter from Douglas Elliott to class members dated March 11, 2008 (on file with author).
each individual class member to pay 50% of their arrears payment in satisfaction of outstanding fees. E Macdonald J. approved the retainer agreement and amended the original fee order to specify that the plaintiff counsel group would only be entitled to 50% of the pre-judgment arrears. Class counsel subsequently contacted each class member and offered three options: (i) pay to class counsel a pro rata share of the outstanding legal fees, calculated as 50% of the pre-judgment arrears; (ii) contract to pay this amount once the class member receives payment of benefit and arrears from the Federal government; or (iii) do nothing, and wait for the Court of Appeal to decide class counsel’s appeal of the s. 65 ruling. Pursuant to options (i) and (ii), class counsel would notify the Attorney General that no solicitor’s lien would be claimed for the class members in question, and consequently, there would be no impediment to calculating class members’ entitlement to benefits and arrears. Under option (iii), class members would continue to wait for payment from the government until the s. 65 issue was finally resolved.

After a complex and costly notice campaign, which included advertisements in dozens of newspapers and trade publications, as well as radio announcements on gay and lesbian specialty channels, approximately 650 class members came forward with a claim for compensation. As of April 2009, 60% of these class members have agreed to options (i) and (ii) under the alternative payment process; with respect to these class members, the Federal government has released payment. Of those class members who promised to pay class counsel once payment of arrears had

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56 Letter from Douglas Elliott to class members (22 July 2008) [on file with author].
57 While the precise size of the class is not known, depending as it does on the number of same sex survivors who are willing to come forward and apply for benefits, based on actuarial data it was estimated that 1000 survivors are eligible for benefits and arrears payments. Thus the take-up rate for this action is 65%.
been received from the government, 30 have failed to pay. Class counsel will seek to enforce payment against some or all such class members.58

The Court of Appeal dismissed class counsel’s appeal on the s. 65 CPP issue in late April 2009.59 Leave to appeal to the Supreme Court of Canada has been sought. Should leave be denied or the appeal lost, class counsel will have no basis on which to ask the Attorney General to hold back any portion of the remaining class members’ arrears. Absent voluntary payments by the 40% of the class that have not opted for the alternative payment process, counsel may have no further source of funding of legal fees. They have collected $6 million to date, from costs awards, pre-judgment interest payments, and payments by the class; this amount represents payment of class counsel’s base fee and a multiplier of less than two, a “mediocre result as a class action, but a lot better than most constitutional cases.”60

There are numerous interesting connections between Hislop and access to justice. At bottom, the case concerned a quest for substantive equality by historically marginalized groups. Thus, the case exemplifies “justice” in both its monetary and social meanings. Other barriers to justice were implicated in the case: the unwillingness on the part of many same sex survivors to come forward publicly and claim their rights; the ineffectiveness of test case litigation, the traditional procedure of choice for activists, in effecting widespread change; the prohibitive cost of bringing a claim for many individuals, whose benefits might not exceed $20,000; and the lack of

58 Interview of Douglas Elliott, supra note 50.
59 Supra note 52.
60 Ibid.
awareness that same sex couples were legally entitled to survivor pensions. The 4.8 multiplier awarded following the successful trial represented a high watermark (at the time) for costs awards, yet the trumping effect of pension legislation raises serious questions about the future of class actions against the government where similar statutes regulating benefits and other entitlements might be at issue. When multipliers of three or more are regularly awarded for settled actions involving credit card overcharges and other consumer wrongs, there are distinct economic disincentives to pursue class actions involving discriminatory benefits policies, despite their social importance and access to justice implications.\(^{61}\)

\textbf{c. Summary of Atlas}

The second case study differs in significant respects from the \textit{Hislop} action. The \textit{Atlas} class action does not involve Charter issues, but rather a breach of the misrepresentation provision of the \textit{Securities Act},\(^{62}\) and various common law causes of action, including negligence and breach of fiduciary duty. The plaintiffs sued a public corporation, an income trust, trustees and the auditor. The Crown is not a defendant. The plaintiffs sought damages in the amount that the trust unit price was inflated as a result of the alleged misstatements made by the defendant in its prospectus. Unlike \textit{Hislop}, no prospective relief was sought. The different subject-matters and legal issues of the two case studies may serve to highlight common characteristics of class actions, and identify variations that may be attributable to the nature of the actions.

\(^{61}\) For a fuller discussion, see \textit{chapter 5 (Fees)}, below.

Atlas Cold Storage Income Trust (“Atlas”) was an income trust whose units traded solely on the TSX. Its operating arm was a corporation, Atlas Holdings, which continues to operate North America’s second largest integrated, temperature-controlled distribution network of storage and logistics services to processors, distributors, food service providers and retailers. By purchasing units in the income trust, Atlas unit holders expected to be paid regular income distributions and possibly capital appreciation depending on the performance of Atlas Holdings. That is, the trust unit price on the TSX was a reflection of Atlas Holdings’ anticipated earnings; any change in earnings affected the unit price.

In 2001 and 2002, Atlas made five public offerings of units. In August 2003, Atlas announced that an independent investigation had revealed that Atlas’ net earnings were overstated. The investigation had been precipitated by an anonymous letter sent to Atlas Holdings’ board of directors; the company’s audit committee thereafter retained independent auditors and lawyers to investigate certain accounting practices and policies. The investigation revealed a number of accounting irregularities and errors. As a result of the announcement, the trading price of units fell, and eventually, Atlas’ financial statements for the years ending 2001 and 2002 were restated. On December 2, 2003, the Ontario Securities Commission issued a cease trade order against management and insiders. By January 2004, a number of officers and directors had either been terminated or had resigned. On January 30, 2004, Atlas announced that it was filing amended

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63 Lawrence v. Atlas Cold Storage Holdings Inc. et al. (certification & settlement), supra note 44 at para. 44.
64 Lawrence v. Atlas Cold Storage Holdings Inc. et al., ibid.
and restated financial statements for fiscal 2001 and 2002; altogether, the earnings were approximately $43 million less than originally stated.\textsuperscript{66}

Following Atlas’ announcement, Paul Lawrence, a chartered accountant, contacted Koskie Minsky LLP to inquire about the possibility of suing Atlas for recovery of his losses. Sutts Strosberg LLP located another potential plaintiff, Anne Eagles, by way of a stock broker with whom lead counsel was acquainted.\textsuperscript{67} When it became apparent that neither Lawrence nor Eagle had purchased their trust units in the primary market,\textsuperscript{68} class counsel published an advertisement in the \textit{Globe and Mail} seeking investors in Atlas who had purchased units pursuant to one of the prospectuses. No institutional investor or individual investor was prepared to act as representative plaintiff, but Charles Simon, a retired lawyer and a trustee of a trust that had purchased during one of the public offerings, responded to the advertisement.\textsuperscript{69} He was subsequently added as a third representative plaintiff.\textsuperscript{70}

The defendants brought various motions to strike the statement of claim; several common law claims were struck as against certain defendants but Hoy J. did not strike the \textit{Securities Act} claim and thus the action continued as against all of the defendants.\textsuperscript{71} Thereafter, two events

\textsuperscript{66} Ibid. at paras. 60-62.

\textsuperscript{67} Interview of Kirk Baert (14 May 2009) (notes on file with author).

\textsuperscript{68} Section 130 of the \textit{Securities Act} facilitates the use of class actions in the primary market by allowing investors to bring actions based upon misrepresentations contained in a prospectus, offering memorandum or takeover bid circular without proving individual reliance. The deemed reliance provisions do not apply to purchases in the secondary market.

\textsuperscript{69} \textit{Lawrence v. Atlas Holdings} (certification & settlement), supra note 44 at 5.

\textsuperscript{70} \textit{Lawrence v. Atlas Holdings} (motion to add plaintiff), supra note 44.

\textsuperscript{71} Ibid.
provided an impetus for settlement of the action. Within weeks of the release of the motion judge’s reasons on the preliminary motions, Atlas Holdings was taken private, and $500 million of fresh encumbrances had been registered against its assets, thereby creating a serious obstacle to execution of any future judgment.\footnote{Lawrence v. Atlas Holdings (certification & settlement), supra note 44 at 6.} Class counsel put the new owners of Atlas Holdings on notice that it would commence an action to set aside the encumbrances; such notice, they hoped, would neutralize the negotiating leverage the defendants would wield in any settlement discussions.\footnote{Ibid.}

Class counsel also discovered that Charles Simon, previously thought to have purchased trust units during the period of the public offering, had actually acquired the units in the secondary market which had no connection to the offering at issue in the proceeding. Faced with the argument that class members would have to prove individual reliance on the misrepresentations contained in the prospectus, class counsel devised a novel legal argument about the efficiency of the market for trust units, and retained an expert in financial economics to provide an opinion on the issue.\footnote{Ibid. at 7.}

The parties adjourned the certification motion originally scheduled to be argued in January 2008, and entered into settlement discussions and a mediation. A settlement agreement was executed in June 2008. Notice of the pending settlement hearing was published in several newspapers and material for the settlement approval hearing was delivered the same month. A second notice program in July 2008 resulted in approximately 10,000 individual notices being electronically transmitted to brokers for dissemination to their clients and mailed to class members.
identified by Computershare Limited and Broadridge Financial Solutions Inc. as having an interest in the trust units.\textsuperscript{75}

The certification and approval hearing for the proposed settlement was heard by Lax J. in August 2008. The motions judge approved the settlement which provided for a recovery of $40 million including expenses and costs. Based on the evidence of both parties’ experts, class counsel accepted that the range of inflation per trust unit resulting from the misstatements was $1.80 to $6.80, and agreed for the purposes of the settlement that the purchase price of each eligible trust unit had been inflated by $4.50.\textsuperscript{76} On a gross recovery basis, if there was 100% take up of the settlement by class members, the settlement provided a 37% recovery of the class’ losses. Taking into account the proposed counsel fee of over $12 million, disbursements, administration costs, payment of the 10% levy to the Class Proceedings Fund\textsuperscript{77} and disbursements, the class would recover 21.5% of its losses.\textsuperscript{78} Lax J. found that the settlement was fair and reasonable, in light of the complexities of the legal issues, the insurance limits and the possibility that the $500 million in encumbrances would prevent recovery of any successful judgment.

On the matter of counsel fees, however, Lax J. was unwilling to grant the $12 million fee order sought. Class counsel claimed a base fee of approximately $3.25 million and a multiplier of 3.7, for four years of work on the matter by three firms. The fee amount represented 30% of the

\textsuperscript{75} Lawrence v. Atlas Holdings (Affidavit of Margaret Woltz sworn July 22, 2008 at exhibit C) (on file with author).

\textsuperscript{76} Lawrence v. Atlas Holdings (certification & settlement), supra note 44 at 7-8.

\textsuperscript{77} The representative plaintiffs’ application to the Fund was approved in June 2004. Funding was sought at the request of Charles Simon, who would only agree to act as representative plaintiff if indemnified against adverse costs (Interview of Kirk Baert, supra note 67).

\textsuperscript{78} Lawrence v. Atlas Holdings (certification & settlement), supra note 44 at 12.
gross settlement amount. The representative plaintiffs had originally signed fee agreements providing for a 25% contingency fee; these agreements were replaced in March 2008 (made effective as of February 2004) to provide that in the event of success, counsel would be paid the greater of a base fee increased by a multiplier of four or 30% of the recovery if the action concluded before trial.  

Three objectors came forward and made submissions opposing approval of the counsel fee requested. The objectors argued that the fees were disproportionate to the settlement achieved, in an action that settled with no trial or discoveries; Lax J. held that “these [were] all valid objections.” While she accepted that the litigation was risky and that class counsel had obtained a result that was “probably the best that could be achieved in the circumstances”, she did not believe that the $3.25 million base fee was reasonable given the risks involved.  

She reduced class counsels’ base fee by 25% and set their multiplier at 2.6.

Class counsel appealed the order, and on July 2, 2009, the Court of Appeal heard arguments from lawyers retained by class counsel. The particulars of their argument will be explored in chapter 5. The claims deadline for class members expired on March 2, 2009; on June 24, 2009, the administrator reported that over 3,200 claims had been made and accepted (though it is not clear how many trust units these claims represent), for an aggregate net loss of over $42 million. Thus, the gross settlement fund of $40 million has been over-subscribed.

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79 Contingency Fee Retainer Agreement, exhibit A to the affidavit of Paul Lawrence sworn June 26, 2008 (on file with author).

80 Lawrence v. Atlas Holdings (certification & settlement) supra note 44 at 15.

81 Ibid. at 16-17.

82 Affidavit of A. Nazarali sworn June 24, 2009 (on file with author).
Though very different from *Hislop*, *Atlas* also raises interesting questions from an access to justice perspective. What constitutes a “good result” in a settled action? What criteria are appropriate in determining a “fair and reasonable” fee for class counsel? Both the judge and counsel in *Atlas* agreed that net payment to class members of roughly 21 cents on the dollar is a fair resolution – but disagreed fundamentally on what would be appropriate compensation for the lawyers who achieve that result. What voice do (or should) objectors have? The objectors in *Atlas* displayed an unusually high degree of activism by retaining counsel to appear at both the motions court and appellate levels. Successful in the first instance, it remains to be seen what weight the Court of Appeal will give to the objectors’ views, or whether they will comment on the utility of objections in a context where plaintiffs’ and defence counsel are no longer exercising their traditional adversarial roles.

**Conclusion**

The survey results and case studies summarized in this chapter will serve as the factual foundation for many of the discussions throughout this paper. Analysis of various features of class actions, from case selection to costs, will be the richer because we have a factual context in which to ground it. The access to justice objective that so often figures prominently in certification decisions can be more fully explored when information about policies as practised “on the ground” is available. Ensuing chapters will confirm that the three areas of class action practice that are the focus of this thesis are brought into sharp relief by the case studies; the importance of counsel fees, for example, looms large in both *Hislop* – where barriers to fee collection have been described
as the death knell of constitutional class actions – and Atlas – where contested fee requests pit
class counsel against class members, and where normative questions are raised about the role of
the class action judge. The significance of case selection is also illustrated in the case studies. In
Hislop, the test case strategy traditionally employed by equality rights advocates was rejected in
favour of a class proceeding. Counsel sought out representative plaintiffs, just as they did in Atlas.
Some detractors object to this kind of activity, on the basis that lawyers are stirring up litigation
rather than ensuring access to the court system for those who seek it. Deeper understandings of
the barriers to justice, however, recognize the importance of identifying systemic wrongs,
especially if those who are harmed do not possess the resources or knowledge necessary to seek
legal advice.

To better understand how class actions further access to justice, therefore, we need facts
about how class actions are conducted. But to assess whether the facts support a conclusion that
access to justice objectives have been met, we need to find common ground about what it means
to give ‘access’, and what constitutes ‘justice’. I explore the access to justice paradigm in the next
chapter.
In this chapter I will explore the various meanings attributed to access to justice by scholars, judges and lawyers. We begin by examining some of the main works in access to justice scholarship spanning three decades, focusing primarily on discussions of class or aggregate litigation within the literature. From Mauro Cappelletti’s Florence Project in the late 1970s\(^1\) to Deborah Rhode’s recent book *Access to Justice*,\(^2\) this scholarship details the evolution of access reforms, the efforts made to understand the barriers to justice, and to find the most promising solutions. I will identify the dominant discourses on class actions’ function as one such solution.

I will then turn to the jurisprudence on class actions to attempt to discern a judicial conception of access to justice. The Supreme Court of Canada’s pronouncements on the concept in non-class proceedings will also be examined to get a more general sense of that Court’s vision of access to justice. I will conclude by reviewing the definitions proffered by class action lawyers themselves.

Throughout, we will see various visions of access to justice. For some, class actions further access to justice because they permit the aggregation of small claims that would otherwise not be litigable. For others, the class action is more than the sum of its parts—it serves the ends of social justice better than even a multitude of individual claims. While all of these are legitimate in their

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\(^1\) Mauro Cappelletti and Bryant Garth, eds., *Access to Justice* (Sijthoff and Noordhoff, 1979).

own right, the approach one takes to the access to justice imperative will, ultimately, affect how one assesses the success of class actions in meeting their legislative objectives.

In this chapter, I discuss varying approaches to access to justice in order to give meaning to a term that permeates almost every discussion of class proceedings, and civil justice more generally. From these approaches, I will distill a definition of the term that has four core components: access to the courts; a fair and transparent process; meaningful participation rights for class members; and a substantively just result.

I. Scholars on Access to Justice

As others have observed, one of the earliest and most comprehensive articulations of access to justice was delivered by Mauro Cappelletti’s ambitious Florence Access to Justice Project. Professor Cappelletti, a leading comparative lawyer, took stock of a massive amount of information about access to justice and law reform initiatives around the world, and ultimately “codified a broadened notion of access beyond the lack of lawyers and beyond courts as the site of justice-seeking.”

Cappelletti traced the emergence of new approaches to access problems in contemporary societies with the metaphor of three waves: in the first wave, under the rubric of judicare, efforts focused on providing legal aid to the poor. The second, public interest law, expanded the scope of access to justice efforts to include the advancement of collective rights. The third wave

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4 M. Galanter, ibid. at 147-148.
concentrated on informal and extra-legal justice mechanisms, including alternative dispute resolution and the plain language movement. Each wave represented “crucial phases regarding the intellectual and policy developments produced by this global access to justice movement,” and the recognition of the many barriers to justice beyond the expense of lawyers. As Kim Economides summarizes the Project’s conclusion:

The liberal political theory informing this project, which I believe remains valid even today, was to shift the emphasis away from formal rights towards substantive justice. ... [T]he main conclusion arrived at is not so much that we need more rights - or more statements of rights (important as these may be for constitutional lawyers or political symbolism) - rather the on-going challenge is to find new ways and means of making the rights citizens already possess both "effective" and "enforceable"."6

In this way, access to justice serves to focus on the two main purposes of any legal system: “First, the system must be equally accessible to all, and second, it must lead to results that are individually and socially just. [...] A basic premise will be that social justice, as sought by our modern societies, presupposes effective access.”7

Importantly, effective access was perceived as more diffuse than access to courts alone. Attention was increasingly focused on not just dispute resolution but on the construction of disputes themselves: how and why were problems perceived as legal ones, and by whom. The empirical studies of the 1960s and 1970s had revealed that barriers to adjudication were layered

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6 Ibid. See Mauro Cappelletti and Bryant Garth, “Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report” in M. Cappelletti and B. Garth, eds., Access to Justice, Vol. I, 1 at 8 (“Indeed, the right of effective access is increasingly recognized as being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication.”).

7 M. Cappelletti and B. Garth, ibid. at 6
and involved a complex social process.\textsuperscript{8} Such evidence fueled the dispute perspective in legal studies, a body of work that Marc Galanter refers to as the intellectual sibling of access to justice born in the 1970s.\textsuperscript{9} The dispute perspective served to identify a series of “access chokepoints” at which an injured party’s quest for justice might fail. Traditional approaches to access to justice were concerned mainly with removing barriers to claiming entitlements; the dispute perspective emphasized that barriers to naming the injury as one that can be remedied by legal institutions, and to blaming those to be held accountable for such actions, were equally important dimensions of access to justice. That is, an injured party might fail to perceive an injury or to identify the cause as a legal wrong, and various economic, informational and psychological barriers may inhibit seeking legal advice or making a claim.\textsuperscript{10} Access to justice initiatives, therefore, had to confront all of these barriers.

The Florence Project explored the myriad ways in which access to enforcement mechanisms was promoted. Not surprisingly, the first wave access to justice perspectives concentrated on access for the poor; access to lawyers and courts for these citizens was crucially important, therefore problems of resources were seen above all else as the primary preoccupation of access to justice. Various initiatives to curb costs were formulated, including legal aid, alternative service

\textsuperscript{8} According to Kim Economides, a lack of economic resources represents only one element in a complex social process leading an individual to seek out and obtain legal representation. At least four steps are involved: (1) awareness or recognition of a problem as a legal problem; (2) willingness to take legal action for solution of the problem; (3) getting to a lawyer; and (4) actually hiring a lawyer: Kim Economides, citing Jerome Carlin and Jan Howard, “Legal Representation and Class Justice” (1965) 12 UCLA L. Rev. 381 at 423.

\textsuperscript{9} M. Galanter, supra note 3 at 148-149.

\textsuperscript{10} Ibid. at 149.
providers and contingency fees. The latter in particular were ambitiously proffered as a “simple device for guaranteeing equality of access to the victim”, a view we will see again in the Ontario Law Reform Commission’s *Report on Class Actions*, discussed below.

Second wave access to justice approaches broadened the scope of reform efforts beyond individual interests. Both before and after the Florence Project, scholars became concerned with access to justice for diffuse interests, which, like the interests of the economically disadvantaged, have been underrepresented in our judicial and administrative processes. Cappelletti and Garth defined “diffuse interests” as collective interests, like clean air or consumer protection, which are difficult to vindicate because of problems of standing, lack of economic incentive to litigate, and no deterrence value even if a small claim is successfully pursued. Second wave access to justice initiatives were thus characterized by a move toward public law litigation, concerned with important public policy issues involving large groups of people. These are the interests served by class actions, perceived in the literature as a species of public interest law mechanisms.

The public interest law movement fuelled the idea of the “private Attorney General who could provide access to justice for previously silent voices and thereby ensure public policy

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13 Ibid. at 171.

14 M. Cappelletti and B. Garth, supra note 6 at 18.

15 Ibid. at 36. See also Abram Chayes, (1976) “The Role of the Judge in Public Law Litigation” 89 Harv. L. Rev. 1041.
decisions were made in the context of balanced advocacy.”¹⁶ These private Attorneys General would vindicate rights where regulatory enforcement was lacking. To fund such activity, Owen Fiss has argued, you either create a corps of lawyers who will pursue litigation in the public interest (such as the B.C. Civil Liberties Association or EGALE) or you permit class actions and contingency fees.¹⁷ In addition, in Canada, where public interest law firms and organizations are not as prevalent as they are in the U.S., public monies are made available to the private bar in the form of Legal Aid test case funding or the Court Challenges Program. In the United States, the 1980s witnessed growing disquiet about using public money to fund partisan litigation;¹⁸ these same criticisms were used to justify the demise of the Court Challenges Program in Canada two decades later.¹⁹ Thus, class actions were viewed as “an evolutionary response to the existence of injuries unremedied by the regulatory action of the government”,²⁰ and class counsel as a fusion of public officer and private citizen²¹ who would vindicate legal rights that for economic reasons might not be enforced privately and for a variety of reasons are not enforced publicly.

The Ontario Law Reform Commission echoed many of these same sentiments in its 1982 Report on Class Actions.²² The Report opens with a description of modern society as highly

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¹⁸ B. Garth, I.H. Nagel & S. J. Plager, supra note 16.

¹⁹ The program was terminated by the Conservative government in late 2006. It was publicly criticized as a misuse of public tax dollars. See Faisal Bhabha, “Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions” (2007) 33 Queen’s L.J. 139 at n. 10.

²⁰ B. Garth, I.H. Nagel & S. J. Plager, supra note 16.

²¹ The fusion concept is Fiss’; supra note 17 at 21.

complex and interdependent, characterized by “mass manufacturing, mass promotion, and mass consumption”; the activities of major corporations, international conglomerates and big government can affect, and possibly injure, large numbers of people. In the wake up such misconduct, “the individual is very often unable or unwilling to stand alone in meaningful opposition.” Class actions, the Report concludes, serve an important access function: “By affording ‘an opportunity for voicing mass grievances in an orderly fashion within the framework of the existing ‘judicial’ system’, they may provide an antidote to the social frustration that exists where neither courts nor administrative agencies are able to protect the rights of citizens on an individual basis.”

The idea that class actions could overcome the various barriers that preclude potential claimants from pursuing remedies, and thus serve an important social function, pervades the Report. Access to justice, along with judicial economy and behaviour modification, were the principal justifications animating the Report’s ultimate conclusion that class proceedings legislation should be enacted. Although they recognized that “not every wrong can be remedied in the courts”, the Commissioners equated access to justice with access to courts. The Commission was of the view that

23 Ibid. at 3.
24 Ibid.
25 Ibid. at 130 [cit.om.].
26 Ibid., vol. I at 140. This acknowledgment invokes a much deeper normative issue. Whether more access to litigation will achieve greater justice is a topic of endless debate, particularly in the American tort reform discussions; see e.g. Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change?, 2nd ed. (Chicago: U. Press, 2008); P. K. Howard, The Collapse of the Common Good: How America’s Lawsuit Culture Undermines Our Freedom (Ballantyne Books: 2001); contra see Timothy D. Lytton, “Clergy Sexual Abuse: Clergy Sexual Abuse Litigation: The Policymaking
many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers. We believe that class actions can help to overcome such barriers and, by providing increased access to the courts, may perform an important function in society. Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.\textsuperscript{28}

Bill Bogart, one of the consultants to the Commission, has similarly observed that even though in Canada the Legislature, not the courts, has made critical decisions on key public policy matters, “this branch of government is unlikely to be able to address with sufficient specificity the myriad issues surrounding particular actions taken by other aggregates or its own agencies and emanations.”\textsuperscript{29} Courts, Bogart writes, are better placed to wade through the evidence and be responsive to the needs of those affected by aggregate action.

The paradigm of the class action as social mission is repeated in academic literature on both sides of the border. In the U.S., commentators have emphasized the societal need to redress wrongs that is served by class actions; for these supporters of class actions, “the goal, consistently, is ready, meaningful justice for the (relatively) disempowered in contemporary, massified societies.”\textsuperscript{30} In Canada, Shaun Finn has characterized class proceedings in a very similar way:

Class actions have arisen, in part, to help right the balance in favour of the consumer or ordinary citizen. From this vantage point, the class action can be described as the

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\textsuperscript{27} Indeed, the terms were used interchangeably. See e.g. supra note 22 at 119 (heading “Access to the Courts” followed by discussion of access to justice as a major benefit of class actions.)

\textsuperscript{28} Ibid. at 139.

\textsuperscript{29} W.A. Bogart, “Questioning Litigation's Role -- Courts and Class Actions in Canada” (1987) 62 Ind. L. J. 665 at 698.

New Equity of our time. It has stepped outside the boundaries of ordinary procedure by pursuing a mission that no other civil mechanism is able to fulfil. [...] More than a tool of convenience, however, it is entrusted with an explicitly social mission: to protect consumer rights, ensure access to justice, and sanction illicit institutional behaviour.  

Several years ago, another lawyer recorded equally strong views about the capacity for class actions to enhance access to justice in a broader sense. In his memoir, Ian Scott, who as Attorney General oversaw the drafting of the legislation, described the CPA as “the most important of his reforms”. As recounted by Justice Binnie, Scott had an ambitious vision for class actions and access to justice:

There is no doubt that this measure filled an important public need to address the myriad of relatively small claims that were going unremedied in the courts because the cost to each claimant wasn't worth the candle to litigate. In large part, the availability of class proceedings is an access-to-justice issue. But there is more to the innovation than that. Representative plaintiffs, empowered to litigate on behalf of a class, serve in effect as some sort of private attorneys general to attack what they consider to be shoddy workmanship, environmental banditry or corporate skullduggery. Through class actions, the government found a cost-effective way to promote private enforcement and thereby to take some of the pressure off enforcement by the budget-restrained government ministries.

Scott’s vision suggests that class actions serve a regulatory enforcement function not as a by-product of its compensatory function, but rather as its very purpose in a particular institutional arrangement.

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31 Shaun Finn, “In a Class All Its Own: The Advent of the Modern Class Action and Its Changing Legal and Social Mission” (2005) 2 Can. Class Action Rev. 333 at 371-373. The language is reminiscent of the famous passage in Justice Douglas’ dissenting opinion in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974), where, after recounting the ways in which society has grown in complexity, he wrote: “The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth ” (at 186).


33 Binnie, ibid.
More general scholarly writing on access to justice has been somewhat less zealous in its approval of class actions and the fulfillment of this social mission. Rod Macdonald, for example, acknowledges the distributive justice function of class actions in a modern consumer society; at the same time, however, he notes that many commentators have argued class actions “merely facilitate[] the instrumental pursuit of money or a like remedy for a collection of individual litigants who otherwise have little in common”, rather than induce social solidarity.\textsuperscript{34} There is skepticism that class action litigation improves access to justice for the poorest in society; as Calabresi observed, class actions, “though certainly of some use to protect the very poorest in society, have commonly been employed to further environmental and consumer interests which […] are more typical of the suburbanite than of the ghetto dweller.”\textsuperscript{35} Deborah Rhode has been equally ambivalent. On the one hand, she notes that individual litigation has permitted some defendants to resolve minor disputes without altering future conduct, and that this pattern of behaviour then forces public interest organizations to squander scarce resources in enforcing the same laws for different claimants – a state of affairs that is avoided if class actions are available.\textsuperscript{36} On the other hand, Rhode is emphatic in her view, based on empirical studies, that litigation is a very expensive way to compensate victims.\textsuperscript{37} From an access to justice perspective, one of the serious flaws in

\textsuperscript{34} Roderick A. Macdonald, supra note 11 at 63-64.
\textsuperscript{35} Guido Calabresi, supra note 12 at 171.
\textsuperscript{37} Ibid. at 33. Rhode reports that by contrast, in Japan experts estimate that legal fees consume only about 2 percent of compensation payments due to a greater reliance on official investigations and non-litigious dispute resolution mechanisms (at 34).
class action litigation no less than any other kind, she writes, is that victims are undercompensated and lawyers are overcompensated.\(^{38}\)

Whether Rhode’s view bears out in the Canadian context is unknown – and unknowable given the dearth of empirical studies evaluating actual outcomes of class proceedings. Have defendant corporations changed business practices as a result of class proceedings (or the threat of them)? How many class actions act as catalysts for government compensation schemes and public apologies, as occurred in the Residential Schools case? Are class members getting less in real dollars than their individual litigant counterparts? Are class counsel paid too much relative to the risk borne and the service delivered? “Too much” compared to what? John Coffee, Jr. has remarked that entrepreneurial litigation does give rise to the fear that clients will be overcharged and underrepresented, but that clients “who never learn of their legal rights receive even less representation and are economically worse off.”\(^{39}\) His argument is consistent with a view of access to justice that is focused on the importance of naming and blaming, to refer back to Galanter’s dispute perspective. Class action lawyers who identify aggrieved parties and commence litigation may be said to provide access to legal information and institutions; they facilitate naming and blaming. If, like Rhode, one focuses on the “justice” part of the equation, however, outcomes, including undercompensation and overcharging, matter a great deal. If corrective justice and substantive results ground one’s conception of access to justice, then the success of class counsel

\(^{38}\) Ibid. at 31.

in identifying wrongs is not enough, nor is providing something – such as nominal damages – better than nothing.

To what extent class actions have fulfilled a social mission will be probed in ensuing chapters when we examine more closely how counsel select cases to prosecute as class actions, what information is conveyed to class members, and how they and their counsel are being compensated. Unlike the more developed empirical scholarship in the U.S., there is an almost complete absence of an evidentiary basis on which to assess whether and how Canadian class actions advance the social mission that legal commentators have ascribed to the procedure. Nevertheless, as we will see in the following section, unquestioned notions of class actions righting the balance in favour of the disempowered, of class counsel filling the gaps of lax regulatory supervision, and of widespread illicit behaviour curbed, repeatedly appear in judicial discussions of class actions as an access to justice mechanism.

II. Judges on Access to Justice

Access to justice as a phrase is repeated in virtually every class action decision on certification.\(^40\) It has also been the focus of decisions in contexts other than class actions. Both lines of cases will be examined for definitional approaches to the term.

\(^40\) A search of the Quicklaw database on June 4, 2009 for cases with the terms “access to justice” and “class action(s)” yielded almost 600 decisions.
a. Access to Justice Cases

Not surprisingly, judicial approaches to the meaning of access to justice tend to emphasize the importance of access to, and the role, of the courts. In one of the earliest commentaries on access to justice by the Supreme Court of Canada, access to justice as access to courts was affirmed as indispensable to the rule of law. In *B.C. Government Employees’ Union v. B.C. (Attorney-General)*, the Court asked rhetorically:

[...] Of what value are the rights and freedoms guaranteed by the Charter if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law hindered, impeded or denied? The Charter protections would become merely illusory, the entire Charter undermined.

There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.41

The B.C. case involved a union picket of courthouses. The Chief Justice of the B.C. Court, on his own motion, obtained an injunction prohibiting picketers from blocking entry to the courthouses on the basis that any hindrance to physical access violated the rule of law. The Supreme Court agreed; in doing so, the Court codified access to justice as an element of the rule of law. Given that the dispute was about physical barriers to the courts, it was inevitable that the concept of access to justice articulated by the Court was limited to a first wave, positivist interpretation of the term. Indeed, in the access to justice literature, “the most elementary form of access to justice is material

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access to official institutions of civil disputing.” At the same time, the Court underscored that rights alone, without effective mechanisms of enforcement, were meaningless.

Despite the Court’s belief in access to justice as fundamental to the Constitutional order, it recently declined to adopt a thicker meaning of access to justice, one that encompasses a more thorough understanding of the dispute perspective discussed earlier in this chapter. The removal of physical barriers to court houses, while surely important for those claiming rights, does not address the barriers that inhibit identification of wrongs as legal ones, and that impede the pursuit of advice necessary for legal or extra-legal resolution of disputes. Economic barriers to such advice were at the heart of Dugald Christie’s challenge to the constitutionality of the legal services tax. He argued that the 7% tax on legal services not only directly increased the cost of legal advice for his low-income clients, but also added to the cost and effort of maintaining his practice due to the additional administration work and accounting systems needed to levy the tax. Moreover, lawyers’ access to justice was also at issue; because the tax had to be remitted to the government on accounts that ultimately were not paid, the net effect of the tax was to prevent Christie from working as a lawyer. Given the demographic he served, his inability to offer legal advice further decreased access to justice for the poor.

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42 Roderick A. Macdonald, “Access to Justice in 2003 – Scope, Scale, Ambitions” (Foundation paper prepared for Law Society of Upper Canada, International Symposium on access to Justice, May 2003) [unpublished] at 16 (listing geographic location, wheelchair inaccessibility, hours of service, and physical design of courthouse as the material barriers to access).


44 Ibid. at paras. 3-5.
The B.C. Court of Appeal, in a split decision, agreed with Christie that access to justice is a constitutional right, and that the tax breached that right for low income persons.\(^{45}\) Newbury J.A. addressed the question of what access to justice entails and proposed the following as its “core aspects”:

... I propose as a working definition the meaning which in my opinion represents the most basic, or core, aspects of access to justice as a constitutional principle -- i.e. reasonable and effective access to courts of law and the opportunity to obtain legal services from qualified professionals, that are related to the determination and interpretation of legal rights and obligations by courts of law or other independent tribunals.\(^{46}\) (Emphasis added)

The Supreme Court of Canada rejected this notion of access to justice as a constitutional principle. It found that neither the rule of law nor the Constitution mandated the right to access a lawyer.\(^{47}\) Although the court accepted that lawyers play an important role in ensuring access to justice and upholding the rule of law, general access to a lawyer was rejected as a fundamental aspect of the rule of law.\(^{48}\)

It is true, of course, that, as Rod Macdonald and others have argued,\(^{49}\) access to justice ought not to be conflated with access to lawyers, and that justice can, in some cases, be achieved

\(^{45}\) (2005), 262 D.L.R. (4th) 51.

\(^{46}\) Ibid. at para. 30.

\(^{47}\) Supra note 43 at para. 23.

\(^{48}\) Ibid. at paras. 22-23.

\(^{49}\) Supra note 11 (referring to private institutions, public legal education, alternative dispute resolution and several other access to justice mechanisms). See also L. Sossin, “The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?” (2007) 40 U.B.C. L. Rev. 727 (noting that para-legals, self-help resource centers and a better organized system of pro bono assistance could achieve greater access to justice for more people [at para. 33]).
effectively by other means.\textsuperscript{50} But the Supreme Court has given little guidance as to how access to justice is to be achieved in those cases where counsel and courts are necessary for the vindication of rights. In \textit{Okanagan}, for example, the Court was seemingly prepared to accept that access to justice imperatives gave rise to special cost rules to ensure access to a lawyer, at least in “special cases where individual litigants of limited means seek to enforce their constitutional rights, [...]. This helps to ensure that ordinary citizens have access to the justice system \textit{when they seek to resolve matters of consequence to the community as a whole}.\textsuperscript{51} The Court was willing, therefore, to lend substance to access to justice principles for at least impecunious litigants who advance cases that engage matters of broad public interest. A short four years later, however, the Court took a very restrictive view of “public interest”, declined to award advance costs using the same test formulated in \textit{Okanagan},\textsuperscript{52} and offered the impecunious litigants no alternatives.

In the wake of the Supreme Court’s jurisprudence on access to justice, it is understandable that commentators are puzzled as to what access to justice means. Some have observed that the term, so often lauded, has been emptied of its content.\textsuperscript{53} Chief Justice Winkler has opined that the phrase “has become a mantra with judges, government officials and bar associations. Nevertheless, like so many other words and expressions, it has become so commonplace that the urgency of its

\textsuperscript{50} Not all types of disputes need to be addressed in the same way – via access to courts. For a discussion of this premise, see L.M. Friedman, “Access to Justice: Social and Historical Context” in M. Cappelletti & G. Bryant, supra note 1, Vol. II, 3.


\textsuperscript{52} \textit{Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)}, [2007] 1 S.C.R. 38.

\textsuperscript{53} Tracey Tyler, “Mixed signals from courts on openness” \textit{The Toronto Star} (26 May 2007) (quoting Prof. Bill Bogart: “‘some folks, including myself, [are] asking what we’ve got here,’ apart from ‘a bunch of homilies and pieties about the noble quality of access to justice.’”)
meaning has tended to become blunted or worn.”

For the Chief Justice, access to justice “simply connotes the laudable notion that people can and should resolve conflicts fairly, affordably and quickly through a court process.” How to promote these goals in practice? Among others, the Chief Justice’s response includes the class action.

b. Class Actions and Access to Justice

Court commentary on class actions as an access to justice mechanism is, for the most part, uniform. Certification decisions invariably refer to the three-part justification for class actions first articulated by McLachlin C.J. in Dutton. There, the Chief Justice set out what has become the definitive conceptualization of access to justice:

[B]y allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.

Here we see intimations of many of the first and second wave ideas of access to justice described at the beginning of this chapter. Class actions are designed to capture diffuse interests, overcome economic barriers to courts and lawyers, and promote the role of the private attorney general who will ensure wrongs are not left unremedied. The Supreme Court has explicitly accepted that the class action has a social dimension, though unlike a few lower courts, it has

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55 Ibid.
57 Ibid. at 28 [cit.om.].
not officially acknowledged a specific role for class actions to fill gaps left by lax regulatory intervention.

For the most part, in the context of class actions courts conceptualize access to justice as fundamentally about resources – if access to justice is defined at all. Indeed, in many a case, including in one of our case studies, the court refers to access to justice as one of the three advantages of class proceedings without elaborating what the term means. Where the court does expand upon the term, it usually refers to the idea that aggregating claims makes “economical what would otherwise be too costly to prosecute individually.” A variation of this definition appears in those cases where certification is denied: if the cost of adjudicating the individual issues after a common issues trial would be as high as the costs of individual trials, then access to justice is said not to be furthered by proceeding as a class.

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

60 Lawrence et al. v. Atlas Cold Storage Holdings Inc. et al., (12 February 2009), Toronto 04-CV-263289CP (Ont. S.C.J.) [unreported]. Hoy J. states simply that “[i]ndividual litigation would be expensive and burdensome for the judicial system” and concludes that certification “achieves access to justice”. Certification and settlement were requested on consent, which may account for the brevity of the judge’s reference to access to justice.


The Supreme Court of Canada’s decision in *Rumley*\(^{64}\) is one of the few instances where access barriers are perceived in something other than in economic terms. The case involved deaf and blind survivors of sexual abuse at the Jericho School. The Court recognized the particular vulnerabilities faced by the class members as a result of their physical disabilities and psychological injuries:

On this point it is necessary to emphasize the particular vulnerability of the plaintiffs in this case. The individual class members are deaf or blind or both. Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members. I am in full agreement, therefore, with Mackenzie J.A.’s conclusion that "[the] communications barriers faced by the students both at the time of the assaults alleged and currently in the litigation process favour a common process to explain the significance of those barriers and to elicit relevant evidence." As he wrote, "[a] group action should assist in marshalling the expertise required to assist individual students in communicating their testimony effectively."\(^{65}\)

Similarly, the Ontario Court of Appeal in *Cloud* referred to the age, economic status, and continuing emotional problems of the former Residential Schools students as strong indicators that access to justice would be enhanced by certifying the proceeding.\(^{66}\)

Non-economic barriers were also acknowledged in one of our two case studies. In *Brogaard*,\(^{67}\) the companion action to *Hislop* which was ultimately stayed after certification in favour of *Hislop* proceeding on a national basis, the B.C. court also alluded to the particular

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\(^{65}\) Ibid. at para. 39 [cit. om.].

\(^{66}\) *Cloud v. Canada (AG)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 87-88.

\(^{67}\) *Brogaard v. Canada (AG)* (2002), 7 B.C.L.R. (4th) 358. Once the B.C. action was certified, the A.G. consented to certification of the Ontario action.
vulnerabilities of the class when weighing the access to justice benefits of a class proceeding.

Justice Allan referred to the following “unique feature” of the case: “The [representative] plaintiffs, who describe having experienced prejudice and harassment on the basis of their sexual orientation, are prepared to publicly advance the litigation on behalf of the members of the proposed class, many of whom fear discrimination and ostracism and desire relative anonymity.”

So, while some individuals may desire participation and an active voice in their litigation, the reasoning in Brogaard illustrates that it may be the invisibility of class members in a representative suit that makes it more responsive to individuals’ needs and a more desirable process. It is noteworthy that the damages sought in Brogaard/Hislop were not insignificant: it was estimated that the average past loss for class members was over $22,000, and annual benefits going forward of over $3,000; still, the court found that “the prohibitive expense of complex litigation relative to the amount recoverable would likely preclude many legitimate claims,” the same economic rationale cited by McLachlin C.J.

Just as the barriers to “access” are primarily (though not exclusively) described in class action case law in economic terms, the conflation of “justice” with “litigation” rarely strays from the traditional positivist emphasis on procedure. That is, so long as the plaintiffs are given the opportunity to litigate their dispute, access to justice has been achieved even if it is only procedural in nature. The procedural advantages of class proceedings over ordinary litigation, including the

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68 Ibid. at para. 121.
69 Ibid. at para. 120.
70 Hollick, supra note 62 at para. 15 (“class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own”).
availability of case management and discovery rights (which are not available in simplified procedures or small claims court actions) are said to further access to justice. Yet even from the perspective of procedural access to justice, this equation is arguably deficient. Whether the procedural particularities of class proceedings, like the additional time and cost of a certification hearing, the litigants’ lack of control over the litigation process, and the negligible participation of class members in the litigation process, enhance or detract from procedural access to justice, are rarely discussed. Moreover, procedural access to justice, at least as it has been conceived by scholars and law reformers, is much more than access to a procedure. As Rod Macdonald writes,

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

Indisputably, the gatekeepers to this procedure for prospective class members are the lawyers who determine which cases to initiate and how to conduct them. As will be seen, some of these lawyers do see their roles as private Attorneys General, charged with ensuring access to a procedure where no other is available. There are variations, however, in how they view the barriers to justice that exist, and the degree of emphasis put on the result achieved by the process.

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71 Lavier v. MyTravel Canada Holidays Inc. (2009), 248 O.A.C. 378 (Div.Ct.) at para. 62. See also Scott v. TD Waterhouse (2001), 94 B.C.L.R. (3d) 320 (S.C.) at paras. 115-116, where Justice Martinson lists the practical advantages of a class, including the ability to attract “sophisticated lawyers” by way of contingency fees, and the insulation of class members from adverse costs.

72 The decision denying certification in Roach v. Caada (AG), [2009] O.J. No. 737 (S.C.J.) is one possible exception. There, Cullity J. indicated that the primary relief sought, a declaration of constitutional invalidity, could be obtained in an ordinary application that would be simpler, less expensive and more expeditious (at para. 40).

73 R. Macdonald, supra note 11 at 105.
III. **Lawyers on Access to Justice**

As explained in the previous chapter, I conducted follow up interviews, by telephone and email correspondence, with many of the lawyers who responded to the detailed questionnaire. In these interviews, I asked them to define access to justice. Their views illustrate what access to justice scholars have repeatedly affirmed: the phrase is often invoked but without consensus as to its content.\(^74\)

It was not surprising, then, that one lawyer observed that access to justice is “overused and misunderstood”. The lawyer stated the concept is about providing [...] people with very small claims or difficult claims the opportunity to get their grievance into the litigation milieu, be it through litigation or alternative dispute resolution mechanisms. One achieves that access by creating a system that encourages lawyers to take on such cases, and by creating a process by which the claims can be resolved.\(^75\)

Both the size and difficulty of claims are perceived as barriers to justice for this respondent. Access to either litigation processes or its alternatives is contemplated, though the assistance of lawyers appears necessary to both. Thus, incentives are needed to encourage lawyers to represent individuals with such claims.

Two lawyers stated that they believed access to justice was about representing people who have no other recourse. The first referred to a client who had been injured by a drug, and who had tried to engage a lawyer to sue the pharmaceutical company as an individual lawsuit; the client had been told such litigation would be costly, and her damages as a homemaker would not be

\(^74\) R. Macdonald, supra note 11 at 19.
\(^75\) Email from Respondent #13 dated May 7, 2009.
significant. Years later, she learned of a class action involving the same drug and defendant, a proceeding which, according to the lawyer, provided the woman with access to a process and a fair remedy.\footnote{Email from Respondent #10 dated May 13, 2009.} According to this respondent, “When I think about access to justice, I think about helping clients like that who would have no other recourse.” For this class counsel, class proceedings do not further access to justice because they are preferable to other processes; they enhance access to justice because they are the only process available.

Another senior class counsel similarly explained that access to justice in the context of class actions is about “cases that could not otherwise be brought”. He argued that true access to justice “is not about the Cassanos\footnote{Cassano v. The Toronto Dominion Bank, [2009] O.J. No. 2922 (S.C.J.) (action alleging bank did not disclose currency conversion fee for credit card purchases made in foreign currency).} and Marksons\footnote{Markson v. MBNA Canada Bank (2007), 85 O.R. (3d) 321 (C.A.) (action alleging bank collected interest on cash advances that violated the criminal interest provisions of the Criminal Code).} which are about dividing up a pie”, but about cases that cannot be resolved other than by way of a class action due to “economic, social and psychological barriers” (referring explicitly to the OLRC Report).\footnote{Interview with Respondent #9 on May 14, 2009 (notes on file with author).}

One respondent focused on substantive results; he stated simply that “access to justice means you have to actually get a remedy to people”. In this context, the respondent expressed some concern about settlements that were distributed solely or predominantly \textit{cy près}. He also stressed that access is more than aggregating small claims; in his view, there are greater barriers than just the cost of litigation. By way of example, he referred to litigation plans which failed to
take into account the geographic location of class members. Access to justice considerations had to be taken into account beyond certification to ensure a just result.  

Finally, one respondent, a senior lawyer, explained that access to justice as a term is not helpful to class members. In his view, access to justice is “a shield against certification”, not a sword in its favour.

All but one respondent, therefore, referred to cost barriers which prevent individuals from getting remedies. Several also referred to the need to conceptualize barriers to justice in non-economic terms, and one emphasized conferral of a remedy or substantive justice as critical. While these views are not necessarily representative of all class counsel, they do provide some measure of what notions of access to justice animate them.

IV. Conclusion – Whither Access to Justice?

Access to justice literature spans many decades and has, over the years, come to recognize a spectrum of barriers to equality beyond the financial expense of courts and lawyers. Class actions are perceived as an access to justice mechanism in so far as they enable the resolution of disputes affecting diffuse interests. This public law function is reflected in the literature, where numerous references are made to the social mission of class actions, with class counsel acting as a private Attorney General. Modern access to justice commentary on class actions is supportive but

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80 Interview with Respondent #12 on May 11, 2009 (notes on file with author).
81 Email from Respondent #1 dated May 26, 2009.
circumspect: there are concerns about under-compensation of class members, over-compensation of lawyers, and processes which are not responsive to individuals’ sense of fairness.

When courts speak of class actions furthering access to justice, they refer exclusively to enabling access to courts and the litigation process. The barriers class actions are said to overcome are primarily economic – i.e. the costs of individual lawsuits are too high relative either to the damages at stake or to the financial means of the litigant. Periodically, courts will refer to other barriers, like the social and psychological barriers averted to in Brogaard, Rumley and Cloud. When alternative, non-judicial procedures are offered by defendants as preferable to the class proceeding, courts have looked at the quantum of compensation offered in determining whether access to justice is enhanced,82 thereby giving some substantive content to the term. For the most part, however, when judges speak of access to justice they mean access to court procedures. Simply put, class actions are designed to overcome economic barriers to accessing the court system. In this way, judges operate on a concept of access to justice that is still deeply influenced by its origins in the idea that the central concern was to overcome barriers (especially financial barriers tied to the cost of legal services) to the enforcement of legal rights by judicial institutions. This, notwithstanding that the past four decades of reflection and reform have revealed its wider scope, larger scale and loftier ambitions.83

The judiciary’s restrictive view of access to justice is understandable given the framework in which judges deliberate on the concept: they are applying a procedural statute in litigation that class counsel have already satisfied themselves justifies the financial risk of working on a

82 Pearson v. Inco, supra note 62. The defendant’s no-fault remediation scheme did not provide for compensation for diminution of property values, and did not, therefore, “address access to justice concerns” (at para. 80).
83 R. Macdonald, supra note 11 at 101.
contingency fee basis. How the particular harm came to be discovered, articulated and translated into a legally cognizable wrong is of little moment. Which claims are rejected by counsel and which groups are denied access to courts is irrelevant to the adjudication of a particular case. To what extent the process of a class proceeding empowers, responds to citizens’ needs, or fosters their ability to understand and participate within the legal system,\(^84\) is not directly engaged by the test for certification or standards for settlement approval. These broader access to justice goals quite understandably appear peripheral to the dispute in question. For those evaluating class actions, however, these dimensions of access to justice are significant.

In the end, the definition of access to justice that I adopt incorporates four basic, but fundamental, core attributes. First, in the context of class proceedings, access to justice necessarily means an opportunity to litigate a claim\(^85\) that would otherwise not be litigable for reasons of economic impracticality, social condition or psychological barriers. While courts generally focus on the small monetary claims rendered non-litigable due to the expense of litigation, I would expand this minimalist definition to give special consideration to the injustices that are not easily named, or for which culprits are not blamed, injustices that marginalize communities and who are most in

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\(^84\) Janice Gross Stein and Adam Cook write that citizens are disengaged from the legal system in large part because legal vernacular remains inaccessible to them. The authors propose both the demystification of the legal sciences and a more active engagement by legal professionals in pursuing social justice outside the framework of the law. “Speaking the Language of Justice: A New Legal Vernacular” in J. Bass, W.A. Bogart & F. Zemans, eds., Access to Justice for a New Century: The Way Forward (Toronto: Law Society of Upper Canada/Irwin Law, 2005) 163.

\(^85\) Implicit in most contemporary discussions of access to the court is the necessary corollary of access to competent representation. This component is not explored here but I note that the crisis of a lack of access to counsel prevalent in other areas of the justice system is not a dominant theme in discussions about class actions for a few reasons. Self-represented plaintiffs do not exist in this form of litigation (beyond the small role that objectors might play) given the scope, expense and complexity of class actions. Contingency fees ensure access to lawyers. Courts assess the adequacy of counsel in the course of applying the test for certification. There is no suggestion in the literature or popular press that there is a dearth of class action lawyers; the question is, what kinds of cases are those lawyers willing to take?
Second, given the full panoply of considerations canvassed in this chapter, a progressive understanding of access to justice would also include more than simply access to a court procedure. The procedure must be fair; in light of the limited participation rights of class members, class actions must be as transparent as possible. Third, where participation of class members is envisioned, those rights must be meaningful. A right to object or to opt out that is rendered hollow due to the same barriers that prevent access to the ordinary court procedure, is no right at all. And finally, a substantively fair result must also define access to justice. Settlements, both in terms of quantity and manner of distribution, need to be designed in a manner that benefits class members to the fullest extent possible. In cases where class counsel does not play the classic private Attorney General role, that is, she does not expose a hitherto unidentified wrongful practice, but rather benefits from the regulatory investigation of the conduct at issue, the adequacy and fairness of the compensation scheme takes on acute importance, since the deterrent function of the class action is potentially of marginal importance.87

With this thicker version of access to justice in mind, I turn now to an analysis of several stages of the class action to determine, if only preliminarily, whether Ontario’s class action experience has fulfilled the access to justice promise.

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86 These would include not just equality-seeking groups and the historically marginalized, but groups whose harms have not been identified or recognized by any regulatory, enforcement or other agency. Class actions that are not an adjunct to regulatory action are, in theory at least, giving voice to silent claimants.

87 As will be explored in the next chapter, many class actions are spurred on by public announcements or government investigations in respect of securities, anti-competitive behaviour or food and drug safety. In these contexts, a public agency has already investigated the wrongful practice and perhaps even imposed regulatory fines. It is arguable, therefore, that the deterrent function of class proceedings in these contexts is redundant.
Since the inception of the CPA, the certification motion has been viewed as the most important moment in the life of a class proceeding. The centrality of certification is reflected in the sheer number of reported decisions on certification, and the attention devoted to the topic in class action literature. While it is true that once certified, a proceeding gives plaintiffs’ counsel increased leverage and bargaining power and often results in settlement, other stages of the litigation are of comparable importance from the vantage point of those seeking access to justice.

One of those stages is case selection. As will be explained in this chapter, it is class action counsel, after all, who determine which cases to initiate. Why are certain cases brought as class proceedings, how many others are rejected, and on what basis are these decisions made? Do these criteria constitute a new barrier to justice or do they, in fact, facilitate access to justice? In this chapter, we attempt to answer these questions, by looking to the survey and case study

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1 A June 9, 2009 search of the Quicklaw database for decisions pursuant to s. 5 of the CPA, for example, yields almost 400 'hits'. Certification has been described as the “watershed moment” in class proceedings: McGee v. London Life Insurance Co, [2008] O.J. No. 5312 (S.C.J.).

2 For example, John Kleefeld writes simply that in the class action context, “certification is everything”: “Class Actions as Alternative Dispute Resolution” (2001) 39 Osgoode Hall L. J. 817 at para. 16.

3 Data from an empirical study of class action litigation in the Northern District of California appears to support this conclusion; of 46 certified class action studied, 36 were settled, whereas only 11 of the 73 uncertified class actions were settled. See Bryant Garth, “Studying Civil Litigation Through the Class Action” (1986-1987) 62 Ind. L. J. 497 at 501 for summary of data results. No comparable empirical study has been conducted in Canada, but in his paper “Class Action Settlements: 10th Anniversary Perspectives on the Canadian Experience” British Columbia CLE (February 25, 2005), online: <http://www.branmac.com/go/download/settlement_anniversary.pdf>, Jim MacMaster relies on the best data available up to 2004 and finds that of 106 successful certification applications in Ontario (both opposed and on consent), 52 resulted in settlement (again, either after contested certification hearings or as a consent certification motion for settlement purposes). Only ten went to trial; given the small number of class actions that have gone to trial in Ontario, the remaining 44 certified actions either settled or were discontinued after his paper was prepared.
information, as well as the policy arguments raised in the jurisprudence. The data provides an empirical basis on which to discuss the access to justice ramifications of entrepreneurial litigation. Moreover, the survey respondents provided information regarding the criteria used to select and reject prospective claims; this information will shed light on an area of class action practice that until now has resided in the shadows, and will be used to evaluate the broader access to justice implications of the lawyer-driven model of advocacy that is dominant in class proceedings.

This discussion of case selection also gives rise to broader questions surrounding entrepreneurial litigation. Anecdotal evidence suggests not only that class counsel are actively searching for legal issues ripe for class litigation, but that as a corollary, they are recruiting the plaintiffs in whose name the litigation will be prosecuted. Such activity has rested uneasily with some on the bench and in the bar. In this chapter we will consider how the recruitment of representative plaintiffs both enhances and threatens access to justice.

I. The Facts: Recruiting Clients and Stirring Up Litigation

As mentioned in chapter 1, class action literature and jurisprudence is replete with references to entrepreneurial lawyers, who conceive and drive class action litigation unrestrained by client instructions, and with far more to gain from the litigation than their clients. Unlike

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4 At the 6th Annual Symposium on Class Actions held in Toronto on April 2, 2009, the first question addressed by a panel of judges and lawyers on the subject of ethics was whether counsel could ask someone to act as representative plaintiff. The practitioners on the panel and in the audience agreed that this activity is permissible.

5 For a recent example, see Paul Perrell, “Class Proceedings and Lawyers’ Conflicts of Interest” (2009) Adv. Quarterly 202, where Justice Perrell describes the relationship between class counsel and the representative plaintiffs and other class members as “exceptional”, giving rise to unique ethical challenges. While the presence of a genuine claimant is necessary as a “check and balance to the excesses of entrepreneurial law firms sponsoring class proceedings”, it is also true that “the lawyer of record may ultimately have a greater financial interest and greater financial risks than the
traditional litigation, which rests largely on the plaintiff herself identifying (naming) the legal harm and seeking legal assistance to blame and claim, entrepreneurial litigation centers on the active participation of lawyers in the generation of legal claims. After identifying a legal wrong, entrepreneurial class counsel approach acquaintances or other individuals who are suspected of possessing the requisite class characteristics, or class counsel find a representative plaintiff pursuant to a mass solicitation campaign. Neither class action legislation nor rules of professional conduct prohibit such activity, and nor has there been any scholarly treatment of the possible ethical implications of recruiting plaintiffs in Canada.  

To date there has been no empirical data upon which to determine the extent to which class actions are wholly lawyer-driven, that is, conceived by entrepreneurial lawyers who identify legal problems and then seek out representative plaintiffs. Similarly, there is no information about the extent to which class actions have the benefit of prior government investigation which unearths the cause of action and the evidence to establish it. Certification judgments do not always reveal how the representative plaintiff came to her role, but anecdotally, recruitment of

plaintiff” (at 204-205). For a U.S. example, see J. Coffee Jr., “Class Action Accountability”, (2000) 100 Colum. L. Rev. 370 (‘where the plaintiffs’ attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney’s own economic self-interest” [at 371-72]).

Some have written about the ethical implications of contingency fees and conflicts of interest between counsel, representative plaintiffs and the class: see Paul Perell, “Class Proceedings and lawyers’ Conflicts” (2009) 35 The Adv. Quarterly 202, and Michael P. Abdelkarim, “Class Counsel’s Ethical Obligations” (2004) 18 W.R.L.S.I. 105. Neither of these articles, however, addresses directly whether recruitment could arguably be considered maintenance, or is otherwise an ethical minefield.

Several years before Ontario’s CPA was enacted, one of the OLRC Report’s consultants predicted precisely this model of litigation: W.A. Bogart, “Questioning Litigation’s Role -- Courts and Class Actions in Canada” (1987) 62 Ind. L. J. 665 at 689.
plaintiffs is viewed as the new paradigm. The information collected in this thesis project confirms that the operating paradigm in class litigation is not the traditional series of events whereby clients seek legal advice and retain a lawyer to prosecute their interests. George Hislop, the representative plaintiff in one of our case studies, for example, was asked to act as representative plaintiff by class counsel. And in *Atlas*, two of the three representative plaintiffs were recruited by the lawyers.

The survey results confirm the anecdotal evidence and buttress the conclusion that the lawyer-as-recruiter paradigm evident in the case studies is not anomalous. Less than 25% of the class actions reported by respondent lawyers were classified as “client-initiated”. Instead, actions were commenced as a result of publicly announced regulatory investigations, on referral by third parties, or as a result of the firm’s own research and investigations, all variations of the entrepreneurial model. Only three respondents reported that 50% or more of their class actions arose as a result of the traditional client-initiated contact. Importantly, however, these three

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8 In my own experience as class counsel, less than half of the cases in which I was involved resulted from individuals contacting counsel seeking legal advice to advance a cause.

9 As will be discussed at greater length in part (c) of this chapter, Doug Elliott, class counsel, conceived of the idea of pursuing CPP benefits for same sex couples, after determining that the test case strategy would not be feasible. He then approached his friend, George Hislop, to act as representative plaintiff: Interview of Douglas Elliott, lead plaintiffs’ counsel (8 April 2009) (notes on file with author).

10 Recall that in *Atlas*, one representative plaintiff approached counsel for advice, the second plaintiff was approached by counsel, and the third came forward in response to an ad placed in the *Globe and Mail* by class counsel. (Above, ch. 1 at 37-38.)

11 Precise calculations are not possible since one responding firm provided only an estimate of the number of actions pending, and another firm did not provide a breakdown of how many actions were client-initiated. Based on estimates for these two firms, and the precise figures provided by the remaining respondents, there were 73 client-initiated actions out of a total of 332 reported class actions.

12 See Appendix B, question 3.
respondents had the fewest class actions of the fifteen respondents.\textsuperscript{13} Of the responding firms with the largest pool of pending class actions (over 40 each), none attributed more than 25% of their cases to client initiation. These respondents did not, however, share the same predominate source of cases: one reported that over half of its cases were the result of internal firm investigation and research, another reported that it had been invited by other law firms to act in 35% of its cases (the largest single source of its actions), and a third respondent reported that 43% of its cases were commenced following the publicity of a regulatory investigation.\textsuperscript{14}

Various forms of ‘piggybacking’, ‘coattail’ or ‘follow-on’ litigation account for a significant number of class actions. That is, class counsel rely on actors other than clients and their own internal research and investigation for the source of class actions. For example, \textit{Atlas} was initiated after public announcements of the results of an internal audit committee investigation and relied also on the results of Ontario Securities Commission proceedings. The numerous vitamins price-fixing claims settled in the early 2000s followed both regulatory and class action proceedings in the U.S. against the defendants’ parent companies.

The survey results confirm the prevalence of follow-on litigation. Half of the respondents had at least some cases derive from ideas brought to them by third parties, with one firm with a large class action portfolio attributing 25% of its cases to ideas by third parties. Three respondents cited regulatory investigations as their predominant source of cases; notably, one of these

\textsuperscript{13} Respondent #3 reported that one of its two pending actions was client-initiated; respondent #11 reported that all five of its actions were client-initiated; and respondent #13 reported that 6 out of 7 of its actions were client-initiated.

\textsuperscript{14} The fourth respondent with over 40 pending cases did not provide precise numbers, stating that the source of its cases was “impossible to determine at this stage” but that it was a “mixture of all.”
respondents had more *Competition Act* claims than any other category of cases in its pool of pending actions, while drugs and medical devices, and securities cases, accounted for the vast majority of the other two respondents’ cases, respectively. Thus, firms with a high concentration of class actions involving regulatory agencies – the Competition Bureau, Securities Commissions and Health Canada – rely heavily on public reports and advisories issued by these agencies to identify potential class actions. Piggybacking on American class actions was cited as the least likely reason to pursue a claim by all but two firms: one reported that most of its actions were commenced after a similar claim was launched in the United States, and another firm reported piggybacking as the second-most prevalent source of new cases.

The purest form of entrepreneurial litigation occurs when legal wrongs are identified by class counsel as a result of internal research and investigation. Increasingly, class action firms are devoting considerable resources to this function. Windsor firm Sutts, Strosberg LLP, for example, recently hired a lawyer formerly responsible for Milberg Weiss’ anti-trust “case-origination work” to do the same this side of the border.\(^\text{15}\) Indeed, class actions have been generated in this way for decades in the U.S. In keeping with this trend, all but two of the firms participating in the survey attributed some of their cases to their own research. Two firms\(^\text{16}\) stated that over half of their cases were initiated as a result of internal research and investigation.

\(^{15}\) Jim Middlemiss, “Windsor firm bags former Milberg man” *National Post* (8 April 2009), online: http://www.financialpost.com/story.html?id=1475462 (quoting Sutts, Strosberg lawyers who note that in Canada, the “market remains largely untapped when it comes to cartel actions and there are a lot more suits to unearth”).

\(^{16}\) One has between 10-19 cases pending, the other over 40 cases pending.
The business of identifying suitable new class actions is time-consuming, and in the world of billable hours, expensive. Class counsel regard the process of case selection as a necessary form of due diligence in light of the investment to be made.\textsuperscript{17} Respondents were asked what percentage of prospective claims – those claims in which a firm devoted at least eight hours of research or opened a file – were rejected in 2008. The vast majority of responding firms reported a rejection rate of over 60%; three firms reported a rejection rate of over 90%.\textsuperscript{18}

The data confirms that to a considerable extent, therefore, class counsel are discriminating in their choice of which actions to pursue. That they are selective follows from the financial investment involved, the delay in payment of fees, as well as the risk of non-payment. But on what basis do counsel select which actions to prosecute? Although the certification motion judge determines access to justice for those claims commenced as putative class proceedings, it is class counsel who play a pivotal and antecedent role in accessing justice for those who have suffered harm. For this reason, the survey explored the criteria used in selecting and rejecting prospective claims.

When asked about the case selection criteria used by counsel, one appellate judge remarked last year that there was but one: money.\textsuperscript{19} This hypothesis was tested in the survey. In

\begin{footnotes}
\footnote{17} Ward Branch and Won Kim, “The Wheat and the Chaff: Class Action Case Selection” (September 2005), Paper presented for Canadian Institute Conference [unpublished], online: http://www.branmac.com/go/download/TheWheatAndTheChaff.pdf (suggesting factors to consider in performing due diligence prior to making “huge investment”, which over time become “instinctual”).

\footnote{18} Appendix B, question 4.

\footnote{19} Discussion with Ontario Court of Appeal judge, October 24, 2008 (notes on file with author).
\end{footnotes}
terms of the criteria used to select those cases ultimately prosecuted by class counsel, respondents were given seven options:

i. size of class
ii. quantum of damages
iii. existence of proceeding against same defendant(s) in U.S. or other foreign jurisdiction
iv. existence of regulatory investigation or report
v. novelty of claim
vi. public interest, and
vii. ‘other’.

Responses varied greatly, but one criterion stood out. Eight out of fifteen respondents chose ‘other’ and then specified that the most important selection criterion was the legal merit of the claim – a criterion that I assumed was a pre-requisite for any case launched by class counsel. That is, if only meritorious actions are prosecuted, the merits of a legal claim would not by itself determine which of the pool of potential claims would be selected for prosecution.

All class counsel are compensated on a contingency fee basis; no other basis for remuneration is described in any of the reported cases or scholarship. It is understandable, therefore, that the strength of the legal claim is of particular importance to at least some class counsel precisely because of the financial risks involved in a contingency fee arrangement. As two practitioners put it,

It is not enough that the merits appear reasonably good. A higher threshold is required in this area. Class actions are so fraught with procedural challenges that you
need to be convinced that the merits are very strong before embarking down the long and difficult path.\textsuperscript{20} (Emphasis in original.)

Quantum of damages was the most important reason for three of the respondents and the second most important reason for ten others. Since the monetary value of a claim is directly proportionate to the potential contingency fee, the importance of this criterion is understandable – and inevitable, according to the appellate judge quoted above. In follow-up interviews counsel were generally agreed that the monetary value of a claim had to exceed $1 million in order for the case to make economic sense.\textsuperscript{21} Such a minimum monetary threshold would appear to favour certain kinds of class actions over others; human rights claims, or those on behalf of a small group of individuals, for example, would be less likely to involve damages exceeding a million dollars.

The estimated class size was also consistently ranked as a moderately important criterion. Three respondents stated class size was the second most important factor (after quantum of damages in the case for two of them), while five ranked it third. Class size may be significant for at least two reasons: the larger the class, the larger the potential damage pool; and the greater the number of individuals affected by the misconduct, the stronger the access to justice and judicial efficiency arguments that can be made at certification.

Perhaps most surprising, given the economic realities of class actions, is that several respondents placed some emphasis on either the novelty of the proposed action or the public

\textsuperscript{20} Branch and Kim, supra note 17 at 3.

\textsuperscript{21} This figure is consistent with Branch and Kim’s advice, ibid. at 5 (“The global damages should be at least $1 million or more. ... It is obvious that the global damages must be in the seven figure range if there is going to be any realistic prospect of obtaining a premium on your time at the end of the day”).
interest at issue in the litigation. In fact, public interest was the most important selection criterion for two respondents, both of whom had significant class action practices. For two other respondents, public interest was the second-most important consideration. Yet, it was not even ranked as a criterion used in selecting cases by three respondents, two of whom have over 40 pending cases each. The novelty of a case was most important for one respondent, but least important for ten others. Non-economic factors, therefore, including the social value of a lawsuit, vary greatly in importance from firm to firm. To the extent that there is an expectation for class action litigation to advance social policy reform, in the way that Rule 23 was designed to do four decades ago in the U.S., the priorities and practices of class counsel are for the most part dispiriting, even if understandable.

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22 “The primary purpose [of Rule 23] was to facilitate civil rights litigation. In the decade following its revision, Rule 23 was used variously to desegregate schools, reform prison conditions, and expand welfare rights.” Deborah M. Hensler, “The New Social Policy Torts: Litigation as a Legislative Strategy” (2001-2002) 51 DePaul L. Rev. 493 at 499.

23 That the quantum of damages is given such significance by several respondents who do not rank “public importance” as an important criterion does not necessarily mean that the cases launched by these respondents do not have a public importance; it would seem, however, that such an impact would be accidental.
As a corollary to the questions surrounding selection criteria, respondents were also asked what was the most important factor for rejecting a prospective claim. Put differently, what consideration constituted an access chokepoint, to use Galanter’s term?\textsuperscript{24} Here the results were somewhat less disparate than for the previous question: difficulty of certifying the claim was the most important factor for four of the respondents, while for ten others, ‘prospects for success on legal issues at trial too low’ was most significant. Difficulty in finding an appropriate representative plaintiff was only moderately significant (i.e. ranked third or fourth most prevalent reason) for four respondents. Not unexpectedly, for half of the respondents, the low monetary value of the claim was the second or third most important reason for choosing not to commence an action.

\textsuperscript{24} Above, ch. 2 at 48.
II. The Implications for Access to Justice

The data collected from the participating lawyers, while not exhaustive of all of the variables that come into play in the early stages of a class action, and despite its inherent frailty because it is self-reported, does help flesh out what it is involved in entrepreneurial litigation. As we have seen, the majority of class actions are not initiated at the instance of an aggrieved client who contacts class counsel with instructions to commence litigation. Instead, more often than not, class counsel initiate the litigation, either as a result of their own creative research or on the heels of a regulatory investigation or similar action in another jurisdiction, what we will call collectively the “entrepreneurial model”.

![Top 3 Rejection Criteria](Image)
Class actions are said to be made possible by contingency fees and an entrepreneurial bar. Yet both the entrepreneurial nature of class action litigation and its implications for access to justice are rarely explicitly addressed in Canadian case law, and to some extent reflect the continuing discomfort judges have with features of entrepreneurial practice. Indeed, late last year a B.C. court denied certification precisely because the case followed the entrepreneurial model. In *Chartrand v. General Motors*, Martinson J. found that, although the pleadings disclosed a cause of action and there were common issues, there was no evidence of an identifiable class of two or more persons with complaints against GM, and the proposed representative plaintiff was inappropriate. In this case, the plaintiff was contacted by class counsel, a lawyer with whom she had previously dealt with respect to a motor vehicle accident. The lawyer advised her she owned a vehicle that might have a problem with a parking brake, a defect that had been the subject of class proceedings and a voluntary recall in the United States. Counsel paid for the inspection of the vehicle and the replacement of the defective part, as the plaintiff could not afford to do so.

Martinson J. concluded that Ms. Chartrand had not been “actively participating” in the decision-making in the litigation, even though she had a basic knowledge of the lawsuit and had read the court documents. On the issue of the plaintiff’s recruitment, the certification motion judge stated: “There is no specific legislative provision or legal principle which prohibits recruitment. Nevertheless, recruitment is a factor to consider in deciding whether a proposed

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27 Ibid. at paras. 2-15. Note that, unlike their American counterparts, Transport Canada did not investigate the alleged defect in the GM vehicles in issue, and GM Canada did not issue a voluntary recall.
28 Ibid. at paras. 99-103.
representative plaintiff can fairly and adequately represent the class.” In the case before her, the judge found recruitment to be indicative of Ms. Chartrand’s passive role as a mere “a placeholder plaintiff for the entrepreneurial interests of her lawyer and his American partners”, and thus the plaintiff was “not in a position to vigorously and capably prosecute the interests of the class.” In addition to recruitment, the judge was also troubled by the fact that the plaintiff knew little about the arrangement between her counsel and American lawyers, the details of which were not given to the judge, and that she had a financial incentive in the case (ie: counsel paid for the repairs to her brakes).

In addition to being unsatisfied with the adequacy of the representative plaintiff, the motion judge was also unconvinced that there was an identifiable class of two or more persons with complaints regarding the brakes. No consumer complaints had been lodged with either GM or Transport Canada, and class counsel adduced no evidence of any other person wishing to participate in the class proceeding. And of course, Ms. Chartrand herself had been recruited to participate. On these facts, Martinson J. held that was no “air of reality” to the assertion of a link

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29 Ibid. at 105.

30 Ibid. at 102, 111. Very similar findings were made in Poulin v. Ford Motor Co. of Canada (2006), 35 C.P.C. (6th) 264 (Ont.S.C.J.). There, the representative plaintiff was described as a “pawn” by counsel who recruited him, and ultimately found not be an adequate representative for the class because he:
(1) He was unaware of the alleged safety defects until they were brought to his attention by a law firm in Sudbury, Ontario.
(2) Notwithstanding his knowledge of the alleged safety defects, he has not repaired the vehicle and continues to drive it.
(3) He was unaware of the role of the U.S. law firm and the terms upon which that firm is providing “litigation support” to his Canadian counsel.
(4) He had not reviewed the amended Statement of Claim before his cross-examination and had not reviewed the affidavit of Mr. Jekel [U.S. counsel who was underwriting the litigation] until the day before his cross-examination.
(5) He did not know what a litigation plan was and accordingly, had no review or input into the terms of such plan.
(6) He was unable to identify all the vehicles within the Affected Vehicles. (at para. 86)
between the class and the common issues.\textsuperscript{31} Yet all of the factors recited in support of this conclusion, especially the recruitment of Ms. Chartrand, and her passive role in the litigation, are not only common in most class actions, but are perhaps inevitable given the entrepreneurial nature of the litigation.

On close examination, the facts of \textit{Chartrand} do not differ significantly from other certified class actions.\textsuperscript{32} Ms. Chartrand was recruited; yet if we extrapolate the results of the survey to the entire universe of pending actions, over 75\% of current class actions were not commenced at the instance of an advice-seeking client. Ms. Chartrand had read court documents and had met with her counsel “many times in the last couple of years to discuss this case”, but did not take part in the decision to amend the claim other than to “discuss” it.\textsuperscript{33} She was not familiar with the litigation plan, nor with the financial arrangements between her counsel and the American attorneys. Similarly, however, representative plaintiffs in the \textit{Atlas} case study deposed that they had met with their counsel and had reviewed documents, but that the specifics of the litigation plan and pleadings were within the expertise of their counsel.\textsuperscript{34} In another action involving automobile deductibles, the representative plaintiffs had an “incomplete understanding of their obligations with respect to costs”, but nevertheless were found to be adequate.\textsuperscript{35} After reviewing the

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\textsuperscript{31} Ibid. at paras. 65-68.
\textsuperscript{32} Nor indeed, do the facts of \textit{Poulin}, supra note 30.
\textsuperscript{33} Ibid. at para. 78.
\textsuperscript{34} Affidavit of P. Lawrence dated September 24, 2004 at paras. 9, 11 (on file with author).
\textsuperscript{35} \textit{Segnitz v. Royal & SunAlliance Ins. Co.} (2003), 40 C.P.C. (5\textsuperscript{th}) 391 (Ont. S.C.J.) at para. 7. The class action was ultimately dismissed as a result of the insurer’s successful summary judgment motion: \textit{David Polowin Real Estate v. Dominion of Canada General Insurance Co.} (2005), 76 O.R. (3\textsuperscript{rd}) 161 (C.A.)
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transcripts of the plaintiffs’ cross-examinations in which their limited understanding of a representative plaintiff’s cost exposure was made plain, Haines J. noted:

It should perhaps be remembered in cases such as these that no representative plaintiff will have much of a stake in the ultimate outcome since the potential recoveries are so modest. Therefore reality dictates that the test for adequacy of the representative plaintiff is in large part a test of the capacity of class counsel to properly pursue the action in the best interests of the members of the class.  

Haines J.’s more practical view is to be contrasted with that of Martinson J. in Chartrand, who had more stringent expectations of a representative plaintiff’s involvement in directing a class action. At bottom, the judge was uncomfortable with the entrepreneurial nature of class action litigation:

What is needed is a genuine plaintiff with a real role to play and not a placeholder plaintiff for the entrepreneurial interests of lawyers who have so much at stake. The CPA does not contemplate that causes of action, legitimate though they may be, will be identified, and class members recruited, for the ultimate financial gain of lawyers or organizers. See: Richard, at para. 42; Poulin v. Ford Motor Co. of Canada, (2007), 52 C.P.C. (6th) 294 at para. 63 (Ont. S.C.J.); and Fantl v. Transamerica Life Canada, (2008), 60 C.P.C. (6th) 326 at para. 104 (Ont. S.C.J.). (Emphasis added)

There are, no doubt, instances where representative plaintiffs take an active role in the litigation. In Lau v. Bayview Landmark Inc., for example, one of the representative plaintiffs sought to change solicitors because class counsel was not prosecuting the case with sufficient diligence. Noteably, however, in Lau the plaintiffs had sued for recovery of deposits in a condominium project, and therefore had a much greater monetary stake in the ultimate outcome of the case than, for instance, Ms. Chartrand. For the representative plaintiff with only nominal damages,

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36 Ibid. at para. 14.
37 Chartrand v. General Motors Corp., supra note 26 at para. 99.
there is little incentive, and for most even less expertise, to oversee the conduct of the litigation in an active manner. Thus plaintiffs are, in a very real sense, “placeholders”, though not only for their lawyers but for the entire class of individuals who may benefit if the action is concluded successfully.

Without interviewing representative plaintiffs themselves, it is impossible to know to what degree they actively and meaningfully participate in decision-making throughout the litigation process. U.S. scholars have observed that the economic incentives in class actions involving small individual recoveries necessarily create a dynamic whereby counsel are not monitored by their clients, especially where the plaintiff is recruited to that role. Our courts, however, do not appear to have recognized this dynamic. Rather, emphasis is repeatedly placed on the representative plaintiff bring a “genuine” one, who will give instructions and engage in meaningful bargaining with counsel. A recent appellate court judgment exhibits the difficulty of reconciling the entrepreneurial paradigm with the rules and customs of non-representative, non-contingency fee-based litigation.

39 Interviews of class members and representative plaintiffs were contemplated for this research but ultimately not pursued because of the anticipated difficulty in obtaining ethics approval and permission from counsel to communicate with their clients.

40 John C. Coffee Jr., “The Regulation of Entrepreneurial Litigation, Balancing Fairness and Efficiency in the Large Class Action” (1987) 54 U. Chi. L. Rev. 877 (“[I]n many settings, few plaintiffs expect a recovery sufficient to justify the cost of monitoring. [...] Finally, the most basic characteristic of a market is lacking within the context of entrepreneurial litigation because the buyer does not shop for legal services. Rather than the ‘principal’ hiring the ‘agent’, the reverse often occurs with the attorney finding the client after the attorney first researches and prepares the action” [at 884-885].) See also John C. Coffee Jr., “Rethinking the Class Action: A Policy Primer on Reform” (1986-1987) Ind. L.J. 625 at 628-634; “Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, (1983) 42 Md. L. Rev. 215.
In an unusual case that came before the Ontario court last year, the motion judge confronted the differences between ‘ordinary’ litigation and class proceedings, and prompted commentators to ask who controls class action litigation – the client or the lawyer? In Fantl v. Transamerica Life Canada, the firm representing Mr. Fantl disbanded soon after settlement discussions began in earnest with the defendant. Won Kim, who had been the senior lawyer responsible for the file, started his own firm. Mr. Fantl, however, chose to appoint Mr. Kim’s former partner’s new firm as counsel, on the basis of his friendship with the former partner and Mr. Fantl’s confidence in the ability of the other firm to prosecute the action. Mr. Kim sought an order requiring Mr. Fantl, himself a retired lawyer, to accept class counsel and his new firm as solicitors of record or alternatively, to replace Mr. Fantl as proposed representative plaintiff. Perrell J. rejected the application, thus allowing the representative plaintiff to sever his relationship with the former lead counsel. On appeal, the decision was affirmed.

Perrell J. recognized that the dynamics of the lawyer client relationship in a class action differ significantly from the dynamics of that relationship in ordinary litigation, principally because in the former, “it may be the lawyer and not the client who has the most financially to win or lose.” Moreover, in a class action, class members are “mostly absent from the litigation fray” and will not

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actively participate in the litigation until their individual trials, if any. The judge commented on
the significance of these dynamics for the judicial role:

Class actions have seen the emergence of the entrepreneurial lawyer and the
entrepreneurial class action law firm that has enormously more to gain and
evermously more to lose than the representative plaintiff or the individual class
members of the class action of which the firm or firms have carriage, especially if the
law firm agrees to indemnify the representative client for his or her exposure to
costs.

The entrepreneurial nature of a class proceeding can be a good thing because it may
be the vehicle for access to justice, judicial economy, and behaviour modification,
which are the driving policy goals of the Class Proceedings Act, 1992. However,
entrepreneurialism can be a bad thing if the representative plaintiff or class counsel
promotes a settlement that sacrifices the interests of the absent class. ...

After acknowledging the unique nature of the representative plaintiff-class counsel relationship,
Perell J. went on to affirm that class actions are designed to have a genuine plaintiff who “acts as a
check and balance to the excesses of entrepreneurial law firms”; if there is a genuine plaintiff, the
judge argued, then the traditional rules that govern the solicitor-client relationship should be the
starting point. Thus, representative plaintiffs possess all of the traditional rights of a client,
including making critical decisions, settling the action, and changing lawyers.

Having spent considerable time in his reasons distinguishing between class proceedings and
‘ordinary’ litigation, it is curious that Perell J. went on to find that, nevertheless, representative
plaintiffs enjoy a traditional solicitor-client relationship with class counsel. Class proceedings
legislation does not require that there be a plaintiff who behaves identically to litigants in individual

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\footnotesize 45 Fantl (S.C.J. decision), supra note 42 at para. 50.

\footnotesize 46 Fantl, supra note 42 at paras. 52-53.

\footnotesize 47 Ibid. at para. 63.

\footnotesize 48 Ibid. at para. 68.
proceedings; the legislation in all provinces speaks to “adequacy” of representation. The Supreme Court of Canada has referred to proposed representatives who will “vigorously and capably prosecute the interests of the class”, to be gauged by reference to three factors:

i. the plaintiff’s motivation to prosecute the claim;
ii. his or her ability to bear the costs of the litigation; and
iii. the competence of his or counsel to prosecute the claim.\(^{49}\)

A plaintiff who seeks to extort a settlement for herself, or gain an advantage not available to other class members, has an improper motivation and will therefore not be an adequate representative plaintiff.\(^{50}\) In addition, representative plaintiffs with close familial relationship with class counsel are inappropriate because of the “clear danger” that they may have interests in conflict with the best interests of the class when deciding matters affecting counsel fees.\(^{51}\) Failing these scenarios, there is nothing inherent in the test set out by either class action legislation or the Supreme Court’s dictum in *Western Canadian Shopping Centres* that compels courts to conclude, as the Ontario Court of Appeal did recently, that “the prosecution of the action rests squarely with the representative plaintiff.”\(^{52}\) Given the asymmetric stakes in the litigation as between counsel and client, it is far more likely that plaintiffs will take a passive role in the litigation, and the prosecution of a class action, therefore, rests squarely with class counsel.


\(^{52}\) *Fantl v. Transamerica Life Canada* (C.A.), supra note 43 at para. 65 (per Winkler CJC). Similarly, the Newfoundland court has also described the representative plaintiff as the party “responsible for directing the litigation on behalf of the class and who instructs class counsel and to whom class counsel gives advice.” *Rideout v. Health Labrador Corp.*, [2007] N.J. 292 (S.C.) at para. 115.
A recognition of the unique role of the representative plaintiff flows directly from the acceptance of the entrepreneurial nature of class litigation. Although slow to recognize the former, courts have readily recognized the latter as that which gives life to class proceedings. That class actions are lawyer-driven as a normative matter is not debated here; it is the model that the legislatures adopted and which the OLRC Report envisioned. What is critical is that we recognize the respective roles played by counsel and representative plaintiff in that lawyer-driven model, and ensure that judicial scrutiny properly addresses any attendant dangers.

On many levels, the entrepreneurial model furthers access to justice in the context of mass wrongs. First, the financial incentives that drive class counsel to devote considerable time and resources to ‘case-origination’ work may lead to discovery of legal harms not even recognized as such by the affected individuals. Thus, some class actions – at least those classified by the survey respondents as resulting from internal investigation as opposed to client contact, regulatory reports or third party referrals – promote a thicker form of access to justice by helping name the injury in question. Recalling that access to justice fundamentally requires access to information,

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53 Fantl v. Transamerica Life Canada (S.C.J.), supra note 42 at para. 53 (“The entrepreneurial nature of a class proceeding can be a good thing because it may be the vehicle for access to justice, judicial economy, and behaviour modification, which are the driving policy goals of the Class Proceedings Act, 1992.”) On appeal, Winkler CJC also stated unequivocally, at para. 66, that “there is no question that class proceedings are entrepreneurial in nature”, but hastened to add that “as far as the CPA is concerned, the entrepreneurial lawyer is a means to an end, not an end in and of itself.”

54 Several provisions (and gaps) in the CPA support this conclusion: the appointment of counsel to represent absent clients (class members); the express approval of contingency fees and multipliers; the absence of provisions that require the consent of the representative plaintiff to a settlement, or that require notice of a settlement to be served on all class members.

55 John Kleefeld, supra note 2 at para. 13 (“Undoubtedly, the stuff of some class actions—a bank’s failure to clearly explain mortgage prepayment terms, lost student class time due to a university faculty strike, a municipality’s neglect to eliminate ragweed—may, for many, never reach the status of a perceived injurious experience, or PIE, in ADR jargon.” [cit.om.])
entrepreneurial class counsel curb information deficits by heightening public awareness of actionable claims.\textsuperscript{56} Given the number of follow-on actions,\textsuperscript{57} however, it cannot be said that all class actions serve this socially useful role. Regulatory agencies (or in the case of voluntary recalls or mandatory disclosure,\textsuperscript{58} the defendant companies themselves) unearthed the wrongs at issue in price-fixing, securities\textsuperscript{59} and some pharmaceutical and medical device actions.\textsuperscript{60} Moreover, \textit{Competition Act} claims often follow guilty pleas and/or U.S. antitrust actions, which accounts for their proliferation in recent years.\textsuperscript{61} Class actions that “feed off the fruits of [a] governmental agency’s efforts” may still advance access to justice if they serve the compensatory function critical to meaningful access to justice; nevertheless, such actions do not “perform the classic function of privately generated exposure of unlawful behaviour traditionally facilitated by the private attorney-

\textsuperscript{56} See discussion of these aspects of access to justice in chapter 2, above at 47-49.

\textsuperscript{57} There were 138 class actions reported in the \textit{Competition Act}, securities and drug/medical devices categories, comprising more than 40\% of all class actions cited in the survey, and more than all mass tort, product liability, environmental and consumer product cases combined.

\textsuperscript{58} For example, in \textit{Atlas} the company’s independent investigation of accounting irregularities led to a public announcement of the restatement of the company’s financial statements. The company did not, of course, offer to compensate unitholders who had overpaid for their investments, so class proceedings were necessary to secure compensation.

\textsuperscript{59} One study of the recent growth of securities class actions reflected the link between regulatory action and class proceedings when it noted that Canada lags behind the U.S. in option backdating class actions because “Canadian regulators have not conducted the kind of large-scale investigations of options granting practice that were undertaken by the United States Securities and Exchange Commission.” Jim Middlemiss, “Class action suits growing fast in Canada” \textit{Financial Post} (28 January 2009) referring to NERA Economic Consulting study.

\textsuperscript{60} See e.g. Vitamins litigation, Canada’s biggest price-fixing settlement to date, which followed U.S. anti-trust proceedings. U.S. counsel involved in prosecuting those actions in federal court first alerted Canadian counsel to the possibility of civil actions in Canada: \textit{Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.}, [2005] O.J. No. 1117 (S.C.J.) at para. 33. On the other hand, an action against the manufacturer of OxyContin was commenced in 2007 in the absence of any regulatory action.

\textsuperscript{61} Katherine Kay, “Canadian Competition Class Actions: New Law, New Claims, More Fun” (Paper prepared for 6th Annual Symposium on Class Actions, Toronto, 2 April 2009) [unpublished] (describing cases that follow guilty pleas and record fines as “the ‘easiest’ actions for plaintiffs to think about bringing”).
general concept.”

Class actions that ferret out and halt unlawful behaviour further the rule of law, and in doing so increase access to justice in the broad sense adopted in this paper.

Second, the entrepreneurial model overcomes some of the barriers to claiming identified by access to justice scholars. Even for those individuals for whom an injury has been named, and a wrongdoer blamed, various cost and other barriers may serve to prevent a claim from ever being made. The proactive search for representative plaintiffs and class members addresses this phenomenon in many class actions. In Hislop, for example, class counsel’s recruitment of George Hislop and the other representative plaintiffs enabled important litigation to go forward on behalf of class members who, by reason of societal prejudice and social pressure, were loathe to come forward publicly to claim their entitlements. Such solicitation is not without its perils, however, particularly from a more comprehensive access to justice perspective. A number of Residential School survivors “went into crisis” after being contacted by class action firm, Merchant Law Group, to discuss their experiences of abuse. The firm defended its conduct on the basis that “[s]urvivors should be made aware that they have legal options, that they are entitled to compensation for what happened”. Concerns about the recruitment of vulnerable class members led the Canadian Bar Association to issue a set of voluntary guidelines in 2000 that stipulate lawyers “should not initiate communications with individual survivors of Aboriginal residential schools to solicit them as

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63 See chapter 2, above at page 45-47.
66 Ibid.
clients or inquire as to whether they were sexually assaulted."67 Such calls for vigilance and an awareness of the pitfalls of solicitation are critical from the perspective of those accessing the justice system. Recruitment, the very technique made necessary by entrepreneurial litigation, nevertheless may be adverse to principles of justice in certain circumstances.

Third, the entrepreneurial model enhances the purely procedural, first wave form of access to justice, by providing legal representation to some of those who would not otherwise be able to afford it. Indeed, the statistics collected in my research tend to confirm what Calabresi opined three decades ago: class actions, “though certainly of some use to protect the very poorest in society, have commonly been employed to further environmental and consumer interests which [...] are more typical of the suburbanite than of the ghetto dweller.”68 Recall that medical device/drug and Competition Act class actions were the two largest single categories of cases and together comprise 40% of all class actions reported. While medical device and drug litigation potentially assists citizens from all socio-economic backgrounds, the same cannot be said for Competition Act cases, which have predominantly involved direct purchaser claimants69 (not indirect consumer purchasers) and products like computers, cars and air cargo. Securities class actions, which account for another 11% of reported cases, also tend to benefit middle- to high-

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67 Canadian Bar Association, Resolution 00-04A, online: http://www.cba.org/CBA/sections_abor/main/00_04_A.aspx. In response to the CBA’s call for increased vigilance in this area, the Law Society of Upper Canada, as well as the a handful of others, issued its own set of guidelines which stated that lawyers “should make reasonable efforts to ensure that initial communications offering legal services to claimants are welcomed”: Guidelines for Lawyers Acting in Cases Involving Claims of Aboriginal Residential School Abuse (Toronto: LSUC), online: http://www.lsuc.on.ca/media/guideline_aboriginal_res.pdf


69 See for eg. Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., supra note 60. This price-fixing class action was eventually settled with funds distributed cy près, and no direct compensation to the indirect purchasers.
Further research is necessary to determine precisely which sectors of the population are participating in and benefitting from class proceedings; the data collected to date however, suggests that class actions are more an access to justice mechanism for the middle class than the poor. In this respect, class action litigation may be as limited in its utility for addressing poverty law and civil rights as is litigation generally. The severe obstacles faced by class counsel in collecting fees in *Hislop* does not bode well for other class actions involving government entitlements, the very kind of action most likely to benefit the poor.

Another implication of the data regarding case selection criteria raises questions about the impact of class action litigation in the lives of our most economically vulnerable populations. The monetary size of the damage claim is a critical factor for all class counsel, though two respondents put ‘public interest’ first in importance. Because the size of the potential settlement or trial judgment is directly proportionate to the prospective contingency fee, quantum of damages will continue to determine which legal claims are chosen for prosecution by class counsel. The public interest value of a claim – those claims that raise issues of broad public importance, involving persons who are historically disadvantaged in our society — is not a factor for most class counsel. The economic reality reflected in the survey results means that meritorious but less lucrative actions are not being pursued by the vast majority of class action firms, some of which may have

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70 Our case study is illustrative. The three representative plaintiffs in *Atlas* were, respectively, a Chartered Accountant, a lawyer, and a wealthy spouse of a company executive.


72 *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5th) 393 (Ont.S.C.J.) at para. 8 (this definition of “public interest” given in context of s. 31 CPA).
significant public interest implications. Indeed, after the weakness of the legal claim and difficulty in achieving certification, the primary reason for rejecting proposed class actions is the insufficiency of damages, and class counsel reject well over 60% of the cases they consider. From an access to justice perspective, therefore, consideration ought to be given to creating incentives for class counsel to represent class members in less lucrative, but important public interest litigation. Suggestions to this effect will be explored further in chapter 5, Fees, including a judicial approach to counsel fee approval that places greater weight on the public interest value of the litigation.

Case selection, therefore, is a critical, but little discussed stage of class proceedings. The literature and jurisprudence refer frequently to the entrepreneurial model made both possible and necessary by class action statutes. Yet no critical attention has been paid to the access to justice implications of the choices being made by class counsel in selecting which legal claims to pursue. Fewer than one-quarter of current class actions were initiated by clients coming to counsel with a legal problem. Rather, largely following regulatory action, U.S. proceedings or third party referrals, class counsel have recruited representative plaintiffs and commenced litigation. Some firms, however, devote considerable resources to independent research and investigation of potential claims. To the extent that naming previously unnoticed legal wrongs is desirable from an access to justice perspective, therefore, current practice is only partially successful.

73 An antecedent issue not dealt with here is why the plaintiff class action bar remains relatively small fifteen years after the CPA came into force. Although judges in carriage motions clearly prefer counsel with extensive experience in class action litigation, thereby creating barriers for new counsel, carriage motions alone cannot account for the limited growth in the plaintiff bar. Risk aversion, financial resources, and lack of expertise are also relevant. Even with a bigger pool of lawyers, however, the risks and incentives remain the same, and it is far from clear that a bigger market would lead to more lawyers taking on less lucrative but important public interest cases.
The practice of class counsel suggests that meritorious actions with potentially high global damages are brought, and for most firms, irrespective of any independent public interest value to the claims. If such lucrative actions conclude successfully – a matter explored in more detail in the next chapter – then the compensatory objectives of access to justice are met, even if non-pecuniary, social policy goals are not. To this extent, we have some distance still to go to ensure that the “access to justice [...] provided by the Act make a meaningful contribution to both private and social good.”74

74 Fantl v. Transamerica Life Canada (S.C.J.), supra note 42 at para. 63 (emphasis added).
Chapter 4

SETTLEMENTS

The Supreme Court of Canada has emphasized that class actions are procedural vehicles.\(^1\) Indeed, much of the case law on class actions has focused on procedure – certification and the myriad motions that might precede its determination; standing; notice requirements; carriage battles; national classes; and so on. All of these issues are important, of course. Access to a fair procedure is integral to law’s response to widespread harm. Indeed, the goal of the previous chapter on Case Selection was to expand the field of observation when considering procedural access to justice, by looking at the gatekeeping function performed by class counsel. But what of substantive justice? Once inside the gates, are class members getting access to a just result?

Access to a just result must be an inextricable component of any access to justice program. While definitions of access to justice remain contested, modern commentators are in agreement that it ought to involve more than access to a judicial procedure. Evaluating whether class actions, on the whole, are giving rise to “just” results, however, is a daunting undertaking. It would first require consensus on what constitutes a “just” outcome. As a normative matter, is justice to be gauged vis-à-vis the compensatory objectives of class proceedings legislation, or is behaviour modification to be given primacy in the justice calculus? The two objectives are not necessarily consistent with one another, and such inconsistency comes to a head in settlements that involve

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\(^1\) Bisaillon v. Concordia University, [2006] 1 S.C.R. 666. After noting that class actions have “a social dimension” in that they “facilitate access to justice for citizens who share common problems and [who] would otherwise have little incentive to apply to the courts on an individual basis to assert their rights”, the majority stipulates that “[t]he class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights” (at paras. 16-17).
significant cy près distributions. Moreover, whatever the normative underpinnings of “justice”,
evaluating how well class members are being compensated, or wrongful corporate or government
conduct deterred, is immensely complex. It is extremely difficult to measure the quality of
settlements. Few attempts have been made to empirically measure the quality of settlements in
Canadian class actions, and none has attempted to assess the impact of class action litigation on
corporate or government behaviour. Studies in the U.S. suggest that class actions tend to settle for
too little, resulting in both under-compensation and under-deterrence. Whether the same trends
exist in Canada is largely unknown. Settlements have been approved, however, which on their face
raise serious questions about the adequacy of, and barriers to claiming, compensation.

Admittedly, a comprehensive audit of class action settlements nationally or in Ontario alone
would require significant resources and is beyond the scope of my study. In section I of this
chapter, I take a narrower approach to evaluating settlements in an access to justice framework, by

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

3 Marc Galanter & M. Cahill, “Most Cases Settle: Judicial Promotion and Regulation of Settlements” (1993-1994) 46
L.J. 817 (QL version) at note 10.

Can. Class Action Rev. 329 (empirical study of shareholder actions in Ontario, concludes that “Ontario shareholder class
actions have not recovered a significant ratio of shareholder losses, and shareholders have ended up paying high
transaction costs in the process” [at 397]).

5 Benjamin Alarie, “Rethinking the Approval of Class Counsel’s Fees in Ontario Class Actions” (2007) 4 Can. Class Action
Rev. 15 at 42 and works cited therein.

6 See e.g. Barham v. Hyundai Canada Inc. (28 February 2008), London Crt. File No. 4487 (Ont. S.C.J.), a settlement of a
class action on behalf of owners of certain models of Kia cars against the manufacturer for allegedly misrepresenting
the horsepower available in the vehicles. The plaintiffs originally claimed damages in the amount of $1,000 per class
member plus punitive damages. Under the settlement agreement, class members could complete a three-page claim
form and swear an affidavit (at their expense) in order to claim compensation of $66.15, net of counsel fees. The
defendants were responsible for administering the claims process, and were not required to report back to the court
on the number of claims received and approved.
focusing on a critical analysis of the standards used by the courts in determining what is a fair and reasonable settlement. As will be seen, the application of these standards in recent cases has been less than robust.

Apart from the substantive elements of access to justice engaged by a consideration of class action settlements, the settlement approval process raises a further critical procedural issue: the notice of settlement to the class is a necessary precondition both to the ability to object to the terms of settlement, and to make a claim for a class member’s share of the settlement fund. Moreover, an approved settlement has *res judicata* effect and prevents the class members – whether or not they participated in the claims process or even knew about the action – from bringing subsequent actions against the defendants with respect to the same legal dispute. Thus, in section II, I will consider the standards used by the bench in approving notice campaigns, and judicial approaches to the objectors who respond to such notice. Whatever the quality of the settlement, take-up rates are one indicator of the success of a notice program and ultimately, of the class proceeding in producing a substantive result for class members. For this reason, I will consider the results of the survey which provide information regarding the tracking of take-up rates by class counsel, and a rough measure of what some of those rates were in 2008.\(^7\) The take-up rate in the *Atlas* case study gives additional insight.

Finally, in section III, I consider the increasing reliance on the social utility of class actions as a justification for settlements that do not confer a benefit directly on class members. In particular,

\(^7\) Appendix B, question #18 and #19.
courts’ approaches to *cy près* distributions are a matter of increasing interest, and as I will argue, of significant concern given the access to justice implications of such settlements.

I. **Judicial Approaches to Settlement Approval**

The penultimate question posed in access to justice literature is often whether access to courts leads to access to just outcomes; it is a vital question to be posed in the class action context where the vast majority of certification hearings results in certification and over 90% of all certified actions result in negotiated settlements. The question has both doctrinal and empirical dimensions, and gives rise to any number of subsidiary questions: How are courts determining a “just” outcome in class proceedings? Are there other considerations which ought to be brought to bear in approving or rejecting class action settlements? How are settlements distributed and what percentage of class members is actually receiving the award? These and other aspects of the settlement phenomenon will be addressed in this section.

Under the CPA and other class proceedings statutes, the courts are entrusted with a critical supervisory role to ensure that the interests of absent class members are protected. The supervisory function is nowhere more important than in the context of a proposed settlement because of the adversarial void created by a negotiated settlement between plaintiffs and

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8 Determination of the number of cases commenced and certified as class proceedings remains an imprecise art, with law firms not consistently reporting the initiation and status of claims to the Canadian Bar Association’s National Class Action Database: [http://www.cba.org/ClassActions](http://www.cba.org/ClassActions). Ward Branch, however, has estimated that as of September 2008, there have been 240 certification hearings in Ontario (both contested and on consent), of which 54 (22%) did not result in certification: Ward K. Branch, *Class Actions in Canada*, looseleaf (Aurora: Canada Law Book, 2008) at §4.1960. Chief Justice Winkler has observed that the settlement rate in class actions is consistent with that of ordinary civil litigation, which currently stands at approximately 96%. See W. Winkler, “Civil Justice Reform – The Toronto Experience” (September 12, 2007), online: [www.ontariocourts.on.ca/coa/en/ps/speeches/civiljusticereform.htm](http://www.ontariocourts.on.ca/coa/en/ps/speeches/civiljusticereform.htm).
defendants, both of whom have a vested interest in having the settlement approved, and the
danger of collusion based on U.S. cautionary tales. Various tests and criteria have been proffered
to guide judges in their assessment of the adequacy of a settlement. Although in the standard
iteration of the test for settlement approval judges acknowledge the need for scrutiny of the
proposed resolution, they have also betrayed a deference to class counsel’s view of the adequacy
of the settlement. Such deference, it will be argued, is inimical to the supervisory function.

There is little, if any, divergence of approach with respect to the role of the court, and the
standards to be applied, in assessing the fairness, reasonableness and adequacy of a proposed
settlement. Courts have consistently applied the following framework of analysis:

(a) to approve a settlement, the court must find that it is fair, reasonable, and in the best
interests of the class;

(b) the resolution of complex litigation through the compromise of claims is encouraged by
the courts and favoured by public policy;

(c) there is a strong initial presumption of fairness when a proposed class settlement, which
was negotiated at arm’s-length by counsel for the class, is presented for court approval;

(d) to reject the terms of the settlement and require the litigation to continue, a court must
conclude that the settlement does not fall within a zone of reasonableness;

(e) a court must be assured that the settlement secures appropriate consideration for the
class in return for the surrender of litigation rights against the defendants. However, the
court must balance the need to scrutinise the settlement against the recognition that
there may be a number of possible outcomes within a zone or range of reasonableness.
All settlements are the product of compromise and a process of give and take and
settlements rarely give all parties exactly what they want. Fairness is not a standard of
perfection. Reasonableness allows for a range of possible resolutions. A less than
perfect settlement may be in the best interests of those affected by it when compared
to the alternative of the risks and costs obligation;

(f) it is not the court’s function to substitute its judgment for that of the parties or to
attempt to renegotiate a proposed settlement. Nor is it the court’s function to litigate
the merits of the action or, on the other hand, to simply rubber-stamp a proposal;
(g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval; and

(h) in determining whether to approve a settlement, the court takes into account a number of factors... [including the likelihood of recovery and the proposed terms of settlement].

The list of factors contemplated by (h) has also remained constant since considerations were first enumerated by Sharpe J. (as he then was) in Dabbs. The factors and the role of the court generally were set out succinctly by Winkler J. (as he then was) in Gilbert v. CIBC:

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

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

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

Winkler J.’s list of factors to be considered in assessing the fairness, reasonableness and adequacy of settlement remains the standard for judges in fairness hearings. In decisions released earlier this
year, Perell J. and Lax J. reiterated the same list of considerations, and in addition, offered two additional criteria: the recommendation of neutral parties, and the absence of collusion.  

Three important themes emerge from the framework for settlement approval evident in the case law. First, public policy is said to favour the compromise of claims. Second, there is a “strong” presumption that the proposed settlement is fair and reasonable. Third, the nature and number of objectors are to be considered, and therefore class members have the right to be heard. Each of these themes implicates access to justice, and will be considered in turn.

a. Public Policy Favours Compromise

Judges favour the settlement of lawsuits. They overwhelmingly favour settlement of class actions. They do so for practical considerations regarding scarce judicial resources, as well as a normative belief that settlement enhances access to justice. As one judge stated at the outset of his discussion regarding the approval of a settlement,


13 *Nunes v. Air Transat*, supra note 9 at para. 7; *Vitapharm*, supra note 11 at para. 110. In the interest of full disclosure, I point out that I was counsel for the plaintiffs in *Vitapharm* on the carriage motion, but had no involvement with the case thereafter, and certainly not at the time Cumming J. granted the certification and settlement approval motion.

14 See e.g., *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225, [1988] O.J. No. 1745 (H.C.J.) at para. 17 (“[T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.”). This passage was cited with approval by the Supreme Court of Canada in *Loewen, Ondaatje, McCutcheon & Co. v. Sparling*, [1992] 3 S.C.R. 235 at 259.

There is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice. Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation.16

Parties in non-representative proceedings are also encouraged to settle at various points in the litigation process,17 and in this way, favouring the settlement of class actions is consistent with legislative policy on civil justice. Settlement is not inherently inimical to access to justice. Indeed, ADR, which aims to facilitate dispute resolution outside of the adjudicative system, is itself a bulwark of the access to justice movement.18

A judge tasked with assessing the fairness of a class action settlement, however, is charged with a unique – and I argue, onerous – task. The judge who is asked to approve a settlement guards the interests of the absent class members. Though they have an interest in the action, class members are not parties to the litigation.19 Those class members who are given effective notice of the proposed settlement and who do not agree with its terms can either object – a process discussed in (iii) below – or ‘vote with their feet’, by opting out of the class proceeding. An individual’s ability to opt-out of an unacceptable settlement and retain the right to sue the defendants, however, is only available in those cases where certification and settlement are sought

16 Vitapharm, supra note 11 at para. 112. The Ontario Law Reform Commission also affirmed, as a general principle, that the settlement of litigation is to be encouraged: Ontario Law Reform Commission, Report on Class Actions (Ontario: 1982), vol. III at 785 [“OLRC Report”].
17 See e.g. Rule 24.1.01, Rules of Civil Procedure, R.R.O. 1990, Reg. 194 which provides for mandatory mediation in certain actions “in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.” As of January 1, 2010, mandatory mediation will apply to class actions where certification has been refused.
at the same time. That is, in cases of contested certification, the opt-out window expires long
before a settlement is negotiated and submitted for approval. Thus, class members who do not
agree with the terms of the settlement in such cases can choose not to claim a share of the
settlement fund, but nevertheless, are bound by the terms of the settlement agreement and are
precluded from commencing their own litigation against the same defendants. Access to justice in
such a scenario is turned on its head; the binding nature of the representative proceeding denies
dissatisfied class members formal access to the courts. Concerns about access to justice, therefore,
strongly favour careful scrutiny of the settlement before approving it and thereby barring class
members from pursuing any further relief – a feature of class actions that is not usually present in
other civil litigation, where settlement binds only the parties to the proceeding.

There is a further reason the public policy favouring settlements of class actions must be
tempered. Unlike judges who approve settlements on behalf of infants or a party under disability,
class action judges do not have the assistance of counsel charged only with protecting the interests
of absent class members. That is, while an infant’s interests may be represented by the Office of
the Children’s Lawyer, or a party under disability by the Public Guardian and Trustee, absent class

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20 Section 9 of the CPA gives class members the right to opt out of the proceeding “in the manner and within the time
specified in the certification order” (emphasis added). The settlement approval provisions of the Act (s. 29), however,
do not contemplate a second opt out opportunity; rather, an approved settlement “binds all class members” (s. 29(3)).
In contrast, the American Federal Rules specifically provide that a court may refuse to approve a settlement unless a
second opt-out opportunity is provided: Fed. R. Civ. Proc. 23(e)(4).

21 U.S. courts have repeatedly highlighted the need for careful scrutiny of class action settlements precisely because of
the “profound differences” between them and ordinary civil settlements: “[C]lass members, unlike individual litigants
in traditional lawsuits, are bound by the settlement even though they do not individually consent to its terms. Instead,
consent is given by class representatives, who derive authority to represent members not by obtaining their consent,
but by obtaining a court order designating them the representatives.” Epstein v. MCA, Inc., 50 F.3d 644, 666-67 (9th

22 Rule 7, Rules of Civil Procedure, supra note 17.
members do not have a representative to closely scrutinize the proposed settlement free of any vested interests. Courts and commentators alike have recognized that class counsel’s neutrality in this regard is compromised by an inherent conflict of interest. Both plaintiff and defence counsel seek to have the settlement approved, and there is a risk that the interests of the absent class members, and the deficiencies of the proposed settlement, will not be fully pressed. This dynamic creates an adversarial void that a judge alone is hard-pressed to fill. Indeed, some judges fundamentally disagree that it is a judge’s role to fill the void at all, relying instead on class counsel to abide by their obligation to make full and frank disclosure of material information. And legal scholars have opined that the void created by settlement simply can never be filled. Among others, John Kleefeld has queried whether courts are “up to the task”:

In an adversarial system, effective dispute resolution is premised on the concept of zealous partisans advocating their best opposing arguments to the judge, who in turn picks the most persuasive ones, or perhaps more accurately, the ones that accord with

23 Dabbs, supra note 10 at para. 33 (“The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved.”). See also OLRC Report, supra note 16, vol. I at 168 (recognizing that because “class lawyers, acting out of self-interest, may occasionally attempt to make a settlement that is unfair to class members”, the judiciary must be given effective discretion to supervise all settlements).

24 Compare Winkler J.’s (as he then was) statement in McCarthy, supra note 15 at para. 21 (“The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court’s determination.”) to that of Sharpe J. (as he then was) in Dabbs v. Sun Life Assurance Co.[1998] O.J. No. 1598 at para. 21 (decision denying motion by objectors for leave to cross-examine affiants supporting proposed settlement) (“In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings.”) [emphasis added]. Sharpe J.’s approach mirrors that of some American courts, including the Ninth Circuit Court of Appeals, which stated in Epstein, supra note 21, that “[i]n order to protect the rights of absent class members, the court must assume a far more active role than it typically plays in traditional litigation.”

25 John Bronsteen & Owen Fiss, “The Class Action Rule” (2002-2003) 78 Notre Dame L. Rev. 1419 at 1448 (stating that a judge who adjudicates a case will hear arguments and evidence on both sides in order to choose a remedy that justice requires, while a court reviewing a settlement defers to the parties’ choices in the bargaining process and only looks to see if settlement manifestly unjust).

26 Deborah Hensler et al., Class Action Dilemmas (Santa Monica: Rand, 2000) at 86-93.
the judge’s view of the facts, the law, and the application of one to the other. Whatever the merits of that concept, it is absent when a high-stakes, intensively negotiated settlement is jointly presented to the court for approval. Would Solomon have been as wise had the two harlots simply presented him with a settlement agreement on how to divide the contested baby? One suspects he would have needed some assistance.27

What “assistance” is available to a judge before approving a settlement? The CPA provides no guidance, as it merely refers to the need for court approval, without elaboration.28 Few Canadian empirical studies which systematically document and evaluate settlement arrangements are available for comparative purposes. Our judges may not be comfortable importing the results of empirical studies abroad. For example, one such American study was presented to the motion judge in Atlas, in support of the plaintiffs’ argument that the settlement provided a recovery for the class that was six times greater than the average recovery in U.S. securities class action settlement; Lax J. dismissed the study as “irrelevant”.29

Other than objectors, no other participants are present during the settlement conference. While various models of third party monitors have been discussed in academic literature,30 the concept has not been given any serious consideration by the bar or the courts. Unlike the United States, Canada has no tradition of public interest legal service firms who intervene in class action litigation. One such American organization called Public Justice, for example, is comprised of eight

27 John Kleefeld, supra note 3 at para. 31 [cit. om.].
28 CPA, s. 29.
full-time attorneys and four fellows, and is supported by a not-for-profit foundation “dedicated to using plaintiffs' and other attorneys' skills and resources to advance the public good.” The firm has intervened in a number of class actions in order to object to proposed settlements. As Professor Hensler documented in the Rand Study, in response to Public Justice’s objections to a proposed $1.3 million settlement of a collateral protection insurance class action, the parties increased the funds allocated to class members to $7.7 million, reduced counsel fees from $5.4 million to $1.9 million, substituted directed payment for a claims-based approach, and required that any residual amounts be distributed *cy près* rather than be returned to the defendants. The Federal Judicial Center’s Handbook for judges entitled “Managing Class Action Litigation” advises judges to allow non-profit entities, government bodies and states attorneys general to participate actively in fairness hearings to provide assistance to the court. Given the restrictive view taken by the Ontario Court of Appeal on the propriety of objectors who are not class members, it is unlikely intervention by a consumer or advocacy group, or government body, would be welcome here absent a significant change in the jurisprudence. The intervention of the Class Proceedings Committee might be more likely given the Fund’s pecuniary interest in maximizing the recovery to the class members (by minimizing the portion of a common fund to be paid to class counsel), on

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31 According to its website, Public Justice (formerly Trial Lawyers for Public Justice) engages in “precedent-setting and socially significant individual and class action litigation designed to enhance consumers’ and victims’ rights, the environment, workers’ rights, public health and safety, civil rights and civil liberties, access to justice, and the protection of the wronged, the poor and the powerless.” In 1995, the organization also commenced a Class Action Abuse Prevention Project, designed to represent objectors or to file amicus briefs challenging “highly objectionable” settlement proposals. Online: http://www.tlpj.org.

32 D. Hensler, supra note 26 at 461-462.


34 Dabbs, supra note 19.
which its 10% levy is calculated in funded cases. To my knowledge, however, such an intervention has never been attempted.

The approval process, therefore, is a purely judicial construct, developed without legislative – or any other – guidance beyond that provided by counsel and objectors. While proactive judges may be capable of probing the fairness of the proposed settlement, current judicial culture makes it is unlikely that all judges would willingly take on an inquisitorial role. Yet, in light of the adversarial void, that is precisely the role that judges ought to take, much as they do currently on ex parte motions. As will be explored in the next two sections, the void is inconsistently, and at times inadequately, filled by counsel and objectors.

b. Presumption That Settlement Fair

As mentioned above, standard criteria applied by courts in determining whether a settlement should be approved include a “strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm’s-length by counsel for the class, is presented for court approval.”35 Courts have displayed considerable deference to the opinion of class counsel, especially where settlement flows from mediation.36 In support of the “strong” presumption,

35 *Vitapharm*, supra note 11 at 113. The court also commented that the “overwhelming majority of proposed settlements are approved when the Court is satisfied that arms-length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement” (at para. 143).

36 See e.g. *Garland v. Enbridge Gas Distribution Inc.* (2006), 38 C.P.C. (6th) 70 (Ont. S.C.J.) at paras. 28, where the judge held that, on the basis of the material filed, “it is not necessary to delve deeply into the course of the negotiations between the parties and their counsel. On this question, and in the circumstances of this case, I believe I should give considerable deference to the recommendation of class counsel and the supporting affidavit sworn by one of their solicitors.”
courts routinely rely on Sharpe J.’s decision in Dabbs. Yet a careful reading of Dabbs does not support this deferential approach. While Sharpe J. did refer to the recommendation by experienced class counsel as a significant factor favouring approval, he did not, strictly speaking, create a “strong presumption” of fairness. Indeed, referring to the large number of individuals not before the court who would be affected, he wrote that he was required to scrutinize the proposed settlement “closely”. He agreed with Garry Watson that settlements “must be seriously scrutinized by judges” and “viewed with some suspicion”. While the benchmark for a fair settlement was not perfection, the process of scrutiny was to be exacting nevertheless.

Sharpe J.’s process of review in Dabbs belies the view that a presumption of fairness operates in the context of class actions. He heard three days of cross-examination of deponents on affidavits filed in support of the settlement. He asked questions of counsel that required further information to be provided. Only after this vetting process did he reach the conclusion that the settlement should be approved. By contrast, based on a reading of over a dozen leading cases, few if any fairness hearings since Dabbs have involved the calling of viva voce evidence (at least as


38 In an earlier decision on a procedural motion, Sharpe J. put it even lower by referring to the opinion of counsel as “evidence worthy of consideration”, but “only one factor to consider” (Dabbs, supra note 24 at para. 16).


40 Ibid. at para. 32.
reflected in reasons for judgment). It is difficult to reconcile a “strong presumption of fairness”, as subsequently articulated by the courts in reliance on *Dabbs*, with the approach in that case.

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

There are, of course, significant differences between a settlement proposal proffered by a public officer and one put forward by private litigants. While a Director has various motives to settle a case before trial, financial self-interest is not one of them. For this reason, the OLRC, while very supportive of class actions, expressed the view that settlements had to be carefully scrutinized by courts because “class members’ interests could be sacrificed for lawyers’ fees.” This is not to say that the financial self-interest inherent in all class proceedings inevitably leads to ‘legal

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41 Supra note 14. The case is referred to in *Vitapharm*, supra note 11 at para. 116.
42 *Sparling*, supra note 14 at paras. 21-22.
blackmail’ or ‘sweetheart deals’. I do argue, however, that a presumption of fairness that operates in a proceeding like the one before Callaghan A.C.J. is not comfortably transposed to a class action. A strong presumption of fairness, even where there is no evidence of collusive behaviour, is inconsistent with the careful scrutiny that courts have repeatedly – here and in the United States – stated is the proper approach at settlement approval hearings. The U.S. Supreme Court stated definitively in the infamous Amchem case that the rights of absent class members must be “the dominant concern” of the court, and that courts should provide “undiluted, even heightened attention in the settlement context” to certain Rule 23 requirements in order “to protect absentees”. Other courts have even described the reviewing court’s function as that of “a fiduciary who must serve as a guardian for the rights of absent class members.” This role, I submit, is fundamentally at odds with a presumption that the settlement is fair and adequate.

Even if courts were to resile from the “strong presumption” that a proposed settlement is fair, the application of the remaining approval criteria is an exercise heavily dependent upon an individual judge’s willingness to take an active role in the settlement hearing. Moreover, as Cullity J. commented in the context of explaining the deference owed to class counsel’s recommendation of the settlement, “the court will rarely, if ever, be in a position to weigh the benefits of the settlement against the litigation risks and likely outcome of the proceeding with the

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45 In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litig., 55 F.3rd 768 at 783 (3rd Cir. 1995). See also In re Cendant Corp. Sec. Litig., 404 F. 3rd 173 at 187 (3rd Cir. 2005).
46 J. Kleefeld, supra note 3 at para. 33.
thoroughness and acuteness of experienced class counsel.” If the length and detail of reasons for judgment are an indication of this role, there is reason to question whether all settlements are being “seriously scrutinized by judges”. Moreover, courts rely on counsel abiding by their duty to provide full and frank disclosure of all material information to the court, whether favourable or otherwise, so that the court has sufficient information to raise its decision above mere conjecture. The ability to test how well class and defence counsel meet this duty is limited. Existing difficulties in obtaining access to court documents raise serious questions about the susceptibility of class action settlements to any meaningful public or academic scrutiny. The role of absent class members who object to the proposed settlement, therefore, becomes all the more critical.

c. Objectors Matter... But Not Often.

There is no question that objectors have a well-established right to be heard at settlement hearings. Class proceedings legislation authorizes judges to give one or more class members the

47 Gould, supra note 15 at para. 27.

48 Dabbs, supra note 10 at para. 31. A random sampling of settlement approval judgments reveals a wide range of detail in the reasons for judgment. In some cases, judges have issued only a short endorsement. See e.g. Gilbert v. CIBC, supra note 11, where the endorsement approving certification, a $16.5 million settlement and counsel fee numbered 25 paragraphs.

49 McCarthy, supra note 15 at paras. 19-21; Dabbs, supra note 38 at para. 15 (denying motion by objectors for leave to cross-examine affiants supporting proposed settlement).

50 I refer here to the difficulties I experienced in the course of this research in obtaining key documents and written arguments submitted in favour of a very large settlement in the spring of 2009. Plaintiffs’ counsel did not post the record and factum on their website, neither plaintiffs’ nor defence counsel made them available on request, and the documents were not available at the courthouse (though they had been delivered directly to the motion judge). In contrast, many other firms and class counsel were extremely accommodating and forthcoming with all public documents. So while this experience does not by itself suggest a growing trend with respect to a lack of transparency in settlement hearings, it does raise a concern about the lack of uniformity in counsel practice with respect to the filing and public disclosure of class action documents.
right to participate at a hearing, and the “number of objectors and nature of objections” are among the criteria used by courts at fairness hearings. Although the fairness of a proposed settlement is to be judged by reference to the best interests of the class as a whole, and not vis-à-vis the interests of any one class member, the views of class members are “certainly relevant and entitled to great weight.”

Objectors typically are asked to file written objections. They have the right to adduce evidence, but only as it relates to the issues raised in the objection. They have no right to oral or documentary discovery, but in principle, may cross-examine deponents at the fairness hearings itself. The lack of access to documentary evidence renders it very difficult for any objector to mount a serious, substantive argument in opposition to the terms of the settlement.

Since *Dabbs* first settled the scope and procedure for objection described above, objectors have appeared at settlement hearings fairly regularly. There is no data on the frequency of objection, and the survey did not ask lawyers to provide these statistics. Moreover, not all settlement decisions are reported, and of those that are, the frequency of objections is not easily retrievable from key word searches in electronic databases. Empirical studies examining the

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51 CPA, s. 14.
52 *Vitapharm*, supra note 11 at para. 117.
53 *Dabbs*, supra note 38 at para. 11.
54 *Vitapharm*, supra note 11 at para. 179.
55 See e.g. the notice in *Atlas*, Appendix C.
56 *Dabbs*, supra note 38 at paras. 18-27.
57 A search of reported decisions electronically will not yield a precise number since all reasons for judgment pursuant to a settlement hearing would contain the key term “objector”, in light of the standard list of criteria for assessment.
incidence of objections and the impact of objectors on fairness assessments would be useful, in order to identify any trends in the nature of objections, and to better understand whether access to the court in these circumstances is meaningful.

Based on a non-scientific sampling of cases involving objectors, however, and the experience of objectors in one of our case studies, some preliminary observations can be made. First, a significant proportion of objectors are not represented by counsel. Second, only rarely are their objections validated by the motion judge. And third, it appears highly unlikely that substantive, evidence-based challenges to proposed settlements can be made in the existing institutional framework.

Three objectors appeared at the Atlas settlement hearing, but were not represented by counsel and did not file written arguments. Similarly, unrepresented objectors appeared in person or made written submissions in Vitapharm, Gould v. BMO Nesbitt Burns, and in Gilbert v. CIBC. In contrast, the 11 objectors who appeared before Sharpe J. in Dabbs were represented by counsel, and these lawyers made oral submissions and cross-examined deponents at the three-day fairness hearing. Objectors in three other cases previously referred to in this chapter also retained

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58 According to one of the plaintiffs’ lawyers, the objectors provided letters outlining their concerns. At the argument of the appeal brought by class counsel of Lax J’s decision regarding the counsel fee, the objectors intervened and were represented by counsel.

59 Supra note 11 (five objectors, all made written and/or oral submissions without counsel).

60 Supra note 37 (two objectors, both made written and oral submissions; one of the objectors was successful in obtaining an adjournment of original fairness hearing in order to “expand on his concerns”).

61 Supra note 11 (fourteen written objections, only one objector appeared at hearing and made submissions).
lawyers for the purposes of the fairness hearings. Based on this small sample, a significant proportion of objecting class members do not retain counsel.

The phenomenon of unrepresented litigants is, of course, not limited to class proceedings. In ever increasing numbers, individuals go to court without the benefit of legal counsel. From an access to justice perspective, this trend is troubling, as unrepresented litigants are statistically more likely to come from vulnerable populations, face problems of procedural unfairness, and fare worse in the outcome of their proceeding than their represented counterparts. Without comprehensive data on the extent to which objections are made in class action settlement hearings, and the appearance of counsel for objectors, we cannot evaluate whether the rate of unrepresented objectors is increasing or is otherwise a matter of concern. The case law suggests, however, that regardless of whether they retain counsel, objectors rarely affect the outcome of the fairness hearing.

The most successful objection in an Ontario action appears to have occurred in *McCarthy v. Canadian Red Cross Society*, one of the three known cases in the province in which a proposed settlement was rejected. The ‘objector’, however, was the Children’s Lawyer, whose argument that the treatment of the derivative claims in the proposed settlement was “inherently unfair” was accepted by Winkler J. and was one of two bases on which he rejected the settlement. The parties subsequently revised the settlement in light of the objection, and the settlement was eventually

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62 *Nunes v. Air Transat A.T. Inc.*, supra note 9; *Bilodeau v. Maple Leaf Foods Inc.*, supra note 12; and *Martin v. Barrett*, supra note 37. Note that some of the objectors in the latter case were self-represented.


64 See note 15, above.
approved. The three class members who objected to the proposed counsel fee in *Atlas* earlier this year were also successful; Lax J. found the objections to be “valid”, and subsequently reduced the base fee by 25%.

Objectors represented by counsel in *Nunes* and *Bilodeau*, however, were not as effective. In both cases, objections were made as to the sufficiency of the settlement fund; in both cases, the motion judges determined that the funds were within a zone of reasonableness. Similarly, in *Gould*, the objector was an unrepresented class member, whose “objections were helpful in focusing attention on a number of issues as well as the extent to which information about the settlement had been communicated to class members and the adequacy of the notice of the settlement approval hearing.” The objector’s substantive concerns about the settlement, however, were not accepted by the judge. Nor were the objectors in *Gilbert*, *Dabbs*, and *Vitapharm* successful in their arguments regarding the sufficiency of the settlement. Instead, the objectors in all of these cases were met with a rather common response: “If their claims involve substantial amounts, such persons may opt out and pursue their claims individually.”

In light of the barriers to justice – especially the high cost of litigation and the small individual recoveries at issue in most class actions – the option of opting out and commencing

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

Worth noting is that the objector in that case relied heavily on information and expert evidence adduced in an Ontario class action against the same defendant regarding the same defective heart valves, which suggests that Ontario counsel were involved in the preparation of the objector’s claim.

There is reason to doubt that current judicial approaches to objectors will increase either the frequency or the strength of their participation in fairness hearings. Apart from the possibility that class members do not receive effective notice of the hearing (see section II, below), there are other significant barriers to effective participation. Class members have few incentives to monitor class counsel or invest their own money to carefully vet the proposed settlement, or more costly, to retain counsel to do so on their behalf. In addition, depending on the detail of class counsel’s motion record, objectors may have too little information, too late, to make a comprehensive

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71 B.C. class counsel was “unable” to confirm the involvement of Ontario counsel (email from J. Poyner to author dated June 26, 2009). He directed me to counsel for the objector, who did not respond to my query. In any event, there may be nothing improper about rival counsel bringing to the court’s attention a weakness in the proposed settlement. I would argue, however, that any such involvement ought to be disclosed to the court.

72 A. Klement, supra note 30 at 51.
argument about the adequacy or structure of the settlement. Recall that very few settlements are rejected at a fairness hearing. Two such cases involved atypical objections: a public officer was successful in McCarthy v. Canadian Red Cross Society, while in the British Columbia case, there are indications that Ontario class counsel assisted in challenging a rival class action. Finally, the very nature of the legal wrong which necessitates representative proceedings – the diffuse and widespread harm caused by the defendants’ actions – also makes it highly unlikely that class members with concerns about the settlement will be able to locate each other and consolidate resources and efforts.73

While objectors have access to a procedure, the fairness hearing, it is far from clear, based on a sampling of cases, that such access alters the approval process in any meaningful way. Further empirical research is needed for a more comprehensive understanding of this issue, and in order to recalibrate, if necessary, judicial approaches to objections and the resources provided to objectors who face considerable barriers to justice. It may be desirable, for example, to establish a fund similar to the Class Proceedings Fund, to pay court-appointed counsel with expertise in class actions to represent the interests of objecting class members. Such a mechanism, I submit, would represent a modest incremental cost, would engender greater transparency in the settlement approval process, and thereby increase public confidence in the justice system.

73 John Coffee, Jr. comes to a very similar conclusion in “Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation” (2000) 100 Colum. L. Rev. 370, where he writes (at 417): “Small claimants have little incentive to vote. Thus, not only will these small claimants be hard to identify or contact, but they have little reason to respond to any solicitation. … [O]bjectors lack both the organization or [sic] incentives to match the expenditures that the settling parties will predictably incur to achieve a favorable vote.”
To the extent the appointment of counsel for absent class members rides on the existence of objections, notice of the proposed settlement becomes all the more critical. All objections, of course, are premised on effective notice of the settlement hearing. Are class members getting this most basic access to information? It is to this question that I now turn.

II. Notice to the Class

By virtue of the representative nature of class actions, class members are virtually powerless to control the litigation. Various provisions of the CPA aim to ensure that class members are kept apprised of important stages in the class proceeding so that they may exercise their rights to opt out of the action, or participate in the trial of the common issues. Notice of the fairness hearing, though not obligatory under the CPA, is almost invariably ordered. Notice is thus necessary to ensure class members maintain some visibility in the litigation process, and to “permit the court to hear concerns that the members might have about the settlement, and the fees of class counsel.” How well are lawyers who craft notice programs, and the judges who approve them, doing in ensuring that class members are given the opportunity to participate meaningfully in the vital stages of the proceeding? If access to justice is fundamentally understood as access to

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74 CPA, ss. 17 and 29(4).
75 Kranjce v. Ontario (2006), 33 C.P.C. (6th) 290 (Ont. S.C.J.) at para. 3. There are exceptions; see e.g. Currie v. MacDonald’s Restaurants of Canada Ltd. (2006), 27 C.P.C. (6th) 286 (Ont. S.C.J.) where notice of the certification and settlement approval hearing was not ordered.
76 Kranjce, ibid. Note that in Kranjce, notice was ordered to be mailed directly to approximately 50,000 class members. Inadvertently, the notice was not mailed to 3,000 members, as disclosed by class counsel to the motion judge. The court did not require notice to be provided to those 3,000 members on the basis that there was no reason to believe they would raise objections that were any different than those of the 47,000 members who did receive notice.
legal information,\textsuperscript{77} does the current approach to notice fulfill the access to justice objective of the CPA?

This discussion of notice will be divided into two parts: first, I will explore briefly how courts are determining what constitutes reasonable notice; and second, I will revisit the take-up rate information gleaned from the survey, and discuss how greater transparency of take-up rates would create better incentives for effective notice programs.

\textbf{a. The Reasonableness of Reasonable Notice}

The content of notice as well as the manner in which it is published must be approved by the court, usually by the judge case managing the proceeding. The court may also dispense with notice altogether,\textsuperscript{78} though in the context of a proposed settlement, notice to the class is invariably ordered. The general principle behind notice is that “it is information not advocacy.”\textsuperscript{79} Section 17(7) of the CPA sets out the information that shall be contained in the notice “unless the court orders otherwise”, including a description of the action, a summary of the settlement agreement, and the manner in which class members may participate in the proceeding.

Notices that meet these criteria do not necessarily meet the objective of providing access to information. Recognizing that class action notices are too often written in complex legalese or


\textsuperscript{78} CPA, s. 17(2).

printed in small font, the U.S. Federal Rule now contains a plain language notice revision. At the request of the Subcommittee on Class Actions of the U.S. judicial branch’s Advisory Committee on the Federal Rules of Civil Procedure, the Federal Judicial Center developed prototype notices of proposed class action certification and settlements. The Center conducted lengthy empirical research, held focus groups, launched a pilot test, incorporated comments from both experts and the public, and evaluated the effectiveness of the precedents by way of a survey, to ensure that ordinary citizens from diverse backgrounds could comprehend the notices it had developed.

Interestingly, the Center differentiated between “publication notices”, one page documents designed to give collective notice by way of newspapers and websites, and “full notices”, multi-paged brochures with considerably more detail about the settlement structure and claims process, which would be mailed to known class members. This dual approach to notice is only starting to emerge in Canada; at least one court has expressed concern that sparse publication notices which invite class members to call class counsel for more information do not satisfy the notice requirements of class action legislation.

A sample publication notice for a securities action prepared by the Federal Judicial Center is attached at Appendix D; stylistically, and in content, it can be usefully contrasted against the Atlas

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80 Since December 1, 2003, Fed. R. Civ. P. 23(c)(2) provides that “the notice must clearly and concisely state in plain, easily understood language” all of the required information, a list that is almost identical to what is contained in s. 17(6) of the CPA.


82 Walls v. Bayer Inc. (2007), Man. R. (2d) 66 (Q.B.) at para. 20 (the shorter notice did not provide information as to the makeup of the class, the class period, the cost arrangement between class counsel and plaintiffs, or the opt out right).
notice found in Appendix C. While they each contain essentially the same information, the design, legibility and language in the Center’s form of notice is more accessible. In addition, there are two significant substantive differences between the two notices: first, the Center refers readers to a website where the full notice can be accessed for more detailed information about how to object to the proposed settlement. Second, the Center’s notice also discloses the minimum payment per share that will be distributed to each shareholder, with a proviso that if fewer than 100% of the class sends in a claim form, class members could get more. In contrast, the Atlas notice does not provide an indication of how much each class member might receive under the settlement. While this information may be gleaned from the lengthy settlement agreement posted on class counsel’s website, such an agreement is not drafted with a lay audience in mind. Class members who only read the official notice in Atlas, therefore, may well be determining whether to object to the settlement without any sense of what proportion of their losses might be recovered under this settlement.

The Atlas notice is typical of Ontario class action notices, and in some cases superior in terms of accessibility of language and design. It reflects the information contained in s. 17(6) of the CPA, and is the kind of notice judges routinely approve as appropriate. Courts speak of the importance of comprehensive notice so that class members can make informed decisions affecting their rights, but they also insist on a “commensurate level of formality” in the document. Unlike Federal Rule 23, there is no legislative requirement in the CPA that plain language be used, nor that

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83 See e.g. Appendix E, a notice of settlement of a securities class action and fairness hearing held in June 2009.
the “best notice practicable” be ordered, nor that notice of settlement be ordered at all. And in
the settlement context, where defence counsel may exert considerable influence in how the notice
is crafted, there may be little incentive for either party to craft the best notice practicable.

In light of access to justice initiatives which focus on making legal information easily
available and understandable to unsophisticated consumers, it is unfortunate that studies like the
one conducted by the Federal Judicial Center have not been replicated in Ontario. It is a study the
Law Commission of Ontario would be well-placed to conduct. Given the pivotal role that notice
plays in providing class members an opportunity to opt out of a certified class action, object to a
proposed settlement, or make a claim pursuant to an approved settlement distribution plan, it is
important that lawyers and judges alike understand how effectively current styles of notice are
conveying key information.

Quite apart from the content of the notice, the manner of delivering notice is also crucial to
class members’ ability to participate and exercise their legal rights. In this regard, the CPA requires
that courts take into account a series of factors, including the cost of giving notice, the size of the
individual claims, and the number of class members.\(^{85}\) While earlier courts were content to publish
collective notices in newspapers or on defendant websites, even when individual notice to some
portion of the class was possible,\(^{86}\) some courts have evinced great skepticism that such forms of

\(^{85}\) CPA, s. 17(3).

\(^{86}\) *Gilbert v. CIBC*, supra note 11 [judge rejected objector’s argument that notice posted on bank’s web page was
ineffective and that this resulted in a low number of objections].
notice are adequate. There are notable and recent examples of very sophisticated notice programs that include direct mailings, television and radio advertisements, and the use of third parties who have access to class members. As I have observed elsewhere, class counsel are paying greater attention to the effectiveness of proposed notice programs in their certification and settlement approval motion material, including hiring experts to design such programs and provide the court with sworn evidence about the expected penetration levels of various forms of notice. Such creativity may come with a steep price tag, of course, and much has been written about the competitive merits of imposing the costs of notice on the representative plaintiff or on the defendants. Obviously, imposing the cost of notice on the plaintiffs may undermine access to justice if such costs deter class counsel from either seeking wide notice or bringing the claim at all. On the other hand, if the entrepreneurial lawyer is the operating paradigm as the survey results appear to confirm, then it makes sense for class counsel to bear the expense of notice as one of

87 Currie v. McDonald’s Restaurants of Canada Ltd. (2005), 74 O.R. (3d) 321 (C.A.) (notice consisting of an advertisement in Quebec newspapers and in a national subscription-based magazine of quite limited readership found to be inadequate for the purposes of the enforcement of a foreign class action judgment).

88 In the Atlas case, the parties utilized the services of two firms specializing in share registration, Broadbridge and Computershare, to obtain class members’ contact information from brokers identified by the firms as having sold Atlas trust units to investors. The firms were thus able to deliver the notice of settlement directly to roughly 10,000 unitholders. See Lawrence v. Atlas Cold Storage, supra note 12 at para. 5.

89 Notice of the proposed $1 billion settlement of the Indian Residential Schools Settlement was effected in 27 languages and native dialects, in every province and territory of the country, in print, radio and television advertisements. See Todd Hilsee, “Canadian Class Action Notice – A Rising Tide of Effectiveness” (Paper presented to the 4th Annual Symposium on Class Actions, Toronto, 26-27 April 2007).

90 See e.g. Andersen v. St. Jude Medical Inc (3 March 2005), Court File No. 00-CV-196906CP (Ont. S.C.J.) [notice delivered to physicians who presumably passed along the information to their patients] and Mondor v. Fisherman (2002), 26 B.L.R. (3d) 281 (S.C.J.) (notice emailed to brokers in shareholder class action).


92 See e.g. Owen Fiss, “The Political Theory of the Class Action” (1996) 53 Wash. and Lee L. Rev. 20 at 27 [discussing respective consequences of forcing plaintiffs and defendants to pay for notice campaigns].
their investment costs. In any event, as Brian Walters has noted, the best notice practicable is often disseminated on the internet, at a fraction of the cost of newspaper publications.93

Official court sanctioned notice is not the only means of communicating information to class members. Class counsel almost universally establish designated websites containing basic information about the class action, and press releases are routinely issued when a case is certified or settled. A more concerted effort to disseminate extensive information about class actions was undertaken by the Northern District Court of California a decade ago, when it passed a rule requiring specified public filings in class action securities fraud cases be sent to a designated internet site for posting. More than just the official notice, the public filings include pleadings, briefs, affidavits related to certification, expert reports, and filings regarding settlement approval and requests for fees.94 A storing house of such material would be invaluable to class members, the general public, academics and others in their efforts to better understand the dynamics and merits of a given class action. It would also encourage these various constituents to exercise a monitoring function that is currently lacking given the courts’ pronouncements on who has standing at a certification or settlement hearing,95 and the absence of public interest intervenors like those operating in the U.S.

In an opt-out regime like Ontario, it is difficult to evaluate how effective are existing notice campaigns. Small numbers of objectors or opt-outs may be either a sign of almost universal

94 Ibid. The designated website is http://securities.stanford.edu.
agreement with the proposed settlement, or equally, a failure to convey material information to
class members. One measure of effectiveness, however, is the take-up rate in a particular
settlement. While there may be class members who receive notice but who fail to make a claim for
reasons of apathy or otherwise, take-up rates do provide evidence of the minimum number of class
members apprised of the proceedings. As discussed in the next section, the take-up rate
information disclosed in the survey is discouraging in this regard.

b. Take-up Rates

As is the case in most aspects of class action litigation in Canada, there is a dearth of
empirical data related to the form of settlement distributions to class members. Compensation
could take place by way of direct payment (as occurred in the Famous Players\(^{96}\) and Colgate
Pension Plan\(^{97}\) actions, where funds were sent directly to class members or added to their
pensions) or, more usually, a claims process (as occurred, for example, in \textit{Atlas, Nunes, McCarthy}
and the Residential Schools settlements). Based on personal experience and anecdotal evidence, it
would appear that claims-based processes are much more common than direct payment schemes.
Notice serves an especially critical function in the latter cases; class members will be bound by the
settlement and precluded from litigating even if they do not know of the certified class action, but
they will also be barred from making a claim for compensation under the settlement if they fail to

\(^{96}\) \textit{CBS Pictures Canada Inc. v. Dillon, Lawless & RBC Dexia Investor Services Trust} (Toronto 06-CV-304599CP) (settlement approval dated Sept. 13, 2006).

\(^{97}\) \textit{Hinds v. Colgate-Palmolive Canada Inc.} (Toronto 98-CV-153808) (settlement approval dated May 12, 2003).
do so by the claims deadline, as set out in the notice.\textsuperscript{98} While plaintiffs’ counsel consistently decry opt in regimes on the basis that they fail to maximize the participation of class members,\textsuperscript{99} they are far more muted in their criticism of claims processes that effectively require opting in. Yet the same problems of apathy, lack of notice and misinformation that vitiate against an opt in regime post-certification, apply equally to the post-settlement claims process. Access to justice at this stage of dispute resolution, therefore, rests singularly on conveying essential legal information to a disparate group of people.

A key measure of effectiveness of notice programs is the number of class members who make a claim – the ‘take-up rate’. A precise take-up rate can only be determined in those cases where the total number of class members is known. Even where the denominator is not fixed, however, the number of claims made (the numerator) is determinable by the administrator of the distribution plan, and an estimate of the class size is usually provided to the court in the course of arguments for certification and settlement. So while accurate take-up rates may not be determinable, particularly in consumer and drug actions where the number of persons who purchased or consumed the product at issue may not be ascertainable even from the defendants’ own records, it would be unusual not to have information that would provide some measure of the size of the class.

\textsuperscript{98} There may be some discretion on the part of a judge to validate a late claim, but a class member would have to make a formal request to the court, and notices do not stipulate that late claims might still be valid. See e.g. \textit{Canadian Red Cross Society (Re)} (2008), 48 C.B.R. (5\textsuperscript{th}) 41 (Ont. S.C.J.) at para. 16 where it was confirmed that courts have the jurisdiction to legitimize late and irregular applications, and that late-filed claims have been allowed from time to time.

Take-up rates are useful for at least two reasons, both relevant from an access to justice perspective. First, they are one of the only ways in which to gauge how effectively notice campaigns are achieving their objectives. Second, they provide evidence of the actual benefits conferred by the class action on the class. Despite these two key functions, take-up rate information is not consistently gathered by class counsel, nor is it routinely provided to the courts.

Most certified actions settle; to date, in Ontario only eight class actions have gone to trial on the common issues. Yet there have been few comprehensive studies regarding the nature of the settlements achieved, and very little academic attention paid to the methods by which settlement funds are being distributed to class members. Do the mechanics of the claims process, for example, create barriers for class members in terms of their complexity, detail or deadlines? How often are arbitrators, designated by the parties to resolve disputes within the claims process, called upon? Are class counsel overcompensated relative to the actual results achieved, and in what proportion of cases do unclaimed funds revert to the defendants?

Answers to these questions cannot be gleaned using only a survey. Lengthy interviews with class and defence counsel, systematic review of settlement agreements and distribution plans, and access to claims records and administrators would all be needed and are far beyond the scope of this thesis. In the survey, however, I did ask the participants to report take-up rates on settlements

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100 C. MacLeod et al., “Discovery and Trials of Class Actions” (Paper presented to the 6th Annual Symposium on Class Actions, Toronto, 2-3, 2009) at 3 [unpublished].
101 In the U.S., one empirical study of claim rates in securities cases found that less than thirty per cent of institutional investors with demonstrated entitlement to relief filed claims. See James D. Cox & Randall S. Thomas, “Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements” (2005) 58 Stan. L. Rev. 411 at 412.
concluded in 2008 in order to assess whether information of this nature is even available from class counsel, and to the extent that it is, what it reveals.

Two of the largest class action firms participating in the survey indicated in response to the take-up rate questions that “take-up rates can’t be determined in most cases” or that it is “impossible to give” because it “would be unusual to know the number of claimants with any precision.” In a follow up telephone interview with one of the firms, the responding lawyer explained that claims information is often tracked, but not computed as a “rate” since the class size is rarely known with precision.\textsuperscript{102} Three other respondents also indicated take-up rates were “unknown” for some of their settled cases.

Of those who could provide take-up rates, four reported rates ranging from 10% to 100%. One reported take-up rates of less than 1% for two of four settled actions, and provided very specific numbers of claims filed by class members for two other settled actions; without any reliable estimate of class sizes, the respondent could not provide a take-up rate for these two actions. Low take-up rates, like those reported by three respondents,\textsuperscript{103} give rise to obvious questions about possible sources for the weak settlement participation levels. But is anyone asking the question? In Ontario, no public interest body exists with a mandate to engage in periodic review of settlements that arguably impact sizeable segments of the public. Again, a role may exist here for the Law Commission of Ontario, or a similar body.

\textsuperscript{102} Interview with Respondent #12 on May 11, 2009 (notes on file with author).

\textsuperscript{103} Respondents #3, 6 and 15 each reported take-up rates of less than 50% for some of their actions.
The judge who approved the *Atlas* settlement did ask the take-up question, when she ordered Deloitte & Touche, the designated claims administrator, to report back to the court after the claims deadline had expired.\(^{104}\) The administrator reported that over 3,200 claims had been made and verified, and another 200 or so claims awaited additional information before a determination on entitlement could be made.\(^{105}\) The net aggregate loss represented by the verified claims was over $42 million; since the global settlement fund was capped at $40 million, the settlement in *Atlas* was oversubscribed, and take-up was estimated at approaching 100%.\(^{106}\)

Judges are empowered by the CPA to oversee settlements. They remain seized of the action even after an order approving the settlement agreement is issued.\(^{107}\) As Winkler J. (as he then was) stated forcefully in *Baxter v. Canada (AG)*,\(^{108}\)

> [T]he fact that the court is not making findings on the merits of the litigation on this motion ought not to be taken to mean that the approval process is a mere formality, or in the vernacular, a "rubber stamping" by the court. The court has an obligation under the *Class Proceedings Act* ("CPA") to protect the interests of the absent class members, both in determining whether the settlement meets the test for approval and in ensuring that the administration and implementation of the settlement are done in a manner that delivers the promised benefits to the class members. In seeking the approval of the court, the plaintiffs and defendants essentially seek the

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\(^{104}\) *Lawrence v. Atlas Cold Storage Holdings*, (Toronto 04-CV-263289CP), judgment dated July 9, 2008 (on file with author).

\(^{105}\) Affidavit of A. Nazarali sworn June 24, 2009 (on file with author). Although 10,000 notices were delivered to anyone who owned Atlas trust units in the class period, there were not 10,000 members in the class; only those unitholders who purchased their units at the inflated price (prior to the misrepresentation being known) and sold at the deflated price (when disclosure of the misrepresentation and a subsequent market correction were made) were properly class members. The notice in *Atlas* was therefore very generous in that it targeted a much wider pool of people (all unitholders) in order to capture the subset who purchased in the class period.

\(^{106}\) Interview of Kirk M. Baert (6 July 2009) (notes on file with author). On a net basis, the class members will recover slightly less than 20% of their actual losses, after payment of administration costs, the Class Proceedings Fund levy and counsel fee, perhaps more if Lax J.’s decision to reduce the counsel fee by $3 million is upheld on appeal.

\(^{107}\) CPA, s. 26(7).

benefits of having the court sanction the settlement. Such approval cannot be divorced from the obligation it entails. Once the court is engaged, it cannot abdicate its responsibilities under the CPA. [emphasis added]

For various reasons, judges do order the parties to report back to court with results of the claims process. Cullity J. did so late last year in Stewart v. General Motors because the defendants had agreed to pay all valid claims under the settlement scheme, but did not commit to a minimum amount to be paid to the class.109 Thus, the amount recovered in the class action, a factor to be considered in approving the counsel fee, could not be determined until after all valid claims had been paid. In Wilson v. Servier, Cumming J. also held that it was “appropriate for the Court to know how the claims process has worked for claimants, the actual take-up by claimants, and the overall achievement of the settlement for class members before determining with finality the full and final amount of class counsel fees.”110 In Atlas, Deloitte & Touche was designated the claims administrator and was also ordered to report back to the court for reasons unrelated to the determination of the class counsel fee.111 But the case law suggests that such orders are uncommon, and absent court order, a significant proportion of the plaintiff bar is unlikely to voluntarily disclose the results of the claims process, as the survey revealed. Less than half of the respondents (seven out of fifteen) stated that they voluntarily report take-up information, and one other firm said it did so “sometimes”.112

111 Atlas, supra note 104.
112 Appendix B, question #18.
The inability of class counsel uniformly to provide data on the take-up rates of class action settlements, and the absence of a judicial requirement that such data be collected and provided to the court, is discouraging, and merits a change in policy. Access to justice is not confined to measures that give the promise of a fair procedure. Beyond such formalism are two more contemporary understandings of the concept: we should be ensuring that individuals are actually obtaining a fair procedure, and the procedure ought to lead to fair outcomes. A mandatory and public reporting procedure to the court after claims have been processed would, of course, require additional judicial resources; yet, it would also improve understanding of settlement processes and give judges – and the public – a basis on which to assess the comparative values of settlements. Judges would have access to data on how different settlement structures and notice programs result in better (or worse) take-up rates. The knowledge that take-up rates would be matter of public record might also have a monitoring function, incentivizing both class and defence counsel to design robust notice programs and user-friendly claims processes. The reforms in and of themselves will not ensure that class members are, in fact, fairly compensated. They will, however, improve the fairness of settlement processes and thereby increase the odds that fair compensation will result.\footnote{114}

\footnote{113}{It is also possible that some lawyers were able but unwilling to report take-up rates, a weakness inherent in self-reporting data that could be remedied by mandatory take-up disclosure.}

\footnote{114}{Donald Puckett has similarly argued that objective criterion by which to judge the substantive fairness of settlements are not available to the courts. He proposes instead more robust measures to ensure the procedural fairness of settlement negotiation and approval, and that if such standards are met, the settlement is presumed to be just (supra note 30 at 1283). I do not agree that fair procedure should give rise to the presumption of a just settlement; however I do agree that greater transparency will decrease the opportunity for collusive or inadequate settlements.}
There is one form of settlement, however, where “under-compensation” is apparent on its face, and where effective notice and activist class members arguably play a negligible role. The increasing incidence of settlements comprised solely or largely of *cy près* distributions is of particular concern from an access to justice perspective because by its nature, it precludes class members from obtaining any direct compensation. In the final part of this chapter, I discuss this phenomenon briefly, and offer preliminary thoughts on how access to justice principles ought to inform judicial considerations of proposed *cy près* distributions.

**III. *Cy près*: The Non-Monetary Benefits of Settlement**

The nature of mass wrongs necessarily creates barriers in distributing judgments or settlement funds. Class members may not be known to either party, as in the case of purchasers of defective consumer products or indirect purchasers in price-fixing conspiracies. Or, it may be prohibitively expensive to administer a distribution of nominal damages to a large class, as occurred in *Sutherland v. Boots Pharmaceuticals PLC*.\(^{115}\) In the face of these barriers, class counsel rely on provisions of the CPA that permit the aggregation of damages and *cy près* distributions.\(^{116}\)

*Cy près* awards figure in settlements in two ways: settlement agreements often include a *cy près* provision for any unclaimed settlement monies, in order that those monies not revert to the defendant; or the distribution scheme envisions the whole or a significant portion of the settlement fund going to charitable organizations in place of direct compensation to class members.

\(^{115}\) (2002), 21 C.P.C. (5th) 196 (Ont. S.C.J.) (case involving misrepresentation of benefits of drug; compensation per class member of $30-$70 deemed uneconomical to distribute to 520,000 class members).

members. It is the latter *cy près* scenario that raises particularly important considerations for access to justice, on two levels: first, *when* is it appropriate to permit *cy près* distributions in place of direct compensation; and second, *to whom* should these distributions be paid?

a. When are Cy près Awards Consistent with Access to Justice?

*Cy près* distributions are clearly appropriate in two situations: where class members are not identifiable, or where the costs of distributing the award approaches or exceeds the benefit. In these two scenarios, *cy près* distributions are consistent with access to justice: they ensure that defendants disgorge ill-gotten gains or pay damages for wrongful conduct, and in this way are called to account for their misconduct, even if these payments do not correspondingly compensate class members. Furthermore, if administrative costs are so great that they dissipate the settlement fund, a *cy près* distribution enhances access to justice by ensuring the full amount of the award is spent on initiatives that benefit the class indirectly. If access to substantive justice is a primary concern in class action litigation, it follows that *cy près* awards should only be permitted in those cases where it is impossible to identify class members, even by way of a robust notice program, or where the costs of distribution far outweigh the amounts being compensated.  

Both plaintiffs’ and defendants’ counsel bear a burden in satisfying the presiding judge that the decision to distribute *cy près* is not a decision of convenience or a cost-saving measure. Courts ought to scrupulously consider such submissions, given that the rights of class members will be extinguished without any direct compensation at all. For example, courts should be wary of accepting the

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117 The OLRC adopted the same approach, stating that “all feasible efforts” must be made to compensate class members directly before making any *cy près distribution*: OLRC Report, supra note 16 at 581.
parties’ submissions that direct compensation would be impracticable if class counsel has not cross-examined defence witnesses or otherwise obtained discovery of the defendants’ records relevant to this issue.

How courts approach this threshold issue is not well developed in the case law. In *Garland v. Enbridge*, the court accepted that direct payments to Enbridge customers was not possible, but gave no reasons for this conclusion beyond the observation that the “class is too large and the settlement amount too small to make a distribution of even an equal amount to each class member a reasonable, and an economically viable, alternative.”\(^{118}\) It is not immediately apparent why a direct payment could not be made; damages for each customer undoubtedly varied but for some totaled approximately $100.\(^{119}\) Unlike retail purchasers of consumer goods, gas customers are identifiable. Moreover, the makeup of the class may remain more constant over time than, for example, a particular bank’s credit card customers. While it may have been expensive to calculate the specific amount each class member in *Garland* paid in criminal interest, the same difficulty did not prevent direct payments being made to the class members in *Gilbert v. CIBC*.\(^{120}\)

In a more recent case\(^ {121}\) involving allegedly improper charges on foreign securities purchases, the court approved a $3.4 million settlement, comprised of $915,000 in counsel fees, and a combination direct payment/cy près settlement fund. Unlike the situation in *Garland*, the

\(^{118}\) *Garland v. Enbridge Gas Distribution Inc.*, supra note 36 at para. 30.

\(^{119}\) Ibid. at para. 29.

\(^{120}\) *Gilbert v. CIBC*, supra note 11 at para. 15 [“The amount of individual payments to class members ranges from 72 cents to $14.32. These amounts are arbitrary and minor in amount. They do not purport to compensate class members in terms of actual amounts owing nor do they compensate only class members with valid claims.”]

\(^{121}\) *Georghiades v. Scotia Capital Inc.* (23 January 2009), Windsor 03-CV-1982 (Ont.S.C.J.) [judgment certifying action and approving settlement].
defendant in the *Scotia Capital* class action was able to produce a spreadsheet containing the names of eligible class members and the precise amount each was entitled to recover. Class members whose recoveries were more than $25 and who were current accountholders would get their award (less counsel fees) deposited directly into their account. Class members owed $25 or more who were no longer accountholders with the defendant would have to make a claim; failure to make a claim would result in their damage amounts being paid *cy près* to one of the charities chosen by counsel. Finally, any class member with less than $25 in damages would receive no compensation; a letter sent directly to each such member notified them that their settlement awards were being donated to charity.\(^{122}\) As no endorsement or reasons for judgment are available, it is not immediately apparent why $25 was chosen as the threshold at which it was not feasible to provide direct compensation. Moreover, if the identities of class members were known to the defendants, access to justice would be enhanced by simply sending the payments directly to the class members (who did not opt out) without the need for a claims application.

Determining when it is no longer “economical” to compensate class members directly varies from case to case. American commentators have been unable to agree on when relief to the class is too small and distribution too inefficient to justify a *cy près* distribution, though at least one consumer organization has suggested that recovery of between $10-20 per class member may be the triggering amount.\(^{123}\) Where the settlement award is capable of being directly deposited into

\(^{122}\) Ibid. at Schedules B, C and D.

\(^{123}\) National Association of Consumer Advocates *Class Action Guidelines* (as revised 2006), online: http://www.naca.net/_assets/media/RevisedGuidelines.pdf at 30 (accessed on May 9, 2009). The NACA is a nationwide organization of over 1500 members committed to promoting justice for consumers, particularly those of modest means.
the bank account of a class member or paid by cheque without the need for a claims process, and compensation, therefore, is both feasible and inexpensive, *cy près* may never be appropriate except in those situations where payment is truly *de minimis*. Where class members are not so easily identifiable then a cost-benefit analysis is required, but as I have argued above, it is an analysis that judges should ensure has been conducted rigorously. There is little in the jurisprudence which suggests that judges in Ontario have scrutinized claims by settling parties that compensation is not feasible, or how “feasibility” is determined. Indeed, one class action lawyer interviewed for this research candidly stated that compensation in one price-fixing settlement in which his firm was co-class counsel could and ought to have been distributed to indirect purchasers, and allocated a higher percentage recovery to direct purchasers, rather than distribute the bulk of the settlement *cy près*.¹²⁴ Though this is one lawyer’s opinion made with the benefit of hindsight, it raises the possibility that the feasibility of compensating class members is not tested thoroughly enough at fairness hearings.

b. **To Whom Should Cy près Awards be Paid?**

Once the threshold issue of feasibility of direct compensation has been crossed, it then becomes vital to consider which criteria will be employed to determine the best possible *cy près* recipients. From a policy perspective, the payment of a significant settlement award to *any* recipient by a defendant can be justified as serving the deterrence function of class proceedings. Reliance on the deterrence argument alone, however, effectively transforms *cy près* awards into payment of a fine, and class counsel into a true private attorney-general. A few courts have

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¹²⁴ Interview with Respondent #12 on May 11, 2009 (notes on file with author).
explicitly embraced this normative view of class action settlements. One judge, for example, stated in this regard that *cy près* “payments largely serve the important policy objective of general and specific deterrence of wrongful conduct […]. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.”¹²⁵ On this view of *cy près* awards, there need not be any nexus between the charitable recipient and the nature of the class action or composition of the class. What is important is that there is a forfeiture by the defendant.

In his study of *cy près* distributions in Ontario class action settlements, Professor Berryman describes fifteen settlements, almost all of which distributed funds to charities that had no conceivable connection to the subject-matter of the class action or the class members. The charities included law schools (in a settlement involving price-fixing of food additives),¹²⁶ the Boys and Girls Club of Canada (in three price-fixing cases)¹²⁷ and two business schools (in settlement involving failure to disclose in a share prospectus).¹²⁸ Similarly, in the *Scotia Capital* settlement approved earlier this year, the designated charities were the Law Society Foundation in trust for the Lawyers’ Feed the Hungry Program (10%), ProBono Law Ontario (10%), Toronto Ronald McDonald House (26.6%), Pelletier Homes for Youth (26.6%) and Unity for Autism (26.6%).¹²⁹


¹²⁸ Ibid. referring to *Boliden v. Liberty Mutual Insurance Co.* [unreported].

¹²⁹ Supra note 121 at para. 1(a).
While it is encouraging that in these cases none of the settlement funds reverted to the defendants, and that the defendant in at least *Scotia Capital* case was required to report back to the court with respect to the claims process, the choice of *cy près* recipients appears arbitrary. The charities, though legitimate and worthy in their own right, have no connection either to the nature of the wrongs committed by the defendants, or the makeup of the respective classes. Judges do appear to ensure that the beneficiaries are validly constituted, and they scrutinize the ability of the various organizations to deliver the intended benefit. The same level of care does not appear to be taken to ensure the settlement is going to be applied in a manner that “may reasonably be expected to benefit the class members.”

There are cases, however, in which the language of compensation, not deterrence, is invoked when judges approve *cy près* payments to charities or non-profit organizations whose works will *indirectly benefit the class*. For these courts, monies distributed *cy près*, which literally means “as near as”, should be applied for a purpose that is as near as possible to the purpose of the law suit. The objective is to provide benefits to the actual class members, even if indirectly. So, for example, in a class action involving a drug prescribed for the treatment of hypothyroidism, the *cy près* beneficiaries were various institutions conducting specific research projects, education and outreach having to do with thyroid disease. To fulfill the compensatory

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130 Ibid. at para. 27.
131 The best example of this review is *Ford v. Hoffman-LaRoche Ltd.*, supra note 11.
132 CPA, s. 26(4).
133 *Sutherland v. Boots Pharmaceuticals*, supra note 115.
134 Ibid.
purpose of class actions, therefore, there needs to be at least some nexus between the recipients of the cy près scheme and the class members themselves.

The distinction between these two normative views is critical for access to justice. While settlements that approach full compensation for class members’ losses also serve a deterrence function, the reverse is not true. That is, payments that only serve a deterrence function do not have any salutary compensatory benefits. Access to justice considerations clearly favour cy près distributions that at least indirectly benefit the class, for at least two reasons. First, although it is not possible to know with certainty at the time a claim is initiated that the case will eventually settle on a cy près basis, a pattern of cy près settlements is detectable in price-fixing and credit card/financial services class actions. As these settlements become more commonplace, it will become arguably more difficult to secure the cooperation of individuals to act as representative plaintiffs; individuals would truly be acting out of altruism to assume the responsibility of representative plaintiff in circumstances where it is likely they will receive not even nominal compensation. This is particularly so in light of one court’s decision that representative plaintiffs who actively participate in researching and vetting appropriate cy près recipients, to ensure a

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135 In this respect, I disagree with Jeff Berryman’s suggestion that the behaviour modification objective may necessitate a distribution that benefits parties other than the class members. He argues that if courts are primarily concerned with the deterrence objective, then public interest organizations and consumer associations, among others, might be a better fit than recipients more closely related to the class members (supra note 126 at 12). I argue that from a behaviour modification perspective, the identity of the cy près recipient is immaterial to the defendant so long as forfeiture takes place. Cy près payments that indirectly compensate class members, therefore, are capable of achieving both compensation and deterrence objectives.

136 Ibid. [Berryman’s case study includes ten price-fixing cases and three foreign/criminal interest claims].
commonality of interest between the organization and class members, are not entitled to any compensation for the work performed.¹³⁷

A second reason access to justice dictates that there be a link between the class and the cy près recipient, and that the process of selecting recipients be more transparent and principled, relates to basic notions of fairness. As described by Professor Berryman, the case law suggests that courts have been “party to schemes that simply privilege some charities, universities, or other organizations over others, or which are the particular idiosyncratic favourites of lawyers.”¹³⁸ He argues that judges should be actively involved in vetting proposed cy près recipients to ensure that class members benefit indirectly, and in a manner that meets standards of openness, fairness and effectiveness. Access to justice fundamentally involves these same notions. Indirect benefits fulfill in at least a partial way the substantive components of access to justice discussed in chapter 2. Equally important, a more rigorous selection and approval process for cy près distributions would address procedural and symbolic access to justice concerns, as well.

A transparent and principled approach to cy près is consistent with procedural access to justice. Deference to counsels’ choice of recipients on grounds of parties’ contractual liberty is not.¹³⁹ A court procedure must be principled and fair for it to inspire confidence and be seen as

¹³⁷ Sutherland v. Boots Pharmaceuticals, supra note 115 at paras. 18-22. Winkler J. (as he then was) seemed particularly concerned about the appearance of a conflict of interest where representative plaintiffs gain materially more than other class members. But see Garland v. Enbridge Gas Distribution, [2006] O.J. No. 4907 (S.C.J.), where Cullity J. referred to Sutherland but concluded that Mr. Garland deserved compensation for his active role in litigation that spanned decades and which ultimately settled on a cy près basis.

¹³⁸ J. Berryman, supra note 135 at 19.

¹³⁹ In Gilbert, supra note 11 the court approved a partial cy près payment to the United Way, despite no apparent link between the charity and Visa cardholders who were improperly charged a foreign currency exchange fee.
promoting the rule of law among its users. Settlements that, with the imprimatur of the courts, confer significant sums of money on organizations personally selected by counsel “without a single penny finding its way into the hands of a class member” fail to accomplish not only the substantive goals of class proceedings, but also undermine the credibility of the court process and any benefits that may inure to individuals by their mere participation in a legal process. In his foundational paper on access to justice, Roderick Macdonald wrote of procedural access to justice that it implies careful attention to every decision-making step within the civil justice system. In every situation involving the attempt to reach decisions with generalized impacts, the process must be understandable to users and must be responsive to their sense of fairness. A process that is efficient and expeditious, but is either a mystery to those who participate in it, or leaves them with a sense of not having been treated fairly, is not a process that enhances access to justice.

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

140 Ibid. at para. 22. Ironically, the court used this language in reference to the unseemliness of the representative plaintiff receiving monetary compensation where other class members receive nothing.

Conclusion

Determining whether Ontario courts have, on the whole, ensured class members have achieved access to a just result is a complex task. Settlement approval by courts is mandatory, but such orders are not always reported, and settlements are not tracked. Much empirical work remains to be done to determine how much justice is meted out when class actions settle.

While judges generally recognize the importance of their role in guarding the interests of absent class members when reviewing a proposed settlement, the standard criteria include a presumption of fairness that I have argued is inconsistent with the active role judges are to play, as first enunciated in *Dabbs*. Judges clearly favour settlement over trial. While access to justice favours fair settlements as well, there is good reason to be more cautious about approving settlements of class actions, given the lack of monitoring by both representative plaintiffs and absent class members, and the rights that are compromised when a settlement is approved. A sampling of cases suggests that objectors do not have an influential place at the fairness hearing, due to a lack of resources, the absence of legal representation, and a judicial culture that is satisfied unhappy class members can simply opt out and commence their own litigation. The same barriers to justice that make class actions necessary in the first place vitiate against the possibility that objectors will ever litigate their claims individually. The success in the United States of public interest intervenors on behalf of objectors raises interesting possibilities about the role a court-appointed neutral expert might play here, to more fully press the interests of objecting class members.
Quite apart from the frailties of the objection process, class members also face a barrier to information where weak notice programs are approved by the court. Here, again, empirical work would identify whether the standard notice used in Ontario communicates critical information as well as it could. The method of transmitting that notice is equally important.Courts are, appropriately, less inclined to order collective notice by publishing in a national newspaper. Courts should insist on direct notice to class members wherever possible, and should also continue to be open to more creative forms of dissemination, like the internet, defendants’ websites, and third party assistance. As the Atlas case study exemplifies, direct notice to class members is key to high take-up of settlements.

Take-up rates are not universally collected or provided to the courts. These rates not only yield important information about the effectiveness of notice programs, but also provide a basis on which future courts can judge the sufficiency of settlement funds and the propriety of distribution plans. In addition, such take-up information would be helpful in determining the true value of a settlement in order to more accurately assess a fair counsel fee. Courts should consistently require class counsel or third party administrators to report back to the court on the claims process, as is envisioned by the CPA, and as is consistent with the courts’ supervisory role.

Judges must be particularly active when presented with settlements that involve a significant cy près distribution plan. If access to justice aspires to provide access to a just result, then settlements which provide no direct compensation to class members while conferring substantial fees on class counsel rightly deserve strict scrutiny. Cy près awards should only be permitted where direct compensation is impossible or economically unfeasible; evidence in this
regard must be produced by the parties. Without a more rigorous approach by the courts to settlement approval, class actions risk failing key access to justice objectives of inspiring public confidence in the fairness of the court system, and empowering its users.

A key feature of the settlement process is the approval of class counsel fee. No aspect of class action litigation has inspired such heated debates as has the question of how much should lawyers be paid for taking on the risk of a class proceeding. Contingency fees make class actions possible because the potential premium creates incentives to take on risk. Over-compensating lawyers, however, likely results in the under-compensation of class members. Striking the right balance is a key access to justice concern, and is the focus of the next chapter.
Chapter 5

FEES

Costs are perhaps the most traditional and oft-cited of all barriers to justice. The high costs of legal services, coupled with the small potential recoveries inherent to many mass tort, consumer and environmental claims, render litigation unviable as an access to justice mechanism. Few institutional responses, such as no-fault compensation schemes or administrative agencies and tribunals, exist for compensating consumers.\(^1\) By aggregating claims and giving plaintiffs’ lawyers a financial stake in the outcome, the class action mechanism is likely the only method by which a procedure – a judicial one – to address mass wrongs is accessible.

It is beyond dispute that contingency fees are the engine that drives class actions.\(^2\) They are what enable plaintiffs to retain counsel to represent them in what would otherwise be unviable suits, and they produce sufficient economic incentives for lawyers to accept the risks of litigation. The OLRC Report expressly recognized that contingency fees must be a feature of class action

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\(^1\) The Ontario Consumer Protection Act originally provided for the establishment of a Business Practices Tribunal before whom complaints could be brought about abusive practices in the marketplace. The Tribunal was ineffective and was abolished in the late 1990s. See Jacob Ziegel, Class Action Course Book, University of Toronto Faculty of Law at 409.

\(^2\) This point was made in an equally unqualified manner by Professors Issacharoff and Miller in a recent article concerning the advent of aggregate litigation in Europe: “It can safely be said that none of the class action procedures adopted or proposed across Europe in recent years will succeed if they fail to compensate counsel adequately. This is not a controversial point.” The authors conclude that it is difficult to design an effective class action procedure in the absence of a contingent fee. Samuel Issacharoff & Geoffrey Miller, “Will Aggregate Litigation Come to Europe?” (2009) 62 Vand. L. Rev. 179 at 197-198.
legislation in order to remove the single largest barrier to justice, and all class proceedings legislation expressly permit contingency fee arrangements.\(^3\)

It is the contingency fee, however, which most threatens the legitimacy of class actions in the public eye and amongst international legal scholars. Commentators have called fees the “lightning rod in the controversy over damage class actions.”\(^4\) The popular press is replete with references to perceived abuses of class actions and contingency fees. In the midst of negotiating settlement of the multi-million dollar *Listeria* class action suits, for example, the president of Maple Leaf Foods said:

> Whether guilty or not, we have accountability for some compensation. I absolutely respect that – we are highly supportive. However, that isn’t where a class action lawyer makes his or her claim, or their money. They collect outrageous (multiple millions) in fees – miles beyond normal legal fees – to try and extract money for large, large bodies of people who make the faintest, thinnest of claims of so-called emotional stress or illness (tummy ache stuff)... There is no question it is absolute fraud...Both the attorneys who make millions from this, and those that participate in these illegitimate classes nauseate me.\(^5\)

Equally, common jokes about lawyers which equate them with unbridled greed, reflect a cynical view of contingent fees and lawyers.\(^6\)

> A core aspect of access to justice asks whether people “respect the law, and do they have confidence in its outcomes?”\(^7\) Access to justice concerns are engaged, therefore, to the extent that


\(^4\) Deborah Hensler et al., *Class Action Dilemmas* (Santa Monica: Rand Institute for Civil Justice, 2000) at 434.

\(^5\) “Emails a window on listeria outbreak”, *Toronto Star* (8 November 2008), A1, A33, quoting Maple Leaf Food Company president, Michael McCain.

\(^6\) Marc Galanter, “Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents” (1997-1998) 47 De Paul L. Rev. 457 (documenting public perceptions of contingency fees, as manifested in surveys, the press and jokes about lawyers). One such joke goes something like this: Client asks ‘what is a contingency fee’? Lawyer: ‘If we lose the case, I get nothing.’ Client: ‘What if we win?’ Lawyer: ‘Then you get nothing.’
generous counsel fees negatively impact public perception of the social utility of class actions. Making lawyers wealthy is not the goal of class proceedings legislation.\(^8\) Increasing access to justice for members of the public is; presumably, the law is morally neutral toward a procedure that enables wealth accumulation within a particular group of lawyers if the fees result from work that achieves the goal.\(^9\) Yet between the objective (increased access to justice) and the reward (compensation at above market rates for legal services), there are a number of considerations that come into play. I will focus on two in this chapter: how are courts navigating the boundary between adequate compensation (sufficient to incentivize counsel to pursue other class actions) and over-compensation? And what kinds of class actions are promoted by recent judicial approaches to fees? Both questions are critical in the access to justice evaluative framework. Compensation proportionate to risk encourages counsel to take on difficult cases – those that are least likely to be pursued in the civil justice system; over-compensation not only reduces the funds available to compensate class members, it also harms public confidence in, and respect for, the law. And as is always critical for access to justice, it is important to assess the impact of initiatives designed to improve access.

These two facets of the fees question will be revisited throughout this chapter. In section I, I look at judicial approaches to fee approval in a number of cases, including the two case studies. Here, many of the same concerns canvassed in the previous chapter on settlements will emerge


\(^9\) The jurisprudence makes clear that substantial counsel fees may accompany class proceedings: Parsons v. Canadian Red Cross, [2000] O.J. No. 2374 at para. 56.
again: an overly deferential approach to fee agreements on the part of some courts, and the hazards of an adversarial void for those judges who do attempt to seriously scrutinize the determination of a reasonable fee. In the second section, I will focus on the question of incentives, specifically, what kinds of cases do the predominant approaches to counsel fees encourage? In the concluding paragraphs, I will suggest other criteria in the fee approval process that may serve to ensure the dangers of over-compensation are avoided, and important class actions continue to be undertaken.

I. **Judicial Approaches to “Fair and Reasonable” Fees**

   a. **The Test**

   Class counsel fees must be approved by the court.\(^{10}\) The legislation requires that judges approve a “reasonable” fee,\(^ {11}\) and authorizes them to consider the manner in which the lawyers conducted the case,\(^ {12}\) but is otherwise silent as to the relevant criteria for determining reasonableness. The operative provisions of s. 33 are as follows:

   On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

   (a) shall determine the amount of the solicitor’s base fee;

   (b) may apply a multiplier to the base fee that results *in fair and reasonable compensation to the solicitor for the risk incurred* in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

\(^{10}\) CPA, s. 32(2).

\(^{11}\) Ibid., s. 33(8).

\(^{12}\) Ibid., s. 33(9).
(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.\(^\text{13}\)

Although the Ontario legislation only expressly contemplates a lodestar method of calculating fees,\(^\text{14}\) courts have repeatedly affirmed that other methods of calculation, including a percentage of the settlement, are permissible.\(^\text{15}\) Courts have also repeatedly affirmed that the essential criterion in determining an appropriate counsel fee is whether it is “fair and reasonable”.\(^\text{16}\) There are both factors and benchmarks used to determine a “fair and reasonable” counsel fee. First, the factors normally taken into account when assessing a reasonable fee as between a solicitor and her own client in ordinary litigation are equally applicable to the class action context.\(^\text{17}\) That is, courts are to consider:

\begin{itemize}
\item[a)] the time expended by the solicitor;
\item[b)] the legal complexity of the matters to be dealt with;
\item[c)] the degree of responsibility assumed by the solicitor;
\item[d)] the monetary value of the matters in issue;
\item[e)] the degree of skill and competence demonstrated by the solicitor;
\item[f)] the results achieved;
\item[g)] the ability of the client to pay [usually a non-issue in class actions]; and
\end{itemize}

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\(^\text{13}\) Ibid., s. 33(7) [emphasis added].

\(^\text{14}\) “Lodestar” is the American term for a calculation that includes a base fee, comprised of the docketed hours times the usual hourly rates, increased by some multiple ranging from just over one to five.


h) the client’s expectation as to the amount of the fee.\(^\text{18}\)

In terms of benchmarks, the fairness and reasonableness of the requested fee is commonly measured by reference to four tests:

a) the percentage which the fees sought are of the gross recovery;

b) whether the resulting multiplier is appropriately placed within the acceptable range, usually between one at the low end and three to four at the high end;

c) how the fees sought relate to the fees that would be payable under the retainer agreement entered into with the representative plaintiffs; and

d) whether the compensation sought is viewed by the court as “sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well”.\(^\text{19}\)

Importantly, the case law provides no guidance as to what might be considered sufficient to provide real economic incentives for class counsel, in either monetary terms or as a matter of principle.

b. Multipliers, Percentages and Cross-Checks

To date, only one empirical study has been conducted examining the range of fees awarded in Ontario class actions. Benjamin Alarie’s 2007 survey\(^\text{20}\) of 27 settled cases revealed a very wide range of fee awards, calculated on both a lodestar and percentage of settlement basis, with an average approved fee of $3.06 million, average multiplier of 2.48, and as a percentage value of

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\(^{20}\) Benjamin Alarie, “Rethinking the Approval of Class Counsel’s Fees in Ontario Class Actions” (2007) 4 Can. Class Action Rev. 15.
settlement, average fees of 14.85%. The highest multiplier identified in the sample group was 4.8, the award made in *Hislop*. As explained in *chapter 1*, however, the actual multiplier recovered by class counsel in that case is less than two, as a result of the court’s interpretation of the Canada Pension Plan legislation which prohibits a charge on benefits. Reacting to the Court of Appeal’s decision, class counsel stated: “It’s the death knell for constitutional class actions”.

A fee award decided in July 2009 likely represents the high watermark in multipliers, and as the most recent fee decision at the time of writing, merits careful analysis. In *Cassano v. Toronto-Dominion Bank*, Cullity J. approved an $11 million fee in a $55 million settlement of the third in a series of cases in Ontario concerning improperly levied fees on foreign currency purchases. The fee represented 20% of the gross recovery, and a multiplier of 5.5 times the base fee. The judge placed considerable emphasis on – and displayed almost unprecedented deference to – the fee agreement between class counsel and the two representative plaintiffs, which provided for a 20% contingency fee. More importantly, Cullity J. expressly rejected using the lodestar calculation as a

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21 Ibid. at 29.
22 Ch. 1 Research Methodology, supra at pp. 28-31.
23 Cristin Schmitz, “Counsel denied millions for Charter class action” *The Lawyers Weekly* (15 May 2009) 1, quoting Douglas Elliott. Mr. Elliott was referring to all class actions involving illegal benefit denials, as those benefits schemes typically prohibit a charge or assignment, and based on the Court of Appeal’s interpretation of “charge”, would therefore preclude a first charge on settlement or judgment funds for lawyers’ fees.
25 A $500,000 fee was awarded to the lawyers representing the haemophilic class members in the Red Cross litigation, a fee that also equated to a 5.5 multiplier. See *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.J.) [“Endean”] at paras. 100-101.
26 The judge in *Cassano* is not alone in deferring to the terms of the fee agreement. See also 799376 Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc., [2008] O.J. No. 5280 (S.C.) at paras. 6 (“I am prepared to approve this fee request because it is consistent with the retainer agreement entered into with the representative plaintiff.”) and 9.
benchmark of reasonableness in a situation where the fee agreement used a percentage of recovery method. He acknowledged that judges have repeatedly used the percentage calculation as a yardstick for assessing fairness where a fee and multiplier are requested; he dismissed doing the converse, without citing precedent or providing a compelling rationale.\textsuperscript{27} He agreed with class counsel that the fee agreement, which referred to a percentage of recovery contingency, ought to be given primacy, without regard to a lodestar comparison.\textsuperscript{28} Since counsel did not agree to act on the basis of the lodestar method, the requirements of s. 33 of the CPA, including the approval of “a reasonable base fee”, did not apply. The lack of cross-check against the 5.5 multiplier produced by the fee represents an important departure from previous practice; courts have long used percentages and multiplier calculations simultaneously as yardsticks for assessing reasonableness, and have been in general agreement that multipliers of 3 or 4 were for “the most deserving of cases”.\textsuperscript{29}

Driving Cullity J.’s reasoning, at least in part, is his preference for percentage of settlement over lodestar calculations. He referred to arguments against the lodestar method previously canvassed in another case he decided last year. In \textit{Martin v. Barrett}, Cullity J. adopted the criticism of the lodestar method enumerated in \textit{Endean v. Canadian Red Cross Society} as “encouraging

\textsuperscript{27} \textit{Cassano}, supra note 24 at para. 60.

\textsuperscript{28} Ibid. at para. 63.

\textsuperscript{29} \textit{Gagne v. Silcorp.}, supra note 19. Recall that in \textit{Hislop}, E. Macdonald J. awarded a multiplier of 4.8 in a case that secured the largest class action trial award in Canada, and marked the first class action judgment in the world to address an infringement of the rights of gays and lesbians.
lawyers to expend excessive hours engaging in duplicative and unjustified work, inflating their normal billing rates, and including fictitious hours."

There are three difficulties, however, with Cullity J.’s reasoning. First, there is nothing in the CPA or in the jurisprudence which precludes or even discourages reference to the base fee as a benchmark for determining the fairness and reasonableness of the requested fee. Certainly, the Court of Appeal in Gagne carved out no exception to the criteria or benchmarks for cases in which the contingency fee was set as a percentage rather than a lodestar. On a strict statutory interpretation, section 33 of the CPA only applies to fee requests involving a multiplier; a determination of a reasonable base fee and a multiplier that reflect the risk incurred in undertaking the action, therefore, would be unnecessary where an agreement providing for a percentage contingency is at issue. While Cullity J. prefers this interpretation, he has acknowledged that it is not the interpretation courts or the bar have adopted. Since percentage fees theoretically “represent a melding of a base fee and multiplier”, the factors taken into account under s. 33 apply to all fee agreements, not just those of a certain stripe, and the reasonableness of the base fee would at least be relevant.

Second, although the criticisms of the lodestar method were adopted from a U.S. federal court task force report on contingency fees, the importance of a lodestar cross-check cited in the

31 Gagne v. Silcorp, supra note 19.
32 CPA, ss. 33(4) and (7).
same report\(^{35}\) were not mentioned in *Endean, Martin v. Barrett* or *Cassano*. Federal Court judges in the U.S. are specifically directed “to supplement the percentage method with a lodestar cross-check to see if the hourly rate is reasonable”\(^{36}\) and leading American appellate cases have endorsed this approach as a “sensible” method of checking the reasonableness of its initial fee calculation.\(^{37}\)

As one court stated after endorsing the Third Circuit Task Force Report’s preference for the percentage fee method, the lodestar remains relevant: “The Court’s choice of a percentage, however, will be heavily informed by the value of services rendered by Counsel. …[T]he percentage awarded must bear some relationship to the work that Counsel have done and the work that they will do under the settlement.”\(^{38}\)

Finally, even *Endean* on which Cullity J. relies in support of his preference for a percentage of settlement methodology for fee awards, also approved a sliding scale approach to ensure that the ultimate percentage of settlement fee was not unreasonable relative to the effort expended,\(^{39}\) or so excessive that it would “impair the integrity of the profession”.\(^{40}\) It has been suggested, for example, that an acceptable fee would take up to 33% of the first $10 million of a settlement, 20%}

\(^{35}\) The task force report referred to, but not cited, in *Endean*, supra note 25 at paras 16-17 is the 1985 Third Circuit Task Force Report, infra note 43. At page 257 of the Report, the members of the task force reiterate that the court retains the discretion to alter the negotiated fee, and to shift to the lodestar technique if a percentage is inappropriate.


\(^{37}\) *In re Cendant Corp. Prides Litigation*, 243 F.3d 722 (3rd Cir. 2001) and cases cited therein. See also *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), writ of certiori denied *Vizcaino v. Waite*, 2002 U.S. Lexis 8338 [“while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award”].


\(^{39}\) *Endean*, supra note 25 at para. 80 [“a percentage fee should generally be lower where the recovery is higher”]. Note that in *Endean*, the fee awarded was $15 million, representing approximately 14% of the settlement fund.

\(^{40}\) Ibid. at para. 85.
of the next $10 million, and 10% of the remaining settlement.\(^{41}\) A de facto sliding scale approach is evident in the results of the empirical research conducted by Professor Alarie; he found that the larger the monetary value of the settlement, the lower the percentage of settlement represented by the counsel fee.\(^{42}\) And in the U.S., both the Third Circuit Task Force Report on Counsel Fees\(^ {43}\) and the *Manual for Complex Litigation* recommend that as “the total recovery increases the percentage allocated to fees should decrease.”\(^ {44}\) Yet the possibility of a reduced fee, which if calculated on the scale described above would have yielded a $7 million fee (or a 3.5 multiplier), was not canvassed by the *Cassano* court.

Approval of percentage of settlement fee requests, without regard to the multiplier produced and the value of the services rendered, and accompanied by a heightened deference for the contractual bargain struck between counsel and representative plaintiff, are inconsistent with class action judges’ ‘most important’ responsibility – approving fees (and settlements).\(^ {45}\) If we want to ensure class actions serve the public well, and avoid the “aroma of gross profiteering” that


\(^{42}\) B. Alarie, supra note 20 at 30.

\(^{43}\) *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 256 (1985) [“The negotiated fee, and the procedure for arriving at it, should be left to the court’s discretion. In most instances, it will involve a sliding scale dependent upon the ultimate recovery, the expectation being that, absent unusual circumstances, the percentage will decrease as the size of the fund increases”].

\(^{44}\) B. Rothstein and T. Willging, supra note 36 at 31.

\(^{45}\) Deborah Hensler, supra note 4 at 86-87.
many critics of U.S. class actions have identified,\textsuperscript{46} then more rigorous analysis of counsel fees is needed.

c. **Enforcing the Contingency Fee Agreement**

The decision in *Cassano* is the most recent example of an important point of law not fully explored in the jurisprudence. The motion judge accepted the argument that it would be unreasonable to reduce the fee solely because it produced a 5.5 times multiplier. In doing so, he expressly gave primacy to the terms of the contingency fee agreement which only contemplated a percentage of settlement:

They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial, and there was nothing in the manner in which the proceeding was conducted that, in my judgment, would justify a refusal to approve a fee determined in accordance with the terms on which the retainers were accepted.\textsuperscript{47}

While the judge quite properly referred to essential criteria on which fairness is to be judged – the degree of success achieved and the risks undertaken – it is questionable whether enforcement of the terms of the agreement necessarily follows. Clearly, the agreement is highly relevant, but it is only one factor of many to be considered.\textsuperscript{48} Moreover, giving effect to the agreement is not, as a policy matter, necessarily desirable from an access to justice perspective. Indeed, the OLRC, a

\textsuperscript{46} Ibid. at 424.

\textsuperscript{47} *Cassano*, supra note 24 at para. 63.

\textsuperscript{48} *Gagne v. Silcorp*, supra note 19 (referring, with counsel’s fee agreement as the third of four benchmarks of reasonableness).
strong supporter of contingency fees in class actions, nevertheless recommended that the level of compensation should only be calculated by the court,\textsuperscript{49} that the fee agreement would not be “a binding contract respecting the amount of a fee or establishing the method by which the fee is to be calculated”,\textsuperscript{50} and that “in every case, the class lawyer’s remuneration would be determined by a judge who ... would engage in the same kind of analysis now employed in the taxation of solicitor’s bills.”\textsuperscript{51}

Previous courts have justified giving effect to the fee agreement on the basis that class counsel require some certainty that, if successful in the action, they will be remunerated at a premium rate. By definition, however, contingency fee agreements evidence counsel’s willingness to act in the face of uncertainty. Moreover, the agreement is unlike the typical retainer agreement negotiated by counsel and individual client. There is no data available to gauge how involved are representative plaintiffs in negotiating fee arrangements (indeed, such data would be impossible to gather absent individual interviews with such plaintiffs). Given that many representative plaintiffs are selected by counsel,\textsuperscript{52} and that most representative plaintiffs have few incentives and little power to monitor counsel, it would be very surprising if representative plaintiffs had any negotiating leverage or expertise to bring to bear. Finally, even in situations where independent legal advice is obtained (as occurred when the fee agreement was renegotiated in \textit{Atlas}),\textsuperscript{53} the fact

\begin{itemize}
\item \textsuperscript{49} OLRC Report, supra note 3 at 737.
\item \textsuperscript{50} Ibid. at 731.
\item \textsuperscript{51} Ibid.
\item \textsuperscript{52} See discussion about recruiting plaintiffs in chapter 3: Selecting Cases, above.
\item \textsuperscript{53} The original fee agreement contemplated a 20% percentage of settlement recovery. In early 2008, the representative plaintiffs agreed to a revised agreement which increased the percentage to 25%, after obtaining independent legal advice from an experienced class action lawyer. It is worth noting that the judge at the fairness
remains that the agreement also binds countless other class members who will be required to pay
counsel notwithstanding their absence from the negotiations between class counsel and
representative plaintiff. In such circumstances, the fee agreement should not attract the same
degree of deference that might operate in a typical contractual setting.

On occasion, in spite of the representative plaintiffs’ endorsement, courts have shown
considerable skepticism in the face of large fee requests, and even with respect to far more
modest ones. Cullity J. himself reduced a base fee by 30% (and concomitantly, the percentage of a
$14 million gross recovery from 34% to 29%) on the basis that there had been an “over-lavish
expenditure of the resources of the firm” in prosecuting the action. In doing so, he placed little
weight on the fee agreement which entitled class counsel to the amounts requested, and pointed
out that in class actions, there is an “absence of a client who will be directly affected and
concerned with the level of fees claimed.” The case law is simply not clear as to when a fee
agreement, even if entered into with an “absent client”, deserves deference, and when it is but one
factor of many to be considered.

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reopening a fee agreement during the course of settlement discussions was appropriate in light of the inherent
conflicts of interest and the implications of counsel’s fiduciary responsibilities. No similar concerns were expressed by
the judge in Atlas.

54 In Residential Schools, the federal government’s representative, retired Justice Frank Iacobucci, filed an affidavit
questioning the propriety of the fee request made by Tony Merchant, including the number of hours purportedly
docketed. Winkler J. (as he then was) approved the fee requests made by the national consortium of class counsel, but
did not approve the totality of the fee requested by Merchant Law Group in light of the verification process to which
that firm was required to submit under the terms of the settlement agreement. See Baxter v. Canada (AG), [2006] O.J.
No. 4968 at paras. 66-69. The verification process itself became the subject of a series of legal disputes, including a


56 Ibid. at para. 52.
d. The Adversarial Void

The decision in Cassano highlights another aspect of the process of fee approval that merits particular attention, especially with a view to enhancing access to justice. Here we confront again the problem of the adversarial void, or the “absent client” described in Martin v. Barrett, and which was previously discussed in the context of settlement approval. With no one class member “directly affected and concerned with the level of fees claimed”, the concurrence of the representative plaintiffs with the fee request, a fact to which almost all motions judges refer, is of little moment. Such evidence is even less persuasive where the representative plaintiff is related to one of the lawyers representing the class.57

The adversarial void is a function also of the role defendants play in the approval process. Defendants do not routinely make submissions with respect to the counsel fee. They do not have the right to do so.58 It has been held that the “settlement agreement ... [is] the place where the defendants, if they intended to participate in the subsequent fixing of the fees and disbursements of class counsel, could have reserved their rights in this regard.”59 It is perhaps for this reason that settlement agreements increasingly include a provision that prohibits defendants from making submissions as to counsel fee.60 In any event, there are few scenarios where defendants would

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57 These were the facts in Cassano, supra note 24 at para. 58; Cullity J. held the relationship was not a factor to be considered in setting the fee since the representative plaintiff had been approved as an appropriate representative plaintiff.

58 Wilson v. Servier, supra note 16.


60 See e.g. recent settlement agreements announced in Smith v. Money Mart (online: http://moneymartclassaction.com/documents/707651_agreement/pdf at para. 8); Barham v. Hyundai Canada Inc.
have any incentive to argue against the fee requested by class counsel. In a common fund settlement, where defendants agree to pay a fixed sum all-inclusive of fees and other expenses, it matters little to the defendants how the fund is divided as between class members and their lawyers. Similarly, where the parties have negotiated a fixed amount for counsel fees, it would be counterproductive then to argue the fee is unreasonable. Only where the parties have structured a settlement to leave the determination of the fee wholly to the judgment of the court and unused monies to revert to the defendants – a structure class counsel with sufficient leverage will not agree upon – would there be any interest in the quantum of the counsel fee on the part of the defendants.

Such was the case in *Wilson v. Servier.* The defendant agreed to establish a $25 million settlement fund and claims process; an additional $15 million fund was also agreed to if the claims exhausted the base fund. The settlement agreement provided that if the claimants’ take-up did not exhaust the fund, the residual would largely revert to Servier. Given the defendant’s reversionary interests, defence counsel sought to make submissions relating to the determination of the fees, submissions that the court “welcomed”, stating that usually, “a court is left alone when it comes to considering the reasonableness of the requested class counsel fees.”

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(online: http://www.classaction.ca/pdf/Kia_Proposed_Settlement_Agreement_EN.pdf at para. 21); *Stewart v. General Motors* (online: http://www.gmcanadiansettlement.ca/english/eng_home.htm at para. 3.11) [stating that the defendants shall consent to the motion for approval of fees]; and the Menu Foods class actions (online: http://www.petfoodsettlement.com/documents/miscellaneous/settlement-agreement-4974746.pdf at page 48). *Contra* see 2003 settlement agreement in the 407 ETR class action which was silent on this point (online: http://www.koskieminsky.com/site_documents/011240_SA_07mar03.pdf).

61 Supra note 16.

62 Ibid. at paras. 17-18.

63 Ibid. at para. 21.
fee agreements provided for a 25% fee (in the Ontario action) and 40% (in British Columbia).

Counsel sought $13 million, representing a base fee of roughly $8.7 million and a multiplier of less than two. The defendants argued that both the hourly rates and the number of docketed hours were too high. Cumming J. agreed in part, and ordered $10 million to be paid to class counsel immediately. He remained seized of the issue pending completion of the claims process since it was “appropriate for the Court to know how the claims process has worked for claimants, the actual take-up by claimants, and the overall achievement of the settlement for class members before determining with finality the full and final amount of class counsel fees.”

It is the rare case, however, where defendants will make submissions as to the reasonableness of class counsel fees. Left to fill the adversarial void are class members themselves. Yet the same monitoring issues discussed in the previous chapter apply with equal force here, and unlike objectors in the U.S., objecting class members in Ontario cannot recover any of their costs in challenging the fee request. For this reason, it is questionable whether judges should put any weight on the absence of objections to a fee request as indicative of the class members’ support for the fee application. Indeed, the Court of Appeal has held drawing such conclusions to be

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64 Ibid. at para. 99.

65 Successful objectors have been awarded costs on the basis that the reduced counsel fee increased the settlements funds available to the class. See e.g. Bowling v. Pfizer, 922 F. Supp. 1261, 1285 (S.D. Ohio 1996), aff’d 102 F.3d 777 (6th Cir. 1996) as cited in B. Rothstein and T. Willging, supra note 36 at 31.

66 Bilodeau v. Maple Leaf Foods Inc., [2009] O.J. No. 1006 (S.C.J.) at para. 97. Note, however, that class counsel in Atlas agreed not to seek costs from the objectors and volunteered to pay $10,000 in costs to them whatever the disposition of the appeal: Telephone interview with Brian Foster, counsel for an objector (16 July 2009) (notes on file with author). The Court of Appeal reserved and as of the time of writing, its decision had not been released. Whether it will approve the payment despite Bilodeau remains to be seen.
tenuous.\textsuperscript{67} And what of those cases where class members object? Statistics are lacking as to the incidence of objections and their impact on the assessment of counsel fees. One of our case studies, however, provides an example of successful intervention, at least in the court of first instance.

In \textit{Atlas}, three individuals filed written objections regarding the $12 million fee (equivalent to a 3.7 multiplier, and 30\% of gross recovery) sought by counsel. The objections turned on a view that the fees were disproportionate to the result achieved after cross-examinations and three days of mediation.\textsuperscript{68} Lax J. agreed that the base fee was unreasonable and that the $12 million fee was “excessive in relation to the recovery for the class.”\textsuperscript{69} The motion judge did not point to any specific examples of overlawyering in the dockets, however, and appeared to be more concerned that the fee would equate to 52\% of the net recovery to class members.\textsuperscript{70} Although she agreed that the settlement reached was “probably the best that could be achieved in the circumstances”, she did not accept class counsel’s assessment of the degree of risk involved in the action.\textsuperscript{71} She ultimately reduced the base fee by 25\% without conducting a full assessment of fees (which she

\textsuperscript{67} \textit{Gagne v. Silcorp.}, supra note 19 (“Moreover, in this case those views, which are said to constitute acceptance or even approval of a multiplier, can be gleaned only by a very tenuous process of inference. One simply cannot say with any certainty that the views of class members on this issue are as they are argued to be.”).

\textsuperscript{68} \textit{Lawrence et al. v. Atlas Cold Storage Holdings Inc. et al.}, (12 February 2009), Toronto 04-CV-263289CP (Ont. S.C.J.) [unreported] at para. 49.

\textsuperscript{69} Ibid. at para. 54.

\textsuperscript{70} Ibid. at para. 57.

\textsuperscript{71} Ibid. at para. 54.
admitted not to be equipped to do), and set the multiplier at 2.6, producing a fee of $6.3 million, or roughly 16% of the gross recovery.\textsuperscript{72}

Class counsel appealed. Given the structure of the settlement (a common fund with no reversion to the defendants), Atlas and the personal defendants had no interest in either the original fee approval or the argument of the appeal. Defence counsel attended the appeal but did not make submissions and were not called upon.\textsuperscript{73} Though not represented at the fairness hearing, the objectors were represented by counsel at the hearing of the appeal, who argued that the fee was excessive but without reference to examples of duplication in the time records.\textsuperscript{74} Objectors do not have rights of disclosure, and the scope of material produced to objectors is not apparent on the face of reported decisions. In \textit{Atlas}, however, the appeal record and dockets were provided to the objectors.\textsuperscript{75}

Even assuming relatively fulsome disclosure, however, class members are not in a position to seriously challenge class counsel’s assessment of the risks assumed and results achieved in the settlement. In their factum on appeal, class counsel argued that the reasonableness of the counsel fee for the purposes of s. 33 of the CPA is not to be considered only from the perspective of class members:

\textsuperscript{72} Ibid. at para. 71.

\textsuperscript{73} Telephone interview with Brian Foster, supra note 66.

\textsuperscript{74} As is typical, the timesheets were not included in the motion record for the fee approval, but were made available to the motion judge at the hearing and to the objector. See affidavit of Jay Strosberg sworn June 26, 2008 at para. 187 (on file with author). All materials filed on the appeal were served on the objector.

\textsuperscript{75} Telephone interview with Brian Foster, supra note 66.
“Reasonableness” should be assessed from the perspective of a person who fully understands what is involved in prosecuting a class action, the quality and quantity of the issues counsel faced in the class action, and what work counsel did in response to those issues. That assessment must be practical and fact-based, guided by an appreciation of what counsel did to prosecute the class proceeding well and bearing in mind the purposes of the Act. Those purposes embrace but are not limited to the interests of class members. Accordingly, it is a mistake to evaluate “reasonableness” only from the perspective of the class members.\textsuperscript{76}

On the basis of this approach to the assessment of the fee, it is highly unlikely a class member’s knowledge of the case would ever rise to meet the standard of a “person who fully understands what is involved in prosecuting a class action”.

Class counsel also argued that the approval of a fee on the basis of a percentage of gross recovery obviates the need to examine the hours worked and to determine an exact multiplier.\textsuperscript{77} They submitted further that a fee agreement which contemplates a percentage recovery for counsel should be given “great weight”.\textsuperscript{78} Whether this also means that the determination of a reasonable fee may be divorced entirely from the work and hours performed is unclear. There is at least the suggestion here, as in Cullity J.’s decision in \textit{Cassano}, that a judge approving a fee as a percentage of recovery need not scrutinize the base fee or be overly concerned with the multiplier that the approved fee yields. Such an approach conflicts with recommendations made by class

\textsuperscript{76} \textit{Lawrence et al. v. Atlas Cold Storage Holdings Inc. et al.}, Toronto C50192 (Ont. C.A.) (Factum of Appellants) at para. 21.

\textsuperscript{77} Ibid. at para. 17.

\textsuperscript{78} Ibid. at para. 42.
action scholars in the U.S., who recommend that the hours worked always be disclosed to the
court, and detailed expense reports provided.\footnote{D. Hensler, supra note 4 at 490.}

There is no principled reason, however, why a fee agreement that provides for a percentage
of recovery contingency fee ought to be given greater weight than a fee agreement structured
another way. In both situations courts must be attentive to what is fair and reasonable in light of
the purposes of contingency fees: to provide class counsel with an adequate incentive to take on
class actions and to achieve the best possible result. If a percentage of the gross recovery is to be
approved irrespective of the actual work performed (though still intimately connected to the
degree of success achieved), is there a point where the fee award over-compensates counsel and
therefore reduces the sum of money available for distribution to the class? If, as has been
suggested in a number of cases,\footnote{Martin v. Barrett, supra note 30; Stone v. Bayer, endorsement dated April 19, 2006 [unreported] at para. 21.} there is growing judicial preference for percentage of settlement
over the lodestar method, then it is hoped that the Court of Appeal in \textit{Atlas} will provide clarity and
principle to the approval process where a percentage is sought.

In \textit{Gagne}, Goudge J.A. stated:

\begin{quote}
The provision of contingency fees where a multiplier is applied to the base fee is an
important means to achieve this objective [enhancing access to justice]. The
opportunity to achieve a multiple of the base fee if the class action succeeds gives
the lawyer the necessary economic incentive to take the case in the first place and
to do it well. However, if the Act is to fulfil its promise, that opportunity must not be
a false hope.\footnote{Gagne v. Silcorp, supra note 19 at 422-423.}
\end{quote}
There is no question that providing the incentives about which Goudge J.A. speaks is critical from an access to justice perspective. The premise begs the question, however, as to what constitutes a sufficient economic incentive. Is double recovery of the time devoted to the file at the usual hourly rates sufficient? If counsel cannot assume that their fee agreements with representative plaintiffs will be enforced, will they, as was argued in *Atlas*, become “much more selective in accepting cases and entering into contingency fee arrangements[?]” Should that occur, [will] the access to justice objective of the Act [...] be thwarted”?\(^{82}\)

II. **Class Counsel Fees: Proper Incentives or Unnecessary Windfalls?**

In his review of multiple sources of evidence about popular perceptions of the contingency fee in America, Marc Galanter concludes that “if the contingency fee is accepted as an institution, this does not mean that the public feels that the price is fair. The public regards lawyers’ charges generally as excessive.”\(^{83}\) Canadian examples of the public’s perception of contingency fees, particularly in the class action context, are difficult to locate. No surveys are known to have been conducted to measure public opinion, and class members’ views cannot be gleaned from an academic study like mine in light of ethical and practical constraints. Unsurprisingly, corporate defendants are cynical about the social utility served by generous class counsel fees. The President of Maple Leaf Foods quoted earlier in this chapter referred to class action lawyers as committing “absolute fraud”,\(^ {84}\) and a 2003 magazine article refers to a senior vice-president and general

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\(^{82}\) *Lawrence v. Atlas Cold Storage Holding Corp.*, supra note 76 at para. 17 (summarizing *Gagne*).

\(^{83}\) M. Galanter, supra note 6 at 466.

\(^{84}\) Supra note 5 and accompanying text.
counsel of Manulife Financial who “believes that by far the majority of class actions are ill-founded, serving only as vehicles for esurient plaintiffs’ counsel.” 85 The same article’s opening sentences state that “many within the corporate and legal establishment view the conduct of plaintiffs’ class action counsel” as “arriviste”, a French term that describes someone who “puts self-advancement above scruple; successful financially, but not from the top rung of the established socio-economic order.” 86 And another article published in Maclean’s three years ago about lawyer Tony Merchant and his fees in the Residential Schools case ran with the simple headline, “White man’s windfall”. 87

Even if viewed as arriviste or a windfall, however, Marc Galanter also concludes that despite the “resentment of the lawyer’s cut, there is an acceptance of its necessity and appreciation of the benefits of the arrangement.” 88 In Canada, once again, we have little data upon which to come to the same conclusion. Assuming clients (all class members) accept the necessity and benefits of the contingency fee arrangement, there remains the larger policy question about whether those benefits come at too high a cost, or achieve their ultimate purpose. This is not to argue against contingency fees – no class action regime could function properly without them. They reflect a laudable policy choice favouring the facilitation of access to legal services for those who otherwise cannot afford them. 89 Rather, the question posed is whether the incentive structure is properly

85 Julius Melnitzer, “The Dog-Eat-Dog World of Class Actions” Lexpert (July/August 2003) 50 at 61.
86 Ibid. at 50.
87 Jonathan Gatehouse, “White man’s windfall” Maclean’s (4 September 2006) (online: http://www.macleans.ca/article.jsp?content=20060911_133025_133025). The byline reads: “The biggest winner in the residential schools settlement is not a native. He’s a lawyer named Tony Merchant, and his firm’s take could hit $100 million. No wonder he has so many critics.”
88 Ibid. at 467.
89 OLRC Report, supra note 3 at 686.
calibrated to ensure both reasonable compensation and appropriate incentives to represent persons who otherwise cannot enforce their rights?

Like beauty, “reasonable compensation” is in the eye of the beholder. There are class action lawyers who have voluntarily sought a reduced fee relative to what was contemplated by the fee agreement. Others have been satisfied to seek only fees at their usual hourly rate with no multiplier. In the survey distributed to class counsel, I did not ask whether a rule of thumb exists as to adequate compensation, be it as a multiple of docketed time or a fixed sum. It is likely that any ‘rule’ would vary depending on the duration of the file, the size of the firm, the number of hours expended, and the number of other pending actions in the firm’s inventory. Nevertheless, one lawyer interviewed did comment that a 2x multiplier was usually sufficient to make a class action ‘worthwhile’. 90 Relative to the modest cost recoveries in constitutional test cases, such a multiplier might even be considered generous. 91

If the question “what is adequate compensation” from the perspective of class counsel is unanswerable as a general matter because of its subjectivity, we are left with objective parameters – guidelines, benchmarks, comparators, such as those used by courts and described in part I above. But in matters related to counsel fees, lists of factors to be considered have long been criticized as “lacking the requisite clarity and precision because they fail to explain what weight should be given to the various factors.” 92

90 Interview with Respondent #9 (notes on file with author).
91 Interview with Douglas Elliott (8 April 2009) (notes on file with author).
92 OLRC Report, supra note 3 at 673, citing City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).
In my view, the list of factors first adopted by the court in 1996 in *Windisman* and referred to repeatedly since then is, for the most part, appropriate.\(^{93}\) The results achieved by counsel, the time expended, the legal complexity of the matters to be dealt with, and the degree of skill and competence demonstrated by class counsel are all important factors. The weight to be placed on each factor, however, deserves more careful attention than has been given to date. In light of the realities of the absent client phenomenon, the expectations of the client, one of the enumerated factors used in *Windisman* and other cases as justifying deference to the fee agreement, should be given little, if any weight. While some would argue that class counsel require the certainty of a contractual entitlement to a particular percentage or multiplier if we want to encourage class actions, it bears repeating that class counsel agree to act despite the risk of non-payment altogether, and with the expectation that their fee will ultimately have to be approved by the court. The only certainty that ought to be promoted is the certainty that a fair and reasonable fee will be determined by a judge, not by one or a handful of representative plaintiffs and class counsel.

The lack of objections by class members should also be given little, if any, weight. It is noteworthy that *Atlas* is the only appellate case to date in which an objector has argued against the counsel fee requested. One of the objectors, a retired lawyer, wrote the factum. Given the expense involved in retaining counsel to mount a sophisticated challenge to fees, and an unwillingness to award costs to successful objectors, considerable barriers exist for any class member who objects to the fee request.

\(^{93}\) *Windisman v. Toronto College Park Ltd.*, supra note 18 and accompanying text.
What is “fair and reasonable” compensation depends in part on the risks undertaken. Greater risks borne merit higher compensation levels. “Coattail” actions that benefit from pre-existing or concurrent regulatory investigations, enforcement proceedings or litigation elsewhere, are not generally as risky as those actions in which the wrong was exposed solely by the class action. The risks of failure or of paying adverse costs, factors weighing in favour of higher compensation, may be more apparent than real, if the results of the class counsel survey are any indication. While the risks of contingency fee work are real and the due diligence needed to research and vet potential class actions is expensive, a minority of the class counsel surveyed themselves paid adverse costs awards, and almost all of those who discontinued class actions received some payment for fees and disbursements in doing so. Further research on the ground would be useful in better understanding the general risks borne by class counsel, in addition to the specific risks of the particular litigation at issue.

Access to substantive justice would place the greatest weight on the results achieved by counsel. Clearly, this factor ought to be given primacy in an analysis of both the fairness of a proposed settlement and the reasonableness of a requested fee. A good settlement is, among other things, one that provides the fairest compensation to class members that can be realized in the circumstances of the case, bearing in mind that settlement involves some compromise. Yet a ‘good’ settlement involves considerations of more than the final monetary figures. Class actions that result in large monetary settlements because of the vast number of class members, but which do not effect changes in corporate conduct, or do not serve other public interests, do not necessarily merit larger fee awards. It is precisely for this reason that appellate courts in the U.S.
direct district court judges to apply a sliding scale approach when approving a percentage-based fee: "[t]he basis for this inverse relationship is the belief that 'in many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.'" An analysis of the “results achieved” must go beyond the number of dollars in the settlement fund, and consider other issues that are critical from a broader access to justice perspective.

On this point, access to justice scholars have been unanimous. Deborah Rhode writes:

> [T]he value of these cases cannot be measured solely in economic terms. Their function is also deterrence. ...An entrepreneurial bar has often been able to penalize those responsible for hazardous products, fraudulent, negligent, or discriminatory practices, and violations of legal rights in a wide range of [...] contexts. ...

Yet while the problem of excessive fees is frequently overstated, it clearly needs addressing. In too many cases, windfall recoveries for lawyers far exceed a reasonable return, or the incentive necessary to bring socially useful lawsuits.\(^\text{95}\)

While there may be as little agreement about what is a “socially useful” class action as there is about the definition of access to justice, Professor Rhode is not alone in her desire that fees be properly calibrated to ensure access to justice is delivered to those most in need of it because of the economic, social and psychological barriers that deny them the full benefit of the law.\(^\text{96}\) It is notable, therefore, that the common iteration of the factors used in fee approval hearings in the U.S. includes a criterion not expressly adopted here: “society’s stake in rewarding attorneys who

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\(^{94}\) *In re Cendant Corp. Prides Litigation*, supra note 37, quoting *In re Prudential*, 148 F.3d at 339.


\(^{96}\) See also J. Leubsdorf, “Co-Opting the Class Action” (1995) 80 Cornell L. Rev. 1222 (summarizing the criticisms expressed by proponents of class actions of the potential misuse of the device).
produce such benefits in order to maintain an incentive to others.”

With respect to this factor, courts ask if the case has provided “benefits to a class of people who are very much in need of help.” Critically, judges have stated that “society has a more significant stake in assuring that cases which are important but which are not, from a lawyer’s perspective, particularly desirable, are nevertheless undertaken.”

Do existing approaches to counsel fees encourage lawyers to become true private attorneys-general – to undertake “important” cases, to enforce laws that would otherwise not be enforced, or to deliver remedies to people who would be denied recourse? I would answer in the negative for two reasons.

First, current approaches favour large but easy settlements, requiring less investigation and fewer risks in terms of the difficulty of legal issues. Fees based on percentage of recovery, like the most recent fee approval decision by Cullity J., encourage litigators to find cases involving very large classes with relatively straightforward legal claims. This is both logical and expected. The results of the survey tentatively support this conclusion as well. As explored in chapter 3: Case Selection, a very significant proportion of cases are initiated not by a client or as the result of the

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98 Bowling v. Pfizer, supra note 65 at 1281-1282.

99 Ibid. at 1282, note 38.

100 Cassano, supra note 24. This is not to suggest that the action was without risk; the obstacles to certification were very significant, requiring an appeal of the initial decision denying certification. Two different sets of risks have been recognized in the case law: one involving the merits of the legal claim, and the other concerning the test for certification. Gagne v. Silcorp., supra note 19 at para. 18.

101 Bryant Garth, Ilene H. Nagel and S. Jay Plager, “The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation” (1988) 61 S. Cal. L. Rev. 353 at 376 [“A lawyer dependent on fees from a successful lawsuit naturally looks for the easy victories; creativity and innovation in the generation of the lawsuit are unlikely.”]
firm’s own research, but following a regulatory investigation or piggybacking on a U.S. class action. Legal liability may already have been proven (or at least a strong case on the merits will have been shown) by pre-existing regulatory reports or evidence gathered in the American proceedings. In fee decisions, however, there appears to be little attention paid to pre-existing reports, precedents in like cases, or regulatory findings, all of which bear on the degree of risk associated with the action and its contribution to enforcing the law. That said, there is no doubt class actions which serve as complements to governmental regulatory activity are valuable, particularly because they may fulfill a compensatory function that regulatory agencies do not possess. Nevertheless, having benefited from a government agency’s identification of a legal wrong, piggyback class actions do not require the same degree of innovation, or entail the same degree of risk in terms of establishing liability, as other cases involving novel claims or previously unexplored wrongs.

The second reason current approaches to fee approval do not promote access to justice in its fullest sense is that settlements involving large monetary awards are favoured over those with non-monetary value. The differences between these types of cases were explored in a 1988 empirical study of class actions in California; the authors described two very different approaches the selection and conduct of class actions, and identified two contrasting ideal types of class action litigators – the “social advocate” and the “legal mercenary”:

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102 Respondent #1 is an exception. This is one of the four firms with the largest portfolio of cases. It identified the majority of its class actions as resulting from either client initiation or the firm’s own concept. Conversely, respondents #12 and 15 attributed the majority of their respective class actions to regulatory investigations and piggybacking on U.S. cases. See Appendix B, qu.3.
Despite imperfection, these terms have the advantage of highlighting what determines the basic decisions of the attorney in a given case, whatever the attorney's ideological or practical motivations may be in general. [...] An ideal social advocate would be a lawyer funded to identify social causes and to litigate cases solely for their value in promoting a particular political end or the interests of a particular group. The ideal mercenary would be a lawyer who selects cases solely on the basis of whether the expected profit from an investment in that particular case would be greater than the profit earned from the same investment in another activity.\(^{103}\)

The approach to fee approval, as evidenced in the recent cases described in this chapter, generally does not favour the social advocates described in the California study.

The survey confirms that current fee models encourage the selection of cases with the largest number of class members and the greatest quantum of damages. After the legal viability of the action, for the majority of responding firms the two most important criteria in selecting cases to prosecute were the scope of potential damages and class size.\(^{104}\) The novelty of a legal claim or the public interest engaged were the least important reasons. From an economic perspective, this process of selection makes eminent sense. But the process does not lend itself to selecting cases that may be less lucrative, either because of class size or quantum of damages, but which are nevertheless immensely important in terms of the severity of the alleged misconduct, and the importance of the rights at issue.

It is in recognition of the economic disincentives to pursue civil rights-based class actions that fee-shifting legislation was introduced in the U.S., to ensure that class counsel were reasonably

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\(^{103}\) B. Garth, I. Nagel & S. Plager, supra note 101 at 374.

\(^{104}\) Appendix B, qu. 4.
compensated.\textsuperscript{105} Such legislation is not required in Ontario, which has a two-way costs rule, but the principle at issue is instructive. If cases involving human rights, Charter breaches (as was the case in \textit{Hislop}), environmental harms or employment do not command large damage awards, or are so legally complex that they require considerable time and resources, then fee awards can be recalibrated to encourage lawyers to pursue them. That these kinds of cases are the rarest of the actions reported by class counsel in the survey is, perhaps, no coincidence.\textsuperscript{106} There is an instinctive dissonance between the compensation levels, for example, in \textit{Hislop} and \textit{Cassano}. In the former, a constitutional class action that succeeded at trial in establishing same sex couples are entitled to equal benefits under CPP legislation, class counsel hope to recover $7 million in fees, representing less than a 2x multiplier and roughly 14\% of the gross value of the damages awarded (including arrears, future payments, interest and costs).\textsuperscript{107} In the latter, a settled consumer action resulting largely in a \textit{cy près} distribution, counsel will recover $11 million or 20\% of the gross recovery and 5.5 times their base fee. That the fee recovery in \textit{Hislop} was hampered by legislation that prevented counsel from taking a first charge on payment of arrears to class members only partially accounts for the discrepancy in fee levels. Where fee requests are made in class actions of this nature, some emphasis ought to be placed on the nature of the rights engaged and the novelty of the legal claims mounted to ensure financial incentives exist to pursue claims for vulnerable

\textsuperscript{105} The U.S. is, of course, a no costs regime. Fee-shifting provisions were introduced for a number of statutory causes of action, including those created by federal securities, antitrust, civil rights, copyright and patent acts, to encourage private enforcement of the statutory substantive rights, economic or otherwise, through the judicial process. See \textit{Third Circuit Task Force Report}, supra note 43 at 250-251.

\textsuperscript{106} Only 27 of the 32 reported cases were listed in the employment or environmental categories, and 31 were classified as “other” (which included historical abuse cases and privacy loss). No separate category for “human rights” was listed in the questionnaire. See appendix B, qu. 2.

\textsuperscript{107} Interview of Douglas Elliott (8 April 2009) (notes on file with author).
groups. Moreover, the same considerations ought to dictate a higher level of costs paid by unsuccessful defendants to the class.\footnote{In Hislop, for example, costs of $2.2 million were ordered at trial. This amount was approximately half of the plaintiffs’ fees and disbursements up to that point in time.}

**Conclusion**

If contingency fees are the engine that drives class actions, then fee approval hearings are critical acts of quality control. The process must be well engineered in the first instance—that is, the factors and benchmarks to be taken into account must be weighted properly. And the process must be executed by vigilant judges who, despite the time-consuming task before them, are aware that fee awards must not only properly incentivize lawyers to continue to undertake class actions, but that the incentives do not ever rise to the level over-compensation.

No statistics have been collected with respect to the fees garnered by counsel in class actions here, and no comparative empirical study has been conducted to measure the scope of fee awards in the U.S. and Canada, and the kinds of cases being pursued as a result. We are left with the checkered history of American class actions where fees have been the lightning rod for controversy and where both critics and proponents of class actions have argued for reform in order to curb excessive fee awards. In Ontario we have had some rumblings of discontent in the press, referred to in section II. In addition, judges have occasionally remarked about the need for proportionality between fees and the objective sought by the proceeding; we must “avoid allowing any practice in class actions that are likely to give the profession of advocate a profit-seeking or
commercial character.” On a practical level, excessive fees reduce the money available to benefit the class. On a political and social level, public perception that class actions are a commercial enterprise, and not a tool for advancing the social good, undermines confidence in our legal institutions and hinders access to justice.

Some may respond that the question of counsel remuneration in class actions should be no more a political or policy issue than lawyers’ compensation generally. Why should government have an interest in counsel fees in the class action context? At least in part, it is because the class action is a state-created mechanism that enables litigation that otherwise would not be brought. The state “in effect designates the agent, underwrites the cost of representation by removing the transactional barrier of having to contract with each client, and allows for a state-enforced taxation of the joint gains to compensate the agent.” Moreover, if counsel rely on the fruits of government investigation or regulatory action in initiating and pursuing a large number of their class proceedings, then some measure of government-mandated judicial oversight of fees may represent something of a quid pro quo. Finally, if access to justice is a justification for class actions, then all facets of access to justice – including a concern for fairness, legitimacy and substantive justice – are necessarily part of the equation.

Several potential reform efforts merit further consideration. First, objectors who succeed in reducing the fee request, to the benefit of the class members’ settlement fund, ought to be paid their costs. Second, clear judicial guidance is needed regarding the weight to be accorded the

various criteria used in assessing a fair and reasonable fee. I would suggest that little or no weight be given to the lack of objectors given the reasons of apathy discussed in *chapter 4*, nor to the fee agreement because of the unlikelihood that the representative plaintiff has any real bargaining power or expertise at the outset of the litigation to negotiate a retainer agreement. Third, even where the representative plaintiff is sophisticated, the agreement should not be accorded deference given that the agreement binds innumerable other class members who were not parties to the contract. Fourth, the fact that the action benefited from a pre-existing regulatory report or foreign litigation ought to be a consideration lowering the fee, as it reflects a lower risk on the merits of the case. Conversely, an action that pursues a novel cause of action or one of great social significance, should result in a greater level of compensation even if the settlement or trial does not result in a large monetary award. I recognize that the latter approach risks under-compensating class members; whether additional funding might be made available (from the Class Proceedings Committee, for example) to pay fees in these exceptional cases should be explored.

Ultimately, this critique of the fee regime is not an indictment of class counsel nor a call for the abolition of contingency fees. To the contrary, I recognize that a healthy class action regime depends in large part on a system of adequate compensation for the assumption of risks and prosecution of large, complex actions on behalf of those who would not otherwise have access to justice. By the same token, however, a healthy class action regime requires careful monitoring, and effective checks and balances, to ensure that this form of litigation secures both private and public good.
CONCLUSION

“Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied.”

So said the Supreme Court of Canada in Dutton, one of its 2001 trilogy of cases.\(^1\) The notion that class actions inevitably open the doors to justice, however, is unsupportable. Six years after Dutton, the Supreme Court of Canada itself recognized that class actions do not inexorably engage access to justice considerations.\(^2\) Class actions do increase the number and types of claims being litigated. The extent to which they are successful in providing a fair remedy for the injuries suffered by the class, or whether they incentivize private Attorneys General to prosecute on behalf of the most powerless, is not self-evident.

Although access to justice scholars viewed class actions as “an evolutionary response to the existence of injuries unremedied by the regulatory action of the government”,\(^3\) very few have sought to evaluate whether or to what extent class actions have, in fact, improved access to justice in Ontario. And while many attribute to class actions a decidedly social mission – to provide “ready, meaningful justice for the (relatively) disempowered in contemporary, massified societies”\(^4\) – judicial approaches to access to justice betray a very narrow

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interpretation of the term (access to a procedure), with insufficient attention paid to issues of substantive justice, transparency, and incentives for class counsel to pursue class proceedings for vulnerable groups. Lawyers and judges talk about it, the public lacks it, but **what is access to justice, and how do class actions provide it?** And can we discuss class actions and access to justice without factual information as to how these cases are actually being initiated, conducted and resolved?

This paper has attempted to start that informed conversation. First, I explored decades of access to justice literature in order to articulate a multi-faceted definition of the term that moved beyond the minimalist view of giving claimants access to a court procedure. Class actions advance access to justice not only if they overcome economic barriers to litigation, but if they also serve to expose previously unnamed harms that affect the most disempowered and vulnerable in society – those most in need of access to justice. The term also necessarily requires that the procedure to which access is given must be a fair one, from the perspective of class members. The limited rights of participation granted to class members must be real ones: meaningful and informed opportunities to object or opt out, as well as access to direct compensation or manageable claims processes. This ‘thicker’ understanding of access to justice is not in itself novel; it is the comprehensive approach to access to justice that has been developed over many years in the literature here and abroad. It is not the understanding of access to justice, however, which animates discussions of, and decisions in, class actions.

I focused on three pivotal aspects of class actions with this evaluative framework in mind. Case initiation, settlement and fees implicate access to justice in several direct ways.
These ‘moments’ in a class action determine, respectively, who has access, how substantive justice is measured, what are the costs of justice for class members. Armed with facts gathered by way of class counsel interviews and responses to a questionnaire, representing information about the class action practices of approximately 77 lawyers in 13 firms, I engaged in a critical analysis of the jurisprudence that was rooted in the reality of class action practice.⁵

**Case Initiation**

The survey results shed light on a number of critical issues relevant to the question of which actions are brought as class actions. Perhaps most significant is that the paradigm of class counsel as private Attorney General does not withstand empirical testing. The private Attorney General ideal envisions class counsel filling a regulatory enforcement gap by exposing a wrongdoer and remedying the mass wrong. Yet a very significant proportion of the cases reported by class counsel were initiated not by a client or as the result of the firm’s own research, but following government investigations, regulatory proceedings, or other identifiers of unlawful conduct. Three firms with large class action portfolios cited regulatory investigations as their predominant source of cases. Only two firms reported that over half of their cases were initiated as a result of internal research and investigation. The survey results also revealed that case selection criteria chosen by class counsel favour ‘easy’ but large cases, those involving very large classes and damages. Few counsel included the novelty of the action or the public interest as a criteria in case selection.

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⁵ Despite the limitations of self-reported data and the small sample size, the survey results provide a factual context that is not available when focused on case-by-case doctrinal analysis.
Class actions that “feed off the fruits of [a] governmental agency’s efforts”, though potentially serving a compensatory function (as was the case in the Atlas case study), do not “perform the classic function of privately generated exposure of unlawful behaviour traditionally facilitated by the private attorney-general concept.”

Similarly, selection criteria that do not place significant weight on the public interest engaged in the action (as opposed, or in addition to, the quantum of damages involved, for example), belie the image of class counsel as social advocate.

The survey also confirmed what has long been characterized as the entrepreneurial nature of class proceedings: less than 25% of the 332 class actions reported by respondent lawyers were classified as client-initiated. In class actions more than any other kind of litigation, lawyers actively participate in the generation of legal claims – by investigating potential actions, determining which cases to prosecute (as opposed to simply accepting instructions from a client to do so), recruiting plaintiffs, and possessing a much larger financial stake in the ultimate outcome than any representative plaintiff or class member. Judges often refer to entrepreneurial litigation, but it is far from clear that they have reconciled the entrepreneurial paradigm with the rules and customs of non-representative, non-contingency fee-based litigation. In a number of recent cases, judges stress the presence of the “genuine plaintiff”, on whom the prosecution of the action rests squarely.

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plaintiff recruitment, however, as well as the asymmetrical stakes in the litigation between
counsel and client, it is very likely that plaintiffs will take a passive role in the litigation. This has
implications for the role judges play in reviewing proposed settlements and fees.

Settlement

While judges generally recognize the importance of their role in guarding the interests
of class members when reviewing a proposed settlement, the standard criteria include a
presumption of fairness that is inconsistent with the realities of this litigation, including the lack
of monitoring by both representative plaintiffs and the absent class members, and the
adversarial void created by defence and class counsel who are united in their quest to have the
settlement approved. A sampling of cases revealed that objectors do not have an influential
place at fairness hearings, due to a lack of resources, the absence of legal representation and a
judicial culture that favours settlement and is content to tell unhappy class members that they
can simply opt out – not a real option in light of the barriers that made the class proceeding
necessary in the first place. Serious consideration should be given to initiatives that would
make more sophisticated and well-resourced objectors possible, either by way of a funding
mechanism or a court-appointed neutral expert, to ensure that the interests of objecting class
members are fully advanced.

The empirical research also revealed that claim rates themselves vary greatly, and that
class counsel themselves do not consistently track how many class members take-up a
settlement. I recommended that judges make reporting of claim rates mandatory, to
incentivize both defence and class counsel to create robust notice programs, and to provide the public and other judges with benchmarks for assessing the adequacy and structure of future settlements.

I also considered the growing trend to distribute settlement funds *cy près*. Given the absence of any direct benefits to class members, judges ought to be particularly wary of these kinds of settlements, and the claim that class members are indirectly benefited or that behaviour modification has been achieved. *Cy près* awards should only be permitted where direct compensation is not possible (because class members cannot be identified) or economically feasible; in both scenarios, counsel should be put to the evidentiary test by the reviewing judge. Once the threshold of necessity has been passed, the *cy près* beneficiaries ought to have a meaningful connection to either the community of class members or the substance of the lawsuit. Failing such a connection, the court is giving its imprimatur to “schemes that simply privilege some charities, universities, or other organizations over others, or which are the particular idiosyncratic favourites of lawyers.”

A review of recent settlement approvals involving *cy près* distributions reveals the need for a principled approach to this form of settlement that, on its face, under-compensates the class.

**Fees**

Under-compensation of class members, clearly an issue of concern from an access to justice perspective, also occurs wherever class counsel are over-compensated. While fee

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awards must properly incentivize lawyers to undertake class actions on a contingency fee basis, whether current judicial approaches to fee approval properly navigate the boundary between rewards for taking on risk and windfall returns, requires careful consideration. Access to justice is concerned with public confidence in civil justice; a perception that class actions are a commercial enterprise benefiting only lawyers must be combated.

I offered several potential reform ideas. For example, objectors who succeed in reducing the fee request, to the benefit of the class members’ settlement fund, ought to be paid their costs. Furthermore, clear judicial guidance is needed regarding the weight to be accorded the various criteria used in assessing a fair and reasonable fee. I argued that little if any weight should be given to the lack of objectors or to the fee agreement. And finally, higher fees should be granted in actions involving novel causes of action or those of social significance, in order to ensure incentives exist for cases that would provide meaningful justice to the disempowered.

A Common Thread – The Need for More Research

Throughout the paper, I have identified various areas where more information is needed. In Canada, we suffer from a lack of systematic data on any number of aspects of class action litigation. Fifteen years after class action legislation came into force in Ontario, it is startling that neither the government, nor the Law Foundation, the Law Commission of Ontario, or any of the bar organizations have attempted to evaluate the impact of class proceedings on our justice system and its success in advancing access to justice. Yet, it is not possible to
measure the impact of class actions without empirical data. The time for serious socio-legal research in the class action context is long overdue.

What follows is an outline of a research agenda that has two main sources: first, are the questions that arise from the answers provided to the survey sent to class counsel. Not unexpectedly, answers to my questions simply gave rise to more questions. Second, legal scholars in the U.S. have frequently commented that empirical data, even in their jurisdiction, is lacking, and have periodically offered suggestions as to the kind information that is needed to help guide rulemakers and policy discussions. It is hoped that policymakers here would similarly benefit from a greater empirical knowledge base.

**Current Caseload**

- How many class actions have been commenced
- How many certified on consent/contested
- What types of claims (by category)
- How many cases discontinued before/after certification motion
- What occurs to cases that are not certified

**Resolution of Class Actions**

- How many actions settle

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• How many go to trial
• Which party succeeds at trial
• How many actions end after rule 20/21 motions
• Average and range of monetary damages awarded at trial/pursuant to settlement
• Nature of any non-monetary relief awarded/agreed to
• Length of time from case commencement to resolution
• Take-up rates
• How many settlements involve reversion of unclaimed monies
• How settlements structured: claims process vs. direct payment
• Comparison of settlements involving same subject-matter, as between class actions, and between class actions and individual settlements

**Participation of Class Members**

• Rate of objections
• Rate of opt-outs
• Impact of objection on outcome of fairness hearing
• Ratio of represented vs. unrepresented objectors and relationship to success of objection

**Costs and Fees**

• Average total costs of litigation, including counsel fees (both plaintiff and defendant), disbursements, and court time
• Prevalence and kind of indemnity agreements (class counsel, third party, Class Proceedings Fund)
• Fees as percentage of gross settlement
• Fees calculated on lodestar method
• Number and amount of adverse costs awards against representative plaintiff
• Who paid adverse costs awards

Pending more systematic information about how Ontario’s class action regime actually functions, I can make the following concluding observation. Class actions have the distinct potential to promote social good by filling regulatory gaps and ensuring corporate (and government) wrongdoers do not inevitably escape culpability. I share the belief expressed by many access to justice scholars that class actions are singularly able to redress wrongs that would otherwise go unremedied, and to provide meaningful justice for the disempowered in contemporary, massified societies. It is precisely because of this promise that we must be constantly vigilant about how the device is used. Complacency is ill-advised, particularly where we are only now, ever so slowly, beginning to ask what is happening ‘on the ground’, and to collect the information necessary to provide answers.
Appendix “A”

SURVEY RE: CLASS ACTIONS

Questions

Except where specifically stated otherwise, all of the following questions refer to your class action practice in the 2004-2008 calendar years.

Current Case Load

1. How many proposed or certified class proceedings in which you are involved are currently pending? [Please check appropriate box]

Between 1-9 □ 10-19 □ 20-29 □ 30-39 □ Over 40 □

2. Please identify the number of current cases in each of the following categories:

<table>
<thead>
<tr>
<th>Category</th>
<th># cases</th>
<th>Category</th>
<th># cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Securities</td>
<td></td>
<td>Product Liability (non-food)</td>
<td></td>
</tr>
<tr>
<td>Pharmaceuticals/Medical Devices</td>
<td></td>
<td>Tainted Food</td>
<td></td>
</tr>
<tr>
<td>Employment and Pensions</td>
<td></td>
<td>Environmental</td>
<td></td>
</tr>
<tr>
<td>Consumer (criminal interest, fees, currency)</td>
<td></td>
<td>Price-fixing and other Competition Law claims</td>
<td></td>
</tr>
<tr>
<td>Mass Tort (personal injury)</td>
<td></td>
<td>Other ______________________</td>
<td></td>
</tr>
<tr>
<td>Pension</td>
<td></td>
<td>Other ______________________</td>
<td></td>
</tr>
</tbody>
</table>
3. How were the current cases initiated? Where more than one reason applies to a particular case, please choose the predominant reason.

<table>
<thead>
<tr>
<th>Reason</th>
<th># cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client initiated</td>
<td></td>
</tr>
<tr>
<td>Other law firm invited your law firm to participate</td>
<td></td>
</tr>
<tr>
<td>Concept for claim originated within your law firm</td>
<td></td>
</tr>
<tr>
<td>Lawyer or other professional contacted your law firm with concept for claim</td>
<td></td>
</tr>
<tr>
<td>Claim initiated after similar claim commenced in the U.S. or other foreign jurisdiction</td>
<td></td>
</tr>
<tr>
<td>Claim initiated following announcement of regulatory investigation (eg. Competition Bureau, provincial Securities Commission)</td>
<td></td>
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</tbody>
</table>

Case Selection

4. Of all prospective claims that you considered in 2008, approximately what percentage was rejected? A “prospective claim” is here defined as a potential claim to which your firm devoted at least eight hours of research or investigation, or for which a file was opened.

Between 0-20%  □  21-40% □  41-60% □  61-80% □  81-95% □

5. Which of the following criteria are considered in selecting cases? [Rate in order of importance, with “1” being most important criterion.]

<table>
<thead>
<tr>
<th>Size of class</th>
<th>Quantum of damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existence of proceeding against same defendant(s) in U.S. or other foreign jurisdiction</td>
<td>Existence of regulatory investigation or report</td>
</tr>
<tr>
<td>Novelty of claim</td>
<td>Public interest</td>
</tr>
<tr>
<td>Other:</td>
<td></td>
</tr>
</tbody>
</table>
6. What were the main reasons for rejecting prospective claims? [Select all that are applicable. Rate in order of prevalence, with “1” being most prevalent reason.]

<table>
<thead>
<tr>
<th>Reason</th>
<th>Prevalence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class too small</td>
<td>1</td>
</tr>
<tr>
<td>Quantum of damages</td>
<td></td>
</tr>
<tr>
<td>Prospects for success on legal issues at trial too low</td>
<td>2</td>
</tr>
<tr>
<td>No representative plaintiff</td>
<td></td>
</tr>
<tr>
<td>Prospects for success on certification motion too low</td>
<td>3</td>
</tr>
<tr>
<td>Another firm already commenced action</td>
<td></td>
</tr>
<tr>
<td>Cost of investigation and/or expert evidence</td>
<td>4</td>
</tr>
<tr>
<td>Other: _____________________</td>
<td></td>
</tr>
<tr>
<td>_____________________</td>
<td></td>
</tr>
</tbody>
</table>

Class Proceedings Fund

7. Between January 1, 2004 and December 31, 2008, how many applications did you submit to Ontario’s Class Proceedings Fund (CPF)? __________

8. How many of your applications were accepted by the CPF? ________ How many were rejected? ________ How many are pending? ________

9. In any previous year, has the rejection of an application to the CPF resulted in the class action in question being withdrawn? Yes □ No □

If you answered “yes”, please indicate how many cases have been withdrawn for this reason? _______

10. What is your main reason for seeking funding from the CPF? [Select one]

<table>
<thead>
<tr>
<th>Reason</th>
<th>□</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indemnity against costs</td>
<td></td>
</tr>
<tr>
<td>Partial funding of disbursements</td>
<td></td>
</tr>
<tr>
<td>Other (please specify)</td>
<td></td>
</tr>
</tbody>
</table>
Discontinuance of Class Proceedings

11. How many class proceedings have you discontinued, either prior to or after certification, in the past five (5) years? ___________ [Note: discontinuance here means the conversion of a certified action into individual actions, or the termination of an action altogether without a settlement being paid to the class.]

12. What were the reasons for discontinuing the action(s)? [Select all that are applicable. Rate in order of prevalence, with “1” being most prevalent reason.]

<table>
<thead>
<tr>
<th>Reason for Discontinuance</th>
<th>Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Representative plaintiff(s) settled own claim</td>
<td>1</td>
</tr>
<tr>
<td>Action became too costly to litigate</td>
<td>2</td>
</tr>
<tr>
<td>Plaintiffs’ counsel determined case should not proceed for other reason(s) [please specify]</td>
<td>3</td>
</tr>
<tr>
<td>Legal basis for claim adversely affected by new jurisprudence</td>
<td>4</td>
</tr>
</tbody>
</table>

13. Was money paid to the representative plaintiff in any of the discontinued actions?

Yes □ No □

14. Were fees paid to plaintiffs’ counsel in any of the discontinued actions?

Yes □ No □

15. Were disbursements paid to plaintiffs’ counsel in any of the discontinued actions?

Yes □ No □

Adverse Costs Awards

16. In the last five (5) years, were any adverse costs awards made against a representative plaintiff in one of your proposed or certified class actions?

Yes □ No □

If you answered “yes”, please indicate how many such awards were made: ___________
17. How were the adverse costs awards satisfied? *Please indicate the number of costs orders satisfied by each method.*

<table>
<thead>
<tr>
<th>Who Paid</th>
<th># of costs orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>CPF or <em>Fonds</em></td>
<td></td>
</tr>
<tr>
<td>Class counsel (as a result of indemnity given to representative plaintiff)</td>
<td></td>
</tr>
<tr>
<td>Representative Plaintiff</td>
<td></td>
</tr>
<tr>
<td>Third Party</td>
<td></td>
</tr>
</tbody>
</table>

*Settlements*

18. Absent court order, does your firm disclose the take-up rates in executed settlements to the judge?

Yes ☐ No ☐ Sometimes ☐

19. In 2008, what were the take-up rates for settled cases in which you were involved? *Please give rates for each action separately.*

Settlement #1: __________ %  
Settlement #2: __________ %  
Settlement #3: __________ %  
Settlement #4: __________ %

JK, Feb. 2009
<table>
<thead>
<tr>
<th>Item</th>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
<th>G</th>
<th>H</th>
<th>I</th>
<th>J</th>
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<td>X</td>
<td>X</td>
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<td>X</td>
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<tr>
<td>6</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

**Note:** The table contains placeholder text and images. The actual content is not readable due to the quality of the image.
NOTICE OF PROPOSED SETTLEMENT OF THE ATLAS CLASS ACTION

Read this notice carefully as it may affect your rights.

PURPOSE OF THIS NOTICE

This notice is to all persons, other than certain persons associated with the defendants, who purchased or acquired Atlas Cold Storage Income Trust Units during the period March 3, 2002 and August 29, 2003 ("Trust Units") under the terms of a prospectus offering, on the Toronto Stock Exchange ("TSX"); or in any other fashion and held some or all of those Trust Units at the close of trading on the TSX on August 29, 2003 ("Class Members").

In 2004, the plaintiffs commenced a class action against Atlas Cold Storage Holdings Inc. ("Atlas") and others in the Ontario Superior Court of Justice, court file no. 04-CV-263288CP (Toronto). The plaintiffs allege that Atlas and others misrepresented the earnings of Atlas causing damage to the Class Members.

The parties in the class action have reached a proposed settlement, subject to obtaining necessary court approval. Some of the defendants have agreed to pay the sum of $40,000,000.00 in full and final settlement of all claims, excluding class counsel fees, disbursements, taxes and management costs in return for releases and a dismissal of the class action. The defendants do not admit any wrongdoing or liability on their part.

The settlement is a compromise of disputed claims.

TERMS OF THE PROPOSED SETTLEMENT

If the settlement is approved by the court, the settlement monies, net of administration costs, legal fees and the Class Proceedings Fund levy will be distributed in accordance with a court-approved and superseded distribution plan which, in general terms, proposes that:

(a) each Class Member must submit a Claim Form and trading information to an Administrator to be appointed by the court on or before a Claims Bar Deadline to be set by the court to be entitled to share in the distribution of the settlement monies;

(b) the Administrator will determine a Class Member’s eligibility and the amount of each eligible Class Member’s net trading loss and, depending upon the number and value of all valid claims for compensation, the amount of prejudgment interest owing to each eligible Class Member;

(c) each eligible Class Member will receive a share of the settlement monies based on his/her/its net trading loss and the number and value of all valid claims for compensation once the court approves distribution.

If any settlement monies remain after payment of Class Counsel fees, disbursements and taxes and the Class Proceedings Fund levy, administration costs and the distribution to the Class Members, the court may order any remaining funds be distributed by photo to organizations for the benefit of the Class Members.

Further information on the proposed settlement may be found at www.atlassaction.com.

Class Members who seek the advice or guidance of their personal lawyers do so at their own expense.

CLASS PROCEEDINGS FUND LEVY, ADMINISTRATION COSTS AND CLASS COUNSEL FEES

The plaintiffs have received financial support from the Class Proceedings Fund. As a result, if the settlement is approved, the Class is required by statute to pay to the Class Proceedings Fund a 10% levy on the amount of the settlement funds to which the Class is entitled after deduction of all costs of the administration and the fees, disbursements and taxes of class counsel. The amount of the Class Proceedings Fund levy, class counsel fees and administration costs will be fixed by the court and paid from the settlement monies.

THE COURT HEARING

The court will be asked to certify the class action as a class proceeding, appoint the representative plaintiffs and approve the proposed settlement as recommended by the plaintiffs and class counsel.

The court hearing will be held on July 9, 2008 at 10:00 a.m. E.T., at the Court House at 261 University Avenue, Toronto.

Class Members who do not oppose the proposed settlement do not need to appear at the hearing or take any other action at this time to indicate their intention to participate in the proposed settlement.

If the court approves the proposed settlement, all Class Members will be bound by the terms of the settlement, unless they opt out. If the proposed settlement is approved, there will be a further court-approved notice program instructing Class Members how to make a claim to receive settlement compensation or how to opt out of the class action if they do not wish to share in the settlement.

OBJECTIONS TO THE PROPOSED SETTLEMENT

At the court hearing, the court will consider Class Members’ objections to the proposed settlement. Class Members may, but are not required to, attend at the court hearing.

Written objections may be sent to:

By mail to: Administrator, Atlas Class Action
Debrette & Touche LLP
Suite 1400
161 Bay Street
Toronto, ON M5J 2V1

By fax: 416.203.4471

By email: kbaetrit@debrette.ca

A written objection should include the following information:

(a) the objector’s name, address, telephone number, fax number and e-mail address;

(b) a brief statement of the nature of and reason for the objection;

(c) documentary evidence that the objector purchased Trust Units during the period March 3, 2002 and August 29, 2003 and certifying that they held some or all of those Trust Units at the close of trading on the TSX on August 29, 2003; and

(d) whether the objector intends to appear at the hearing in person or by counsel, and, if by counsel, the name, address, telephone number, fax number and e-mail address of counsel.

QUESTIONS ABOUT THIS NOTICE, THE PROPOSED SETTLEMENT OR THE CLASS ACTION

Questions for class counsel should be directed by telephone or in writing to one of the following class counsel:

Joseph Grisso
Grisio & Company Professional Corporation
The Sterling Tower
372 Bay Street, Suite 1000
Toronto, ON M5J 2W9
Tel: 416.203.4471
Fax: 416.203.4471
E-mail: jgrisso@grisio.com

Kirk Baetrit
Koskies Minsky LLP
20 Queen Street West
Suite 900, Box 32
Toronto, ON M5H 3R9
Tel: 416.773.4304
Fax: 416.971.3316
E-mail: kbbaetrit@koskies.ca

Harvey T. Strasberg, Q.C.
Strasberg LLP
600-251 Goyeau Street
Windsor ON N9A 6V4
Tel: 868.460.0824
Fax: 868.318.5308
E-mail: asclassaction@strasbergco.com

This notice has been approved by Justice Joan Lax of the Superior Court of Justice for Ontario.

Questions about this notice should NOT be directed to the court.
NOTICE OF THE APPROVAL OF THE SETTLEMENT IN THE ATLAS COLD STORAGE INCOME TRUST CLASS ACTION AND THE HEARING TO FIX THE AMOUNT OF CLASS COUNSEL FEES

Read this notice carefully as it may affect your rights.

PURPOSE OF THIS NOTICE

This notice is to all persons, other than certain persons associated with the defendants, who purchased or acquired Atlas Cold Storage Income Trust Units in the period March 1, 2002 to August 29, 2003 (the "Trust Units") under the terms of a prospectus offering, or on the Toronto Stock Exchange ("TSX"), or in any other fashion and held some or all of those Trust Units at the close of trading on the TSX on August 29, 2003 ("Class Members").

In 2004, the plaintiffs commenced a class action against Atlas Cold Storage Holdings Inc. ("Atlas") and others in the Ontario Superior Court of Justice. The plaintiffs allege that Atlas and others misrepresented the earnings of Atlas causing damages to the Class Members.

On July 9, 2008, Justice Lax certified the action as a class proceeding and approved a settlement of $40 million. The defendants do not admit any wrongdoing or liability. The settlement is a compromise of disputed claims.

TERMS OF THE SETTLEMENT AND METHOD OF DISTRIBUTION

Some of the defendants will pay $40 million in full and final settlement of all claims.

Before any distribution to the Class, the expenses related to the class action must be paid, including the costs of administration, a 10% levy payable to the Class Proceedings Fund and Class Counsel’s Fees.

After payment of these expenses, the net settlement monies will be distributed in accordance with the court-approved and supervised Distribution Plan which, in general terms, provides that:

(a) each Class Member must submit a Claim Form and trading information to the Administrator on or before 5:00 pm Toronto time on March 2, 2009 to be entitled to share in the distribution of the settlement monies;

(b) the Administrator will determine each Class Member’s eligibility and calculate the amount of each Class Member’s net loss based on the number of units held by each Class Member calculated net of losses to the total net losses of all eligible Class Members multiplied by the amount of the net settlement fund, and

c) in addition, depending upon the amount of all valid claims, each eligible Class Member may receive interest at a maximum of 17%.

If any settlement monies remain after the payment of administration costs, the 10% payable to the Class Proceedings Fund, Class Counsel Fees and the proposed distribution to the Class Members, the Court may order the remaining funds to be distributed to or for the benefit of the Class Members. No part of the $40 million will be repaid to the defendants.

Complete information on the settlement including the Settlement Agreement, the draft Judgment and the Distribution Plan may be found at www.atlasclassaction.com.

THE ADMINISTRATOR

The Court appointed Deloitte & Touche LLP as Administrator. The Administrator’s contact information is as follows:

Administrator, Atlas Class Action
Deloitte & Touche LLP
Suite 1400 - 181 Bay Street
Toronto, ON M5J 2V1
www.atlasclassaction.com
fax: 866 868 1384
tel: 866 569 6615

TO MAKE A CLAIM FOR COMPENSATION

To receive compensation, each Class Member must submit a completed Claim Form and supporting documents, on or before 5:00 pm Toronto time on March 2, 2009. The Claim Form is available at www.atlasclassaction.com or by calling 866 569 6615.

The Claim Form should be submitted by using the secure Online Claims System at www.atlasclassaction.com. You should submit a paper Claim Form only if you do not have a computer with a connection to the internet.

The paper Claim Form may be sent by fax, mail or courier to the Administrator at the address set out above.

If you fail to submit a Claim Form and the supporting documents, on or before 5:00 pm Toronto time on March 2, 2009, you will not receive any part of the net settlement monies unless the Court extends the deadline.

TO OPT OUT OF THE CLASS ACTION

All Class Members will be bound by the terms of the settlement, unless they opt out. Any Class Member who does not wish to participate in the settlement must opt out of the class action by sending a completed Opt-Out Form on or before September 30, 2008 at 5:00 pm Toronto time by fax, mail or courier to the Administrator at the address set out above.

The Opt-Out Form is available at www.atlasclassaction.com or by calling 866 569 6615.

THE HEARING TO FIX CLASS COUNSEL FEES

Class Counsel are requesting fees of $12 million plus GST of $600,000 plus out-of-pocket expenses paid on behalf of the Class in the amount of approximately $450,000. The Court will hold a hearing to fix the amount of Class Counsel Fees on Tuesday, August 12, 2008 at 10:00 a.m. at the Court House, 361 University Avenue, Toronto, Ontario.

At that hearing, the Court will consider any objections to the amounts claimed by Class Counsel only if the objection is in writing and is sent to and received by the Administrator at the address set out above on or before Monday, August 11, 2008 at 4:30 p.m.

A written objection should include the objector’s name, address, telephone number and fax number, a brief statement of the nature of and the reason for the objection, and documents evidencing that the objector is a Class Member and purchased Atlas Trust Units during the period March 1, 2002 to August 29, 2003 and held some of these units on the close of trading on the TSX on August 29, 2003. An objecting Class Member may attend the hearing in person. If the objector intends to have a lawyer appear at the hearing on the objector’s behalf, the Class Member must also provide to the Administrator the name, telephone number and email address of the lawyer.

Some of the relevant material filed with the Court in support of the claim for Class Counsel Fees may be reviewed at www.strosbergco.com/atlas.

INQUIRIES

If you need help, or are having difficulty with the Online Claims Process, or if you do not have access to a computer, or if you prefer not to register Online, you may telephone:

THE CLAIMS ADMINISTRATION HELP LINE AT 866.669.6615
Class Members who seek the advice or guidance of their personal lawyers do so at their own expense.

This notice has been approved by Justice Joan Lax of the Superior Court of Justice for Ontario. Questions about this notice should NOT be directed to the court.

This Notice is a summary of the Judgment. If there is a conflict between the provisions of this Notice and the terms of the Judgment, the Judgment will prevail.
LEGAL NOTICE

If you bought XYZ Corp. stock in 1999, you could get a payment from a class action settlement.

Para una notificación en Español, llamar o visitar nuestro website.

A settlement has been proposed in a class action lawsuit about the price of XYZ Corporation stock. The settlement will provide $6.99 million to pay claims from XYZ investors who bought the company's stock during 1999. If you qualify, you may send in a claim form to get benefits, or you can exclude yourself from the settlement, or object to it.

The United States District Court for the District of State authorized this notice. Before any money is paid, the Court will have a hearing to decide whether to approve the settlement.

Who's Included?

You are a Class Member and could get benefits if you bought shares of XYZ stock during 1999. You are a Class Member only if you bought shares of XYZ stock individually, not simply through a mutual fund. If you sold XYZ stock during 1999, you are a Class Member only if those shares you sold were purchased in 1999. XYZ officers and directors, as well as immediate family members of directors of XYZ during 1999, are not Class Members.

Contact your broker to see if you had shares of XYZ stock. If you're not sure you are included, you can get more information, including a detailed notice, at www.XYZsettlement.com or by calling toll free 1-800-000-0000.

What's this about?

The lawsuit claimed that XYZ and its Chief Executive Officer, Anne Adams, misled investors by intentionally overstating the profits that the company expected to earn in the future. The lawsuit also claimed XYZ issued false and misleading information about income and earnings per share for 1999, and that XYZ executives sold their personal shares at inflated prices during that time. XYZ and Ms. Adams deny they did anything wrong. The Court did not decide which side was right. But both sides agreed to the settlement to resolve the case and get benefits to investors. The two sides disagree on how much money could have been won if the investors had won at trial.

What does the settlement provide?

XYZ agreed to create a fund of $6.99 million to be divided among all Class Members who send in valid claim forms. A Settlement Agreement, available at the website below, describes all of the details about the proposed settlement.

Your share of the fund will depend on the number of valid claim forms that Class Members send in, how many shares of XYZ stock you bought, and when you bought and sold them. Generally, if you bought more shares and have more Net Recognized Losses (as explained in the detailed notice), you will get more money. If you bought fewer shares and have fewer Net Recognized Losses, you will get less. All of the $6.99 million will be paid out.

If every eligible Class Member sends in a valid claim form, the average payment will be 17½ cents for each share of stock bought in 1999. The number of claimants who send in claims varies widely from case to case. If less than 100% of the Class sends in a claim form, you could get more money.

How do you ask for a payment?

A detailed notice and claim form package contains everything you need. Just call or visit the website below to get one. To qualify for a payment, you must send in a claim form. Claim forms are due by Month 00, 0000.

What are your other options?

If you don't want to be legally bound by the settlement, you must exclude yourself by Month 00, 0000, or you won't be able to sue, or continue to sue, XYZ about the legal claims in this case. If you exclude yourself, you can't get money from this settlement. If you stay in the settlement, you may object to it by Month 00, 0000. The detailed notice explains how to exclude yourself or object.

The Court will hold a hearing in this case (North v. XYZ Corp., Case No. CV-00-5678) on Month 00, 0000, to consider whether to approve the settlement and a request by the lawyers representing all Class Members (Lawfirm LLP, of City, ST) for $3,010,000 (7½ cents per share) in attorneys' fees and costs, for investigating the facts, litigating the case, and negotiating the settlement. The fees and costs won't reduce the settlement fund. You may ask to appear at the hearing, but you don't have to. For more information, call toll free 1-800-000-0000, visit the website www.XYZsettlement.com, or write to XYZ Settlement, P.O. Box 000, City, ST 0000-0000.
CLASS ACTIONS IN ONTARIO AND QUÉBEC HAVE BEEN SETTLED FOR $2.1 MILLION

In 2008, class actions commenced in Ontario and Quebec against TVI and certain of its current and former officers and directors (the “Defendants”). The Plaintiffs in the actions allege that the Defendants contravened their duty of care to TVI’s shareholders by issuing materially false and/or inaccurate audited consolidated financial statements for the years ended December 31, 2005 and 2006, and interim unaudited consolidated financial statements for the quarter ended March 31, 2007. The Plaintiffs also allege that TVI’s Stock Option Plan (the “Plan”) allowed for the granting of in-the-money options in contravention of the Plan’s stated purpose, the FSX Company Manual prohibition and Ontario and Quebec securities legislation.

The parties in the class actions have reached a proposed settlement subject to obtaining the approval of the courts in Ontario and Quebec. The Settlement Agreement provides that the Defendants will pay $2.1 million (the “Settlement Amount”) in full and final settlement of all claims, including counsel fees, disbursements, taxes and administration expenses in return for releases and a dismissal of the class actions. Additionally, TVI has agreed to make efforts to re-price certain outstanding stock options and to adopt corporate governance measures targeted at eliminating the potential for future stock option manipulation.

The settlement is a compromise of disputed claims and is not an admission of liability, wrongdoing or fault on the part of any of the Defendants, all of whom have denied, and continue to deny, the allegations against them.

SETTLEMENT APPROVAL MOTIONS WILL BE HELD IN ONTARIO AND QUÉBEC

The Settlement Agreement must be approved by the courts in Ontario and Quebec before it can be implemented. Class Members may, but are not required to, attend at the settlement approval motions which will be held:
1. In Ontario: on June 17, 2009 at 10:00 a.m., at the Courthouse, 361 University Ave., Toronto, Ontario; and
2. In Quebec: on June 22, 2009 at 10:00 a.m. at the Quebec City Court House, 300 boul. Jean-Lesage, Quebec City, Quebec.

If the Settlement Agreement is approved, another notice to Class Members will be published which will provide instructions on how to make a claim to receive compensation from the settlement amount and how to opt out of the class if the Class Member does not wish to share in, or be bound by, the settlement. Class Members who do not oppose the proposed settlement do not need to appear at any of the hearings or take any other action at this time to indicate their desire to participate in the proposed settlement.

CLASS COUNSEL, FEES AND ADMINISTRATIVE EXPENSES

In addition to seeking the courts’ approval of the Settlement Agreement, Class Counsel (as identified below) will seek the courts’ approval of their legal fees not to exceed 25% of the Settlement Amount, plus disbursements and applicable taxes (“Class Counsel Fees”). Class Counsel will also seek appointment of an Administrator for the Settlement Agreement whose fees, together with any other amounts incurred or payable relating to approval, notification, implementation and administration of the Settlement (“Administrator Expenses”), will also be paid from the Settlement Amount. Class Counsel Fees and Administration Expenses will be deducted from the Settlement Amount before it is distributed to Class Members.

HOW WILL CLASS MEMBERS BE COMPENSATED?

The remaining of the Settlement Amount, after deduction of Class Counsel Fees and Administration Expenses (the “Net Settlement Amount”) will be distributed to Class Members in accordance with the Distribution Protocol, which is Schedule “B” to the Settlement Agreement.

The amount of each Class Member’s actual compensation from the Net Settlement Amount will depend upon: (i) the number and the price of TVI securities purchased by the Class Member during the Class Period; (ii) when the Class Member sold the TVI securities purchased during the Class Period and the price at which such securities were sold; (iii) whether the Class Member continues to hold some or all of the TVI securities purchased during the Class Period; and (iv) the total number of claims for compensation filed with the Administrator.

A copy of the Settlement Agreement including the Distribution Protocol, may be found at www.classaction.ca.

EFFECT OF SETTLEMENT APPROVAL ON OTHER ACTIONS COMMENCED BY CLASS MEMBERS

If the courts approve the proposed settlement, all Class Members will be bound by the terms of the Settlement Agreement, unless they “opt out”. This means that they will not be able to bring or maintain any other claim or legal proceeding against the Defendants or any other person released by the Settlement Agreement in relation to the matters alleged in the class actions.

If a Class Member opts out, they will not be bound by the terms of the Settlement Agreement, but they will be barred from making a claim and receiving compensation from the Settlement Amount.

OBLIGATIONS TO THE PROPOSED SETTLEMENT

The courts will consider objections to the Settlement Agreement at the Approval Motions. Class Members who wish to comment on, or object to, the Settlement Agreement must submit an objection to Class Counsel (at the addresses listed below) no later than June 12, 2009. Objecting Class Members may, but are not required to, attend at the Approval Motions.

A written objection should include the following information:
(a) the objector’s name, address, telephone number, fax number (where applicable) and email address;
(b) a brief statement outlining the nature of, and reason for, the objection;
(c) documents establishing that the objector purchased securities of TVI during the Class Period;
(d) a statement as to whether the objector intends to appear at the Approval Motion in person or by legal counsel, and, if by legal counsel, the name, address, telephone number, fax number and email address of such legal counsel.

INTERPRETATION

If there is a conflict between the provisions of this notice and the Settlement Agreement, the terms of the Settlement Agreement will prevail.

QUESTIONS ABOUT THE PROPOSED SETTLEMENT SHOULD BE DIRECTED TO CLASS COUNSEL

Monique Radlein
Siskinds LLP
Barraclough and Solicitors
680 Waterloo Street
London, ON N6A 3R8
Tel: 519 660 7868
Fax: 519 660 7869
>Email: monique.radlein@siskinds.com

Simon Hebert
Siskinds Desmeules s.e.n.c.j.
Les Promenades du Vieux-Québec
43 Rue Buade, Bât 320
Québec City, QC G1H 4A2
Tel: 418.694.2000
Fax: 418.694.0281
Email: sime.hebert@siskindsdesmeules.com

PUBLICATION OF THIS NOTICE HAS BEEN AUTHORIZED BY THE ONTARIO SUPERIOR COURT OF JUSTICE AND THE QUEBEC SUPERIOR COURT